

Decision Notice 036/2023

Loans, assessments and emails

Applicant

Public authority: Highlands and Islands Enterprise

Case Ref: 202100229



Scottish Information
Commissioner

Summary

HIE was asked for a range of information regarding loans made to a named company, HIE's assessments of these loans, and email correspondence between the parties. HIE disclosed some information, and withheld the remainder under a number of exemptions in FOISA. The Commissioner found that HIE had generally complied with FOISA in responding to the request, but required HIE to disclose further information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy); 47(1) and (2) (Application for decision by Commissioner)

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 26 October 2020, the Applicant made a request for information to Highlands and Islands Enterprise (HIE). The information requested was:
 - Part 1 Company A's application for the £0.175m loan that HIE approved 6 March 2019;
 - Part 2 HIE's assessment of that loan application;
 - Part 3 Company A's application for a Pivotal Enterprise Resilience Fund (PERF) award;
 - Part 4 HIE's assessment of that PERF application, which resulted in HIE awarding £70k; and
 - Part 5 correspondence between HIE and Company A from 1 January 2018 to 30 September 2020.
2. HIE responded on 24 December 2020. It disclosed redacted copies of the information requested in parts 1 to 4 of the request, withholding information under sections 25, 30(b) and (c), 33(1)(b) and 38(1)(b) of FOISA. In relation to part 5 of the request, HIE advised that it was preparing this information, which it hoped to disclose early in the New Year.
3. On 12 January 2021, the Applicant wrote to HIE requesting a review of its decision. It was dissatisfied that the requested correspondence had not been disclosed, two of the documents requested had been withheld in their entirety, and there were substantial redactions to the documents disclosed.
4. HIE notified the Applicant of the outcome of its review on 10 February 2021. It advised that further information would be disclosed shortly and summarised its position with respect to each of the five parts of the request. In addition to the previously cited exemptions, it also notified the Applicant that it was relying on the exemption in section 36(2) to withhold information.
5. On 12 February 2021, HIE disclosed redacted copies of the information it identified in its review response to the Applicant.

6. On 22 February 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant was dissatisfied with the outcome of HIE's review in relation to parts 1 to 4 of the request, because it considered information had been withheld to cover up financial wrongdoing. On 10 March 2021, the Applicant wrote again to the Commissioner about its dissatisfaction with the information being withheld, including that which had been withheld in the redacted correspondence, in part 5 of the request.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 18 March 2021, HIE was notified in writing that the Applicant had made a valid application. HIE was asked to send the Commissioner the information withheld from the Applicant. HIE provided the information and the case was allocated to an investigating officer.
9. Time was spent obtaining complete copies of the withheld information from HIE. HIE was also asked, and clarified, which exemptions it was relying on and which exemption applied to which information being withheld. HIE subsequently confirmed that it was no longer relying on the exemptions in sections 25 and 30(b) of FOISA to withhold information.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. HIE was invited to comment on this application and to answer specific questions. These questions related to the searches undertaken to identify the relevant information falling in scope of the request, and HIE's reasoning for withholding the requested information. HIE responded and provided its submissions as to why the withheld information should continue to be withheld.
11. During the investigation, HIE was asked on several occasions, whether it held further correspondence for 2019. It provided copies of the few emails it held. This matter will be considered within the decision.
12. The investigating officer engaged in correspondence with the Applicant explaining the range of information falling within scope of the request. The Applicant was asked and confirmed that certain information could be excluded from the Commissioner's investigation and decision. This included personal data of third parties, attachments to some emails disclosed in redacted form at review, some of the documents disclosed in response to parts 1 to 4 of the request and the excel spreadsheets attached to some emails in relation to Company A's financials (but not the management accounts).
13. The Applicant also explained why, in its view, the public interest lay in disclosing the information. Throughout the investigation, the Applicant provided updates in support of its reasons why the withheld information should be disclosed.
14. HIE disclosed further information to the Applicant during the investigation.

Commissioner's analysis and findings

15. 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 HIE. He is satisfied that no matter of relevance has been overlooked.

