



Scottish Information
Commissioner
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Decision Notice 019/2025

Details of investments in a named company

Authority: Scottish Enterprise

Case Ref: 202200533

Summary

The Applicant asked the Authority for information about investment in a named company. The Authority initially did not recognise the request as a request for information and instead dealt with it under its complaint procedures. The Authority later disclosed some information but withheld other information under various exemptions in FOISA.

The Commissioner investigated and found that the Authority had generally complied with FOISA, but had failed to notify the Applicant that it did not hold information in relation to some of his requests, and had also failed to respond to one of the Applicant's requests. He required the Authority to provide the Applicant with a response to this request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 16(1) (Refusal of request); 17(1) (Information not held); 36(2) (Confidentiality); 38(1)(b), (2A) and (5) (definitions of "data protection principles", "data subject", "personal data" and "processing") and (5A) (personal information); 47(1) and (2) (Application for decision by Commissioner)

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

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (5), (10) and (14)(a), (c) and (d) (Terms relating to the processing of personal data)

Background

1. On 17 January 2022, the Applicant made a multi-part request for information to the Authority. He asked for information about investments in a specific (named) company. A copy of the full request is provided in Appendix 1.
2. The Authority responded on 7 February 2022. The Authority addressed each of the points in the Applicant's emails, and provided some information, but did not respond in terms of FOISA.
3. On 15 February 2022, the Applicant wrote to the Authority requesting a review of its decision. He told the Authority he was specifically seeking information and correspondence that was held by it, and that he did not consider it appropriate for the Authority to withhold it. He argued that disclosure of the information was in the public interest, and that the public had a right to know whether the Authority was following the correct corporate regulations and performing appropriate due diligence when undertaking investment decisions.
4. On 15 March 2022, the Authority responded to the Applicant under the terms of its complaints procedure, but not under FOISA.
5. On 9 May 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he had not been given the information he asked for.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 23 June 2022, the Authority was notified in writing that the Applicant had made a valid application. At this time, the Commissioner gave the Authority advice on how to recognise a freedom of information request.
8. The Authority issued a further response to the Applicant's request on 18 August 2022. It provided some information and withheld other information under sections 33(1)(b), 36(1), 36(2) and 38(1)(b) of FOISA. The case was allocated to an investigating officer.
9. The Applicant was dissatisfied that the Authority continued to withhold information in relation to parts (i), (iii), (iv), (viii) and (x) of his request.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to its reasons for withholding information. The Authority was also asked to send the Commissioner the information withheld from the Applicant.

Commissioner's analysis and findings

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

Information disclosed during the investigation

12. During the investigation the Authority disclosed some of the information that fell under the scope of request (iv) and which it had withheld under section 33(1)(b) of FOISA.
13. The Authority was not able to provide the Commissioner with any reasons as to why it had originally considered this information to be sensitive, nor why the exemption in section 33(1)(b) applied to this specific information.
14. As the Authority disclosed this information to the Applicant subsequent to its review response and, in the absence of any submissions to the contrary, the Commissioner considers that the Authority wrongly applied the exemption in section 33(1)(b) of FOISA to the information it later disclosed. In doing so, the Commissioner must find that the Authority failed to comply with section 1(1) of FOISA.

Identifying information captured by the request

15. The Authority explained that members of its growth investment team who were specifically involved with the investment in the company, or who held knowledge of it due to their seniority, carried out the searches for information captured by the Applicant's request. The Authority provided the Commissioner with the names and job titles of those staff members.
16. The Authority explained that its investment work followed established legal processes and therefore record keeping in relation to its investments was structured and secure. The Authority explained that folders are created for each investment and that all documents and correspondence associated with the investment would be held there. Given its records management practices, the Authority submitted that searches for relevant information were straightforward and involved gathering information held in the company's folders. It noted that the relevant investment staff members also carried out searches of their Outlook email folders.
17. The Authority provided the Commissioner with evidence of the searches it conducted, along with details of its general information gathering exercises, to demonstrate the thoroughness of the searches it had undertaken.
18. The Commissioner is satisfied that the Authority took appropriate and adequate steps to identify all of the information that fell within scope of the Applicant's request.

