

Decision Notice 158/2021

Grant funding relating to specific projects

Applicant: The Applicant

Public authority: Scottish Enterprise

Case Ref: 202000290



Scottish Information
Commissioner

Summary

Scottish Enterprise was asked for information relating to specific projects funded at Raytheon. Scottish Enterprise provided some information, but withheld the remainder, arguing that it was either commercially sensitive or that disclosure would lead to an actionable breach of confidence.

The Commissioner investigated and found that Scottish Enterprise had partially breached FOISA in responding to the request. Although some of the information had been correctly withheld by Scottish Enterprise, he found it was not entitled to withhold other information and required this information to be disclosed.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(c) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy); 36(2) (Confidentiality)

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

Background

1. On 11 September 2019, the Applicant made a request for information to Scottish Enterprise. The information requested was for information relating to specific projects funded for Raytheon:
 - Transition Development project, approved in May 2017
 - Callisto project, applied for in 2017
 - Business Capacity and Improvement project, approved in June 2016

For each of these projects the Applicant requested a copy of the grant offer made by Scottish Enterprise, a copy of the application for funding by Raytheon, a description of the project, and any other documents relevant to the funding of these projects.

2. Scottish Enterprise responded on 9 October 2019 providing a number of documents with information redacted under sections 33(1)(b), 36(2) and 38(1)(b) (Personal information) of FOISA.
3. On 11 October 2019, the Applicant wrote to Scottish Enterprise, requesting a review of its decision on the basis that:
 - He had asked for a copy of the grant offer, a copy of the application for funding by Raytheon, a description of the project, and any other documents relevant to the funding of these projects and yet had been provided with only one document for each project. He asked for the missing documents, therefore, in particular the grant offer for the Callisto project and the application forms for the Business Capacity and Improvement and Transition Development projects.
 - As these projects concerned public sector support for private companies, he believed it was in the public interest to know the details of the projects, including the redacted information.

4. Scottish Enterprise notified the Applicant of the outcome of its review on 11 November 2019. It clarified to the Applicant that the “Callisto project” and “Transition Development project” were in fact one project for which Scottish Enterprise support had been provided. Some information previously redacted was provided to the Applicant. The remaining redactions were upheld under the exemptions referred to in Scottish Enterprise’s response.
5. On 11 February 2020, 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 Scottish Enterprise’s review because he did not agree with the redactions under section 33(1)(b) and 36(2) and considered it to be in the public interest for the information to be disclosed.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 28 February 2020, Scottish Enterprise was notified in writing that the Applicant had made a valid application. Scottish Enterprise was asked to send the Commissioner the information withheld from the Applicant. Scottish Enterprise provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Scottish Enterprise was invited to comment on this application and to answer specific questions regarding its decision to withhold information under section 33(1)(b) and 36(2) of FOISA. (The Applicant did not question Scottish Enterprise’s exemptions under section 38(1)(b). Consequently, the Commissioner will not address those redactions in this decision.)

Commissioner’s analysis and findings

9. 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 him by both the Applicant and Scottish Enterprise. He is satisfied that no matter of relevance has been overlooked.

Withheld information

10. Scottish Enterprise has provided three documents to the Applicant, each containing information redacted under section 33(1)(b) (Commercial interests and the economy) and, in the case of document 2, also section 36(2) (Confidentiality).

Section 33(1)(b) Commercial interests and the economy

11. As noted above, Scottish Enterprise withheld some of the redacted information under section 33(1)(b) of FOISA. This exemption provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
12. There are certain elements that an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to identify:

- whose commercial interests would (or would be likely) to be harmed by disclosure;
 - the nature of those commercial interests; and
 - how those interests would (or would likely) be prejudiced substantially by disclosure.
13. The prejudice must be substantial, in other words be of real and demonstrable significance. Where the authority considers the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear. While the final decision on disclosure will be one for the public authority to make, it is helpful if the third party has been consulted on the elements referred to above.
 14. In its submissions, Scottish Enterprise argued that disclosure would harm the commercial interests of Raytheon. It is not apparent from the submissions provided by Scottish Enterprise that Raytheon was directly asked for its view on the commercial sensitivity of the information being withheld. Scottish Enterprise explained that the Scottish Enterprise account manager determines what is considered commercially sensitive in relation to an FOI request, following discussion with (and, where appropriate, challenge from) the FOI Team. In line with what Scottish Enterprise considers to be best practice, the third party (for example, Raytheon) is informed beforehand of the information to be disclosed.
 15. The submissions provided to the Commissioner by Scottish Enterprise were quite generic in nature. It noted that the information related to live projects, arguing that disclosure would reveal aspects of the company's position (at the time of the request) and that this, in turn, would prejudice substantially its bargaining power and therefore its ability to compete against other businesses.
 16. Scottish Enterprise's view was that the information redacted from the contract and application was particularly sensitive, as it related to project costs, third party consultation and planning and operations information on live projects.
 17. Taking into consideration all of the submissions of Scottish Enterprise in relation to the application of section 33(1)(b), the Commissioner can accept that the disclosure of some of the information being withheld would be substantially prejudicial to Raytheon's commercial interests.
 18. The Commissioner does not accept that this extends to all of the information withheld, such as the project name and the basic description of what the money is for. In the Commissioner's view, Scottish Enterprise has not provided sufficient evidence to show the commercial disadvantage that would be caused to Raytheon.
 19. Having reached the conclusion that some of the information requested was not properly withheld under this exemption (the project name and basic description of what the grant money was for), the Commissioner does not have to consider the public interest test in section 2(1)(b) of FOISA, but rather requires that the Applicant be provided with this information. He will identify separately to Scottish Enterprise precisely which text he requires disclosed.
 20. The Commissioner will now consider the public interest test in relation to the remaining information he accepts does correctly fall under section 33(1)(b) of FOISA.

Public interest submissions by the Applicant

21. The Applicant submitted that it was in the public interest for the information requested to be in the public domain. Given the Scottish Government's position that it did not provide public funding via Scottish Enterprise to companies involved in the arms trade for projects involving

the manufacture of munitions, but rather aimed funding at helping these firms diversify into civilian and non-military markets, the information should be disclosed.

22. The Applicant drew attention to projects funded at Raytheon that appeared to be expanding production capacity at a site specialising in weapon's subsystems and making subcomponents for Paveway IV bombs. The Applicant believed that, if public funds had been used to expand or improve production of Raytheon's weapons subsystem in Scotland, then it was in the public interest to know this.
23. The Applicant was of the view that redactions on the grounds of commercial sensitivity and confidentiality might have been used to cover up information contradicting the Scottish Government's stated position (see paragraph 21 above). He therefore believed it was in the public interest for this information to be made available, particularly that relating to the nature and aims of the project, the markets being targeted, and the expectations Scottish Enterprise had from funding these projects.

Public interest submissions by Scottish Enterprise

24. Scottish Enterprise recognised the public interest in decision-making being open and transparent in public bodies and that making certain information available could increase accountability for decisions impacting on the wider public, especially in relation to spending of public money.
25. On the other hand, Scottish Enterprise identified a public interest in ensuring it could protect its assessment of business opportunities, to enable it to spend public money effectively.
26. It considered there was no public interest in disclosing information that could have an adverse effect on the commercial interests of third parties. Scottish Enterprise believed allowing commercial parties to maintain confidentiality in their commercial positions for prospective commercial transactions was important to maintaining and supporting the efficient operation of free markets, which was of concern and benefit to the public.
27. Scottish Enterprise therefore concluded the public interest was better served in withholding the information.

Commissioner's view on the public interest test

28. The Commissioner has considered all of the arguments in this case and the withheld information. The Commissioner notes the general public interest in transparency and accountability, particularly in relation to how public money is spent.
29. The Applicant has made a strong public interest argument, based on his concern that public money may be being used to fund projects against stated Scottish Government policy. While the argument presented by the Applicant is strong, with regard to the information that is being withheld, the Commissioner is not satisfied that disclosure would meet this aim.
30. The Commissioner also accepts that there is a public interest in enabling public authorities such as Scottish Enterprise being able to spend public money effectively and that this may mean that not all of the information shared with Scottish Enterprise by the third parties they provide public money to can be shared with the public.
31. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all of the circumstances of the case, the public interest in maintaining the exemption in section 33(1)(b), at the time of the review, outweighed that in favour of disclosure.