Information falling in scope of the request

Searches

16. HIE provided a summary of the searches conducted:
- the relevant staff that supported and dealt with Company A had been contacted and were asked to search their emails, electronic record stores, desktops, EDRMS and notebooks for information relating to this request
 - any recorded information relevant to the request, was saved in a separate folder so that it could be reviewed later.
 - a separate and more general search was undertaken on HIE's records management database and a snapshot of all Company A's files created after 31 December 2017 was created.
 - with regard to the four specific documents that had been requested, they were also copied over to a separate folder.
 - searches were conducted by the Account Manager for Company A, noting that, as a previous request sought similar information regarding Company A, it was not considered necessary to search for this information which had already been located and held separately.
17. HIE provided copies of screen shots referenced in its submissions.

2019 correspondence

18. Part 5 of the request was for correspondence between HIE and Company A from 1 January 2018 to 30 September 2020.
19. HIE provided very minimal correspondence between itself and Company A for 2019. Consequently, throughout the investigation, HIE was asked several times to check its records to ensure any relevant correspondence from 2019 had been identified and provided.
20. At the start of the investigation, HIE was asked in emails and follow up telephone calls why there was minimal correspondence in 2019.
21. During May 2021, HIE was asked several times about the lack of 2019 correspondence. HIE explained that, during November 2018 to January 2020, there was a personnel change, and the focus was on other accounts, and when the new account manager joined the team, they underwent training. HIE was asked about the lack of correspondence introducing the new account manager; HIE advised that many new account managers prefer to telephone and have handover meetings face-to-face with clients.
22. Following the issue of a letter to HIE requesting its submissions, including the lack of 2019 correspondence, HIE identified and provided copies of three further emails, one of these emails dated from 2019.

The Commissioner's conclusions on searches conducted

23. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out. He will also consider, where appropriate, any reason offered by the public authority to explain why it does not hold further information and, in this case, why it held minimal correspondence for 2019.
24. The Commissioner considers, where appropriate, any reason offered by the public authority to explain why it does not hold further information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information *is* (or was, at the time the request was received) actually held by the public authority.
25. The Commissioner has considered in detail all of the information falling within the scope of the request, including that disclosed and withheld. The Commissioner notes that HIE responded to questions raised about the 2019 correspondence throughout the investigation.
26. Although he finds it surprising that there is minimal correspondence between HIE and Company A for 2019, he acknowledges that the change in Account Manager for Company A, and the fact that each Account Manager will engage with clients in their own way, whether that be via verbal communication or written correspondence, may result in limited correspondence.
27. Overall, having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that, by the end of the investigation, HIE had taken adequate, proportionate steps to establish whether it held any further information that fell within the scope of the request.
28. The Commissioner is satisfied that the relevant information falling within scope of the request has been identified by the searches conducted by HIE (both generally, and that related specifically to the 2019 correspondence). In conclusion, the Commissioner is satisfied that HIE does not hold any further recorded information falling within scope of the request, than that provided.

Section 30(c) - Prejudice to effective conduct of public affairs

29. 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 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 applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. The exemption (if found to be engaged) is also subject to the public interest test in section 2(1)(b) of FOISA.
30. As noted in previous decisions, there is a high threshold to be crossed in applying the tests contained in the section 30(c) exemption. The prejudice must be substantial, and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future and not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case-by-case basis, taking in to account

the actual content of the information and all other relevant circumstances (which may include the timing of the request).

HIE's submissions

31. HIE submitted that Company A was operating in a highly competitive sector and has had to make significant changes in response to the emerging trading environment. In order for HIE to appropriately and adequately support Company A, it is vital that Company A is confident in sharing all relevant information with HIE, including information that could be extremely sensitive.
32. HIE commented that, given the constantly evolving operating environment caused by the pandemic, it is difficult to know the true value of information disclosed to other parties, particularly competitors and in particular the harm in disclosure.
33. HIE considered it was important to protect information that is unique to Company A including staffing structures, plans for development of staff and other administrative and management areas. These areas remain very sensitive to clients, not only because of the influence on commercial performance, but also because of the implications for employees, suppliers and others who have a working relationship with the organisation.
34. HIE considered it essential that it is able to focus on its statutory duty, which is to support the economic development of the Highlands and Islands and those organisations that contribute to the overall aim. HIE cannot act in a way that is highly likely to cause detriment to any business.

Effect on HIE's relationship with other clients and organisations

35. HIE referred to the challenging conditions facing some sectors of the economy, particularly in the Highlands and Islands.
36. HIE considered that disclosing highly sensitive information about clients would have an extremely detrimental effect on the organisation being able to carry out its public task required by legislation. Given HIE's statutory duty to support businesses in their growth and development in the Highlands and Islands, it is essential that organisations are able to use HIE as a sounding board to articulate, formulate and develop ideas, even if those ideas never come to fruition. HIE would always need to consider whether a competitor could use the information to, in some way to create a competitive advantage.
37. Should HIE be required to disclose information, it would affect its relationships with other clients, who would stop sharing information with HIE. In support of this point, HIE referred to [Decision 020/2019](#)¹, where the Commissioner noted that HIE is often in possession of extremely detailed business information.