Requests (i) and (iii)

19. Requests (i) and (iii) arose from communications within email correspondence between the Authority and the Applicant, that took place between 9 December 2021 and 15 March 2022, in relation to investments in the named company.
20. In request (i), the Applicant asked for "evidence as to how you were informed that I gave my consent to the waiver of my rights", and in request (iii) he asked "You state that... I did not wish to take up my pre-emption rights. Could you please provide me with a copy of the specific communication where this information was passed to [the Authority]".
21. The Authority submitted that it had responded to these requests by providing the Applicant with copies of emails between itself and third-party investors, Par Equity.
22. The Commissioner has considered the contents of the email communications referred to by the Authority.

He notes that the communications began by an email from the Applicant to the Authority on 9 December 2021, in which the Applicant summarised a telephone conversation he had had with an employee of the Authority the previous day. Within the summary, the Applicant stated that:

“...You also said that you were told that I was provided with relevant documents for this investment round and gave my consent to waive my pre-emption rights and voted in favour of passing Member's resolutions for this investment event.

...I asked you where you received that information, and you did not confirm who told you that I had given my consent...”

23. The Authority's employee indicated her understanding of these matters by email on 13 December 2021, and she further clarified her understanding in a detailed response to the Applicant on 16 December 2021, where she stated:

“I would like to clarify that I did not state that I knew you had waived your pre-emption rights or provided consent, I only commented that it was my understanding that you had been given an opportunity to take up your rights.”
24. The Authority submitted that the offering of pre-emption rights was a matter for the company and not for the Authority. The Authority re-iterated its position that it only held information that indicated pre-emption rights had been offered.
25. The Applicant stated his concerns that he had not received any communication from any party involved in the investment round and he was concerned that either the Authority had overlooked him on the ballot (while signing the consents), or that the Authority had been misled by Par Equity.
26. The Commissioner acknowledges the Applicant's concerns that he had received no communication from parties regarding his participation, or non-participation, in the investment round. These are matters that are relevant to company law. The Commissioner's remit extends to freedom of information law and his powers extend only to the provision of information.
27. The Commissioner is satisfied that the Authority does not hold any information falling within scope of requests (i) and (iii). The Commissioner has considered the wording of these requests carefully. The requests seek evidence of something which does not exist (i.e. evidence that the Authority had confirmation that the Applicant had waived his rights). The request appears to have arisen from a misunderstanding between the Authority and Applicant, where the Applicant believed that the Authority had been notified that he had waived his rights, and so he requested evidence of this.
28. From the previous correspondence given to the Commissioner by the Applicant, as part of his application, it is clear to the Commissioner that the Authority did not advise the Applicant that it had been notified that he had waived his rights, but rather it told the Applicant that it had been notified that he had been given the opportunity to take up his rights. Given this, the Commissioner is satisfied that the Authority does not (and did not, on receipt of the request) hold any information that falls within the scope of requests (i) and (iii).
29. That being the case, the Commissioner finds that the Authority should have issued a notice under section 17(1) of FOISA, advising the Applicant that it did not hold the information he had requested. In failing to do so, the Authority failed to comply with section 17(1) of FOISA.

Requests (iv) and (viii)

30. Request (iv) sought any correspondence held by the Authority regarding Member's resolutions from November 2021 and, in request (viii), the Applicant asked for the name and contact details of the person(s) who signed the consent (to the member's resolutions), the date that it was granted and a copy of that consent.
31. The Authority disclosed some information, comprising email correspondence, which fell within the scope of request (iv) during the investigation. One of the emails identified by the Authority, dated Wednesday 24 November 2021 at 12.23 PM contained two attachments that fell within scope of the request, and other information not within scope of the Applicant's requests. During the investigation, the Authority disclosed some additional information in the email to the Applicant, but it withheld other information in the email under section 36(2) of FOISA and section 38(1)(b) of FOISA. The two attachments were withheld, wholly, under section 36(2) of FOISA. One of the attachments was the disclosure letter and the second attachment comprised the written resolutions.
32. The information falling within scope of request (viii), comprised a signed and dated copy of the second attachment discussed in paragraph 31, that the Authority withheld under section 36(2). The Authority also applied section 38(1)(b) of FOISA to the name and contact details of the signatory to the consent.
33. The Commissioner will firstly consider the information that was withheld under section 36(2) of FOISA.