Section 36(2) – Confidentiality

32. Under section 36(2) of FOISA, information is exempt from disclosure if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not apply if the disclosure of the information is necessary in the public interest.
33. Section 36(2) contains a two-stage test, both parts of which must be fulfilled before the exemption can be relied upon.

Information obtained from another person

34. The first test is that the information must have been obtained 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.
35. The withheld information is contained within a document that forms part of the application process to Scottish Enterprise for funding.
36. In the circumstances, the Commissioner is satisfied that the information was obtained by Scottish Enterprise from Raytheon and so the first part of the section 36(2) test has been satisfied.

Actionable breach of confidence

37. The second part of the test is that disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by another person. The Commissioner takes the view that “actionable” means that the basic requirements for a successful action must appear to be fulfilled.
38. 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:
 - The information must have the necessary quality of confidence
 - The public authority must have received the information in circumstances which imposed an obligation of confidence
 - Unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

39. Scottish Enterprise submitted that the information and the way it was obtained were such that there was an implied duty of confidence. The withheld information was not common knowledge, nor was it in the public domain, but rather was given in an application form for funding that required particular information be provided.
40. Having considered the nature of the withheld information and the explanation put forward by Scottish Enterprise, the Commissioner is satisfied that it fulfils the criteria of having the necessary quality of confidence.

Obligation to maintain confidentiality

41. Scottish Enterprise submitted that the information had been provided in circumstances implying an obligation of confidence. The third party was required to provide the information in order to access funding from Scottish Enterprise.
42. In the view of Scottish Enterprise, this was information a reasonable person would understand as involving an obligation of confidence.
43. The Commissioner accepts that the information was provided in circumstances that imposed a duty of confidentiality. However, the Commissioner's position on this has been finely balanced, largely due to the sparse nature of the submissions provided by Scottish Enterprise.
44. The Commissioner also highlights his view that Scottish Enterprise could improve the wording of its application form to make it clearer what the provider of information should expect. It is unfortunate that the current format does not ask what third parties providing information consider confidential.

Unauthorised disclosure would cause detriment

45. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person that communicated it. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence.
46. Scottish Enterprise submitted that disclosure of the withheld information would be detrimental to Raytheon as it contained detailed and sensitive information on the company and its plans.
47. Considering the nature of the information and the commercial arena in which the third party is operating, the Commissioner accepts that there is potential for damage to Raytheon through disclosure of the information into the public domain.
48. 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).
49. 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

50. 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.
51. 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.
52. Scottish Enterprise argued in its submissions that there was a public interest in it maintaining the confidence of third parties, which was essential in helping it meet its overall objective of furthering the development of the Scottish economy.

53. Scottish Enterprise also submitted that it was in the public interest for it avoiding taking steps that could lead to a court action.
54. The Applicant has made a strong public interest argument, based on his concern that public money may be being used to fund projects against stated Scottish Government policy.
55. The Commissioner has considered the submissions made by both Scottish Enterprise and the Applicant, as well as the withheld information. He finds that the argument presented by the Applicant is strong but, with regard to the information that is being withheld, the Commissioner is not satisfied that disclosure would meet this aim.
56. 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 awarding of public grants and assistance. There is, on the other hand, a strong public interest in the maintenance of confidences.
57. 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.
58. 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 Scottish Enterprise was entitled to withhold the information under section 36(2) of FOISA.

Decision

The Commissioner finds that Scottish Enterprise 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 withholding some of the information it withheld under section 33(1)(b) (Commercial interests and the economy) and all of the information it withheld under section 36(2) (Confidentiality) of FOISA, Scottish Enterprise complied with Part 1.

However, the Commissioner also finds that Scottish Enterprise failed to comply with section 1(1) of FOISA, by wrongly withholding some information under section 33(1)(b).

The Commissioner therefore requires Scottish Enterprise to disclose to the Applicant the information he has found was wrongly withheld under section 33(1)(b) of FOISA, by **22 November 2021**. As noted above, the Commissioner will identify separately to Scottish Enterprise precisely which text he requires disclosed.

Appeal

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

Margaret Keyse
Head of Enforcement

7 October 2021

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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (c) section 36(2);

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

36 Confidentiality

...

- (2) Information is exempt information if-

- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

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