Effect on the administration of future funding

38. Disclosure of some of the information would provide detailed information for those considering applications to any future schemes, potentially making it easier for those applying to change or alter information to ensure it met criteria.

¹ <https://www.itspublicknowledge.info/decision-0202019>

The Applicant's submissions

39. The main focus of the Applicant's arguments was that HIE had mis-scored Company A's loan application, stating that it was predominately based in the Highlands and Islands area when, in the Applicant's view, this was not the case. The Applicant considered that it was this mis-scoring which prejudiced the effective conduct of public affairs. In the Applicant's view, it risks substantial costs to the public purse.

The Commissioner's conclusions

40. The Commissioner has taken account of all relevant submissions, together with the corresponding withheld information.
41. He notes that HIE's remit is different from that of many public authorities, in that it supports and develops businesses and provides grants for funding. Consequently, it is necessary that any organisation it works with will be candid and open, sharing and discussing ideas and options to develop and grow its business. HIE can only continue to operate if it has the trust of the organisations it supports and works with.
42. However, the Commissioner must also take into account the fact that the organisations which are supported by HIE benefit from not only receiving support, but public money. Having considered all of the withheld information in detail, he is of the view that where the withheld information relates to correspondence confirming funding, this information is generally not exempt.
43. The Commissioner notes, from HIE's submissions, that it considers disclosure of the information would lead to a reluctance by other organisations to be open and honest, to provide detailed information in future, and that this would impair HIE's ability to engage with businesses, and provide support that underpins its remit.
44. Having considered the peculiar relationship between HIE and the companies it supports, the Commissioner accepts HIE's argument in relation to other parts of the withheld information. He is of the view that information more akin to providing direction and support for the projects that are being funded will generally be exempt. He accepts that disclosure of such information would make it unlikely that other companies would be willing to engage with HIE if they considered any correspondence, specifically information seeking help and guidance, would be routinely disclosed in response to an information request.
45. The Commissioner recognises that HIE must be allowed private space in which such matters can be discussed and explored, and is satisfied that the exemption under section 30(c) of FOISA is engaged. Having scrutinised the information, the Commissioner accepts that it is information of the type which would be crucial HIE's function to provide advice and support to private businesses. In addition, some documents contain a detailed analysis of Company A's business either by the company itself or HIE's review of Company A's proposition. That withheld information is a candid and frank review of Company A and the Commissioner accepts that disclosure would prejudice substantially HIE's ability to be open and honest in future reviews.
46. In conclusion, the Commissioner does not accept that the exemption in section 30(c) of FOISA should be upheld in respect of all of the withheld information, particularly correspondence confirming funding. Where HIE has not relied upon any other exemption to withhold this information, apart from section 30(c), it should be disclosed to the Applicant, with any relevant redactions for personal data. The Commissioner will provide HIE with

annotated copies of the information he does not consider to be exempt under section 30(c) of FOISA and which should accordingly be disclosed to the Applicant.

47. In relation to the remaining information which relates to Company A's internal working practices, future projects and financials, the Commissioner accepts that disclosure would be likely to have a negative impact on the relationship between HIE and the businesses it supports, given that it would make it less likely that such businesses would be completely open and honest and share sensitive information with HIE. It is clear that the nature of such an information sharing relationship depends on trust between the parties involved. If trust were lost, this would, in turn, prejudice substantially the ability of HIE to support the businesses it works with. Consequently, the Commissioner is satisfied that section 30(c) applies to this information. He will now go on to consider the associated public interest test.

The public interest

48. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in disclosing the withheld information for which he concluded that the exemption in section 30(c) applied is outweighed by that in maintaining the exemption.

The Applicant's submissions

49. The Applicant made extensive public interest submissions during the course of the investigation. The Applicant stated that it was in the public interest for the information to be disclosed in order to ascertain whether HIE deliberately mis-scored its assessment of Company A's application and cost to public purse.
50. The Applicant considered that withholding information frustrates appropriate scrutiny and that there were strong grounds for suspecting wrongdoing. The purpose of the request was to establish the extent of any wrongdoing and their cost to the public purse.
51. The Applicant also submitted that HIE withheld information to cover up that it ignored its criteria to ensure funding went to a favoured company that had no entitlement to receive it.