Section 36(2) – Confidentiality

34. Section 36(2) of FOISA provides that information is exempt from disclosure if it was obtained by a Scottish public authority from another person (including another authority) and its disclosure by the authority obtaining it, to the public (otherwise than under FOISA), would constitute a breach of confidence actionable by that person or any person. Section 36(2) is an absolute exemption and is not, therefore subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain disclosure of information which is necessary in the public interest.

Information obtained from another person

35. Section 36(2) contains a two-stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
36. The Authority submitted that the information withheld under section 36(2) was provided to it by third parties and that it was commercially sensitive information.
37. The Commissioner has viewed the relevant withheld information. The information comprises a disclosure letter, the proposed written resolution and a copy of the proposed written resolution that has been signed and dated by a member of the Authority's staff. He is satisfied that this was obtained by the Authority from another person and that the first part of the section 36(2) test has therefore been fulfilled.

Actionable breach of confidence

38. The second part of the test is that disclosure of the information by a public authority must constitute a breach of confidence actionable, either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
39. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
- (i) The information must have the necessary quality of confidence;
 - (ii) The public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - (iii) Unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

40. The Commissioner's briefing on [section 36](#)¹ of FOISA provides more detail on what will need to be considered when deciding whether information has the necessary quality of confidence:
- (i) The information must not be common knowledge; a member of the public would have to apply skills and labour to produce the information;
 - (ii) The passage of time will be relevant, particularly for contractual information relating to pricing, which often loses relevance (and any element of confidentiality) with the passage of time; (not relevant in this case);
 - (iii) Where the information can be ascertained from other information, which is in the public domain with relative ease, the necessary quality of confidence may not exist, even if the information was, at one point, confidential.
41. The Authority explained that the written resolutions and signed consents were part of the supplemental investment agreement (SIA) (also known as the disclosure bundle) that is shared with investors. The Authority submitted that all of the documents within the SIA, including those within scope of the Applicant's request, were very sensitive. The Authority explained that the SIA had its own confidentiality clauses and it provided these for the Commissioner's consideration. The Authority submitted that this information was not in the public domain.
42. Having considered the nature of the information withheld and the arguments put forward by the Authority, the Commissioner is satisfied that this information fulfils the criteria of having the necessary quality of confidence.

Obligation to maintain confidentiality

43. The Authority submitted that this information was shared with the Authority on a strictly confidential basis and was not for onwards circulation. The Authority argued that this imposed an express obligation upon it to maintain that confidentiality. The Authority noted that the information was commercially sensitive and would only have been viewed by a limited number of individuals.

¹ https://www.foi.scot/sites/default/files/2023-07/BriefingSection36Confidentiality_2023.pdf

44. The Authority submitted that the member's resolutions being withheld in response to the Applicant's request (iv) had their own confidentiality provisions, which prevented the sharing of (a) confidential Information; (b) information relating to the negotiation, provisions or subject matter of the SIA; and (c) information concerning any of the 2021 investors. The Authority stated that its decision (to accept these confidentiality obligations) was made in good faith and for proper purposes. The Authority submitted that disclosure of any part of the SIA would be unauthorised and would constitute grounds for an actionable breach of confidence.
45. Having considered the circumstances, the source and content of the information, the Commissioner is satisfied that the information withheld was received in t circumstances that imposed a duty of confidentiality. He therefore accepts that there was an obligation to maintain confidentiality.

Unauthorised disclosure would cause detriment

46. The Authority submitted that disclosure of information would compromise future negotiations and investment opportunities, resulting in a likelihood of damage to the company and its financial proposition.
47. The Authority also argued that disclosure of the information would likely substantially prejudice its own commercial interests in terms of its ability to work in a meaningful way with companies in Scotland to explore investment opportunities and deliver on its functions under the Enterprise and New Towns (Scotland) Act 1990.
48. The Authority submitted that companies would not share detailed information with it, if its sensitive consideration of those plans was subject to disclosure into the public domain.
49. Considering the nature of the information and the commercial arena in which the Authority is operating, the Commissioner accepts that there is potential for significant inhibition to its functions, and a conceivable risk of damage to the company, through disclosure of the information into the public domain.
50. The Commissioner is therefore satisfied that the tests for an actionable breach of confidence have been met in this case, in relation to the information being withheld under section 36(2).
51. Having found that all the tests for the exemption in section 36(2) of FOISA have been met, and the exemption is properly engaged, the Commissioner must now go on to consider where the balance of public interest lies in disclosure of the information.

Public interest defence

52. As noted above, the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and not subject to the public interest test in section 2(1)(b). However, the law of confidence recognises that in certain circumstances, the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of the information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is generally known as the public interest defence.
53. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.

54. The Authority argued that the public interest in maintaining confidences was not outweighed by any counter arguments for disclosure. It commented that it retained an ongoing obligation to the other parties of the SIA to keep details of the investment rounds confidential.
55. The Applicant has raised his concern that public money may be being used to improperly devalue the company.
56. The Commissioner has considered the submissions made by both the Authority and the Applicant, as well as the withheld information. He finds that the argument presented by the Applicant has substance but, with regard to the actual information that is being withheld, the Commissioner is not satisfied that disclosure would meet this aim.
57. There is clearly a general public interest in economy, efficiency, effectiveness and integrity in the expenditure of public funds, and more particularly in transparency and effective scrutiny in relation to the investment and support given to companies. There is, on the other hand, a strong public interest in the Authority maintaining the confidence of all parties within the environment in which it operates.
58. On balance, having considered all relevant submissions, the Commissioner is not persuaded that there is a public interest in disclosure sufficiently strong to outweigh that public interest in confidentiality.
59. Having considered all the arguments, therefore, the Commissioner does not consider that there is a reasonable argument in this case for the disclosure of confidential information on public interest grounds, and consequently he is satisfied that the Authority was entitled to withhold the information under section 36(2) of FOISA.
60. Given that the Commissioner is satisfied that the signed copy of the consent, including the signatory's name, was correctly withheld under section 36(2) of FOISA, he is not required to consider the application of section 38(1)(b) to the personal data within the consent.
61. The Commissioner will now go on to consider whether the remaining personal data contained in the email correspondence that fell within scope of request (iv) were correctly withheld.

Section 38(1)(b) – Personal information

62. Section 38(1)(b) of FOISA, read in conjunction with section 38(2A)(a) or (b), exempts information from disclosure if it is "personal data" (as defined in section 3(2) of the DPA 2018) and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the UK GDPR or (where relevant) in the DPA 2018.
63. The exemption in section 38(1)(b) of FOISA, applied on the basis set out in the preceding paragraph, is an absolute exemption. This means that it is not subject to the public interest test in section 2(1)(b) of FOISA.
64. To rely on this exemption, the Authority must show that the withheld information is personal data for the purposes of the DPA 2018 and that disclosure of the information into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles found in Article 5(1) of the UK GDPR.
65. The Commissioner must decide whether the Authority was correct to withhold some of the information covered by the Applicant's request (iv) under section 38(1)(b) of FOISA.

Is the withheld information personal data?

66. The first question the Commissioner must address is whether the specific information withheld by the Authority, and identified as personal data, is personal data for the purposes of section 3(2) of the DPA 2018.
67. "Personal data" is defined in section 3(2) of the DPA 2018 as "any information relating to an identified or identifiable living individual". Section 3(2) of the DPA 2018 defines "identifiable living individual" as a living individual who can be identified, directly or indirectly, in particular by reference to -
- (i) an identifier, such as a name, an identification number, location data, or an online identifier, or
 - (ii) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
68. The two main elements of personal data are that the information must "relate" to a living person, and that person must be identified – or identifiable – from the data, or from the data and other accessible information.
69. Information will "relate to" a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus.
70. An individual is "identified" or "identifiable" if it is possible to distinguish them from other individuals.
71. Having considered the information that the Authority is withholding under section 38(1)(b) of FOISA, the Commissioner notes that it comprises the names and contact details of individuals. He accepts that this information relates to identifiable individuals. The Commissioner is therefore satisfied that the withheld information is the personal data of identifiable individuals and, as such, is personal data in terms of section 3(2) of the DPA 2018.