HIE's submissions

52. HIE commented that it was entirely appropriate for the decision making that informs its support for businesses and other organisations to be open and transparent. It agreed it was in the public interest that HIE is held accountable for the support it provides. However, there should be boundaries as to how far the requirement for openness and transparency should extend to the information provided by clients.
53. HIE accepted that there was a public interest in open governance and in public bodies being accountable to the public. There must also be some expectation from those working with HIE that a certain amount of their organisation's information will be made public: their organisations have received assistance and benefited from public funds, and therefore they must accept that certain information about that assistance will be made publicly available.
54. HIE fully expects to be held accountable for their decisions when allocating finite public sector resources.
55. However, against disclosure, HIE considered that it had aimed to distinguish between information that demonstrates due diligence and decision making and information that helps maintain the client relationship and is sensitive to clients. It had come to the decision that it cannot be in the public interest to disclose information that will be detrimental to the client

and to the HIE client relationship, particularly when it is not directly related to any award of funding or support.

56. Disclosure would, in HIE's view, be very likely to result in companies being reluctant to approach HIE in the first instance and, where they do, providing the level of detailed information required for HIE to appropriately deliver its functions.
57. Overall, it considered the inherent public interest in protecting HIE's relationship with its clients, ensuring clients feel able to approach HIE to deliver the services that HIE is required to provide by law, outweighed the public interest in disclosure of the information. The long-term implications of the pandemic for rural areas Highlands and Islands is likely to mean HIE will be required for critical business support and interventions and must maintain a position where it can maximise public funding investments. Therefore, on balance, HIE considered it was in the public interest for the exemption in section 30(c) to be maintained.

The Commissioner's conclusions

58. The Commissioner agrees with the Applicant that there is a strong public interest in scrutinising the actions of an organisation that distributes funding to private businesses and whether such funding is on the basis of accurate information.
59. The Commissioner notes that HIE disclosed redacted copies of the information at review. While he does not consider all of this information to be exempt under section 30(c), this disclosure has gone a long way towards meeting the public interest associated with this exemption.
60. The Commissioner notes the Applicant's arguments as to why the remaining information should be disclosed.
61. The Commissioner has already concluded that disclosing some of the withheld information would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs. Whilst there is inevitably a public interest in understanding how public authorities award grants, fund and support businesses, disclosing the remaining withheld information would lay bare the matters which HIE takes into consideration when supporting businesses and would decrease the trust and openness that has been built up over a considerable time with businesses which engage with HIE in an open and frank manner.
62. Although there is a public interest in the disclosure of the information, especially given the use of public funds, in this case the Commissioner does not consider it strong enough to outweigh the public interest in maintaining the exemption. On balance, therefore, the Commissioner is of the view that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
63. The Commissioner notes there are other avenues which can be explored by the Applicant other than the disclosure of information into the public domain under FOISA, (which he understands the Applicant has instigated) to examine the accountability or otherwise of HIE's award of funding and grants to Company A.
64. Therefore, the Commissioner finds that HIE was entitled to withhold the remaining information under section 30(c) of FOISA.

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

65. Section 33(1)(b) of FOISA 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, without prejudice to that generality, a Scottish public authority). This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

66. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
- 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 be likely to) be prejudiced substantially by disclosure.
67. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear. Generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.

HIE's submissions

68. HIE submitted that both Company A's and its own commercial interests would be affected by disclosure of the withheld information.
69. HIE noted that its remit requires it to economically develop the Highlands and Islands and to engage with businesses to achieve this. It therefore has a highly developed understanding of the commercial sensitivities around company information, particularly where it relates to a client.
70. In support of this position, HIE referred to the finding by the Commissioner in paragraph 14 of [Decision 223/2013](#)²:
- “commercial interests in their clearest sense will relate to any commercial trading activity an organisation undertakes, such as the sale of products or services, commonly for the purpose of revenue generation. Such activity will commonly take place within a competitive environment. There is no requirement that these activities are profit-making before this exemption can be engaged, although it would be normal.”
71. HIE submitted that Company A operates in a highly competitive industry. It considered that disclosure would be significantly detrimental to Company A, providing those in the same sector with insider trading knowledge and giving competitors