Would disclosure contravene one of the data protection principles?

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

Article 6(1)(f) of the UK GDPR - legitimate interests

77. Condition (f) states that processing shall be lawful if it –

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

78. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their tasks, section 38(5A) of FOISA makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.

79. The three tests which must be met before Article 6(1)(f) can be relied on are as follows (see paragraph 18 of [South Lanarkshire Council v Scottish Information Commissioner \[2013\] UKSC 55](#)² - although this case was decided before the GDPR (and the UK GDPR) came into effect, the relevant tests are almost identical)

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

Does the Applicant have a legitimate interest in obtaining the personal data?

80. The Authority acknowledged that it had not asked the Applicant for his legitimate interests in the information, but it contended that the Applicant did not have a legitimate interest in the personal data. The Authority submitted that the individuals concerned were not senior officials and they had no expectation that their personal data would be placed into the public domain in this manner. It noted that only its Chief People Officer and the Chief Executive have a public profile and are named publicly as senior Authority officials. It acknowledged that some directors are occasionally quoted in its press releases but the names of staff below Executive Leadership Team level are not routinely disclosed.

81. The Applicant explained to the Commissioner that he wanted all the information disclosed to him without any withholding. He argued that disclosing the information was not relevant to the protection of personal data because the personal data of all of the Authority's decision making staff was already in the public domain via its website, and via the filing of confirmation statements in Companies House records.

82. The Applicant submitted that it was in the interests of the general public to know who made the decision to invest public money in the company and why that decision had been made in light of the company being significantly devalued before that investment round took place. He argued that it was in the public interest, and his own, to know how and why this investment decision had been taken in contradiction with Company Law, and how such a resolution could have been passed without his participation.

83. The Commissioner has considered the Applicant's comments carefully.

² <https://www.supremecourt.uk/cases/uksc-2012-0126>

He notes that these individuals are not senior officials and would have no expectation that their personal data would be disclosed in response to the Applicant's information request. The Commissioner rejects the Applicant's claims that the personal data being withheld in relation to request (iv) is already in the public domain by virtue of it being published on the Authority's own website, or by Companies House; it is not.

84. The Commissioner is willing to accept that the Applicant has a legitimate interest in the personal data of those making decisions within the Authority regarding a company that he is shareholder of. Disclosure of the personal data would enable the Applicant to fully understand the decision-making processes of the Authority, and he finds these are legitimate grounds for seeking disclosure.

Is disclosure of the personal data necessary?

85. Having satisfied himself that the Applicant has a legitimate interest, the Commissioner must consider whether disclosure of the withheld information, the personal data, is necessary to achieve the legitimate interest in the information. "Necessary" means "reasonably" rather than "absolutely" or "strictly" necessary. When considering whether disclosure would be necessary, public authorities must consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the Applicant's legitimate interests could reasonably be met by means which interfered less with the privacy of the data subject(s). The Applicant argued that it was in the interests of the general public to know who made a decision to invest public in a business which had been devalued just before that investment round took place.
86. The Authority argued that any legitimate interest the Applicant did have in disclosure of the information would be outweighed by the rights and freedoms of the data subjects because those data subjects were not senior employees and did not have a public profile.
87. The Commissioner has considered the withheld personal data. Whilst he acknowledges the Applicant's legitimate interest in transparency of decision making at the Authority, he is not persuaded that disclosure would meet those legitimate interests, or that the Applicant's legitimate interests outweigh the fundamental rights and freedoms of the data subjects. It is clear that the individuals concerned are junior level staff who do not have responsibility for deciding whether or not to invest public funds in a particular business. Given this, the Commissioner considers that disclosure of the personal data would add very little to the Applicant's understanding of the Authority's decision-making processes. The requirements of condition 6 cannot be met here.
88. In all the circumstances of this particular case, the Commissioner concludes that condition (f) in Article 6(1) of the UK GDPR could not be met in relation to the personal data sought by the Applicant.

Fairness and transparency

89. Given that the Commissioner has concluded that the processing of the personal data, would be unlawful, he is not required to go on to consider whether disclosure of such personal data would otherwise be fair and transparent in relation to the data subject.

Conclusion on the data protection principles

90. For the reasons set out above, the Commissioner is satisfied that disclosure of the personal data would breach the data protection principles in Article 5(1)(a) of the UK GDPR.

91. In all the circumstances, the Commissioner is satisfied that such personal data would be exempt from disclosure under section 38(1)(b) of FOISA, on the basis that the information would be so exempt.

Request (x)

92. In request (x), the Applicant asked for information about the Authority's shareholding in the company, specifically whether that shareholding had been diluted by the Authority's participation in the investment rounds of 24 November 2021, or 10 December 2021. The Authority responded to the Applicant by providing details of its shareholding in the company and noting that this information was in the public domain.
93. The Applicant was dissatisfied with the response given by the Authority. The Applicant explained that he sought the information because he believed that the 24 November 2021 round of investment devalued the company significantly, from £1.89 per share to £0.068 per share. He explained that the statements of capital filed at Companies House gave the overall number of shares but did not provide any information on the participants in each investment tranche, and he raised his concern that the Authority (and others) increased their shareholding during this time, using taxpayers money to do so.
94. The Authority explained that it interpreted "dilution" in this context to mean a reduction in the percentage of ownership for existing shareholders following the issuing of more shares by a company. It submitted that it had responded to the Applicant to inform him that its shareholding in the company had not been diluted in percentage terms, but instead had increased from 21.1% to 25.1%. The Authority commented that the opposite of dilution had occurred.
95. The Commissioner acknowledges that the Applicant is frustrated by the Authority's response and the circumstances surrounding the Authority's investment activity in the company. However, the Commissioner has no remit over the means of investment in private companies. His remit extends to FOI law and whether the Authority has responded to request (x) in compliance with FOISA.
96. The Commissioner notes the Authority's interpretation of the term dilution, and he is satisfied that this is a reasonable interpretation of the request.
97. The Commissioner has carefully considered the wording of request (x) and has considered the Authority's response. In request (x), the Applicant asked the Authority to confirm that its investment had not been diluted by its participation in the investment round on 24 November 2021, or after the investment round on 10 December 2021. The Authority responded by confirming its shareholding before the investment round on 24 November 2021 and following completion of all subsequent investment rounds up to, and including, 22 February 2022.
98. The Commissioner is not satisfied that Authority's response adequately addresses the information the Applicant asked for. The Applicant did not ask whether the Authority's participation in all investment rounds at that time had resulted in dilution. The Applicant asked whether the Authority's shareholding was diluted after the investment round on each of two specific dates; the 24 November 2021 and 12 December 2021. In the Commissioner's view, the Authority has not provided the Applicant with information that would satisfy this request.
99. The Commissioner cannot, therefore, accept the Authority's position that it has responded to the Applicant's request.

100. The Commissioner finds that the Authority has not complied with section 1(1) of FOISA when responding to request (x), and he requires the Authority to respond, in clear terms, to the Applicant's request (x).

Handling of the request

101. The Authority explained that it had been engaged in regular communications with employees of the named company since 2016, including the Applicant. It stated that those communications were conducted on a business-as-usual basis, to facilitate the support given to the company by the Authority and the Authority's investment activity.

102. Nonetheless, it is a matter of fact that the Authority did not identify that the Applicant's request was a request for information and did not respond to the request until notified by the Commissioner.

103. Section 16(1) of FOISA requires an Authority to give the requester notice in writing (a "Refusal notice") when it applies any exemption covered by Part 2 of FOISA.

104. The Commissioner finds, by not providing the Applicant with a Refusal Notice, explaining that some of the information was being withheld under specific exemptions, and detailing why those exemptions applied, the Authority has not complied with section 16(1) of FOISA.

Decision

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

The Commissioner finds that by correctly withholding information under sections 36(2) and 38(1)(b) of FOISA, the Authority complied with Part 1.

However, the Commissioner also finds that the Authority:

- wrongly withheld information falling within the scope of request (iv) that it later disclosed (breach of section 1(1) of FOISA)
- failed to notify the Applicant that it did not hold information falling within the scope of requests (i) and (iii) (breach of section 17(1) of FOISA)
- failed to notify the Applicant of the exemptions it was relying on to withhold information (breach of section 16(1)(c) and 21(4) of FOISA)
- failed to advise the Applicant of his right to seek a review or make an appeal to the Commissioner (breach of section 19 of FOISA)
- failed to respond to the Applicant's request (x)

and in doing so, it failed to comply with Part 1.

The Commissioner therefore requires the Authority to provide the Applicant with a response to request (x) by disclosing information about its shareholding in the company on the day after the first investment round on 24 November 2021, and information about its shareholding in the company on the day after the second investment round on 10 December 2021, by **14 March 2025**.

Appeal

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

Enforcement

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

Euan McCulloch
Head of Enforcement

28 January 2025

Appendix 1: The Applicant's Request

- (i) As I documented in my email of 9th December, you clearly stated to me in our call on 7th December that you had been informed that I had given my consent to waive my pre-emption rights. Could you please provide me with evidence as to how you were informed that I gave my consent to the waiver of my rights?
- (ii) In your email below, you state that you did not, in our call on 7th December, say that you understood that I had given my consent and waived my pre-emption rights. I do not agree with this statement. I understood your clearly in our call on 7th December, and confirmed this to you by email. (This is a statement, not a request for recorded information)
- (iii) You state that SE's SCF partner Par Equity confirmed to SE that I did not wish to take up my pre-emption rights. Could you please provide me with a copy of the specific communication where this information was passed to SE? I do not wish to seek this information from Par Equity. I am specifically seeking copies of these communications that are held by SE.
- (iv) Similarly, if SE is holding any correspondence regarding the Member's resolutions from November 2021, I request a copy of any such correspondence from SE. I am specifically seeking copies of the information provided to, or held by, Scottish Enterprise with respect to this matter.
- (v) Could you please provide me with copies of the correspondence, presentations and business plans provided to SE for participation in this investment round, on 24th November 2021? I do not wish to be directed to the Company. I am specifically seeking this information from Scottish Enterprise. You stated in your response below that you did not believe it would be appropriate or permissible for SE to provide me with this correspondence. However, it is my understanding that it is permissible for you to share that information with me, and I request that you share this information.
- (vi) Additional Investment Round on 10th December 2021. Could you please confirm whether or not SE participated in this investment round? Could you please provide me with any copies of business plans, company updates as well as the request for SE to invest in this investment round?
- (vii) Could you please provide me with copies of any correspondence, notes from meetings and/or phone calls that SE is holding in relation to my position and standing at [the Company] from 1st August 2021 - present?
- (viii) Consents - Details of who provided consents on behalf of SE is relevant. I would be grateful if you could please provide me with the name and contact details of the person or persons who signed these consents, date that the consents were granted, and copies of such consents.
- (ix) SE Structure and Reporting - Could you please provide me with an overview of the SE Growth Investment Team Structure and reporting? I am specifically interested to learn who else at SE would be working on this [Company] portfolio? Who do they report to? Who would have accountability and decision making responsibility in relation to investment in [the Company]?

- (x) Dilution - You state in your response that the question of dilution is not relevant to SE, because you took up your investment rights in this round. To clarify, can you please confirm that SE's shareholding was not diluted through participation in the investment round on 24 November 2021 (as recorded at Company House)? Could you please also confirm whether SE's shareholding was diluted after the investment round which took place on 10th of December 2021, as recorded at Company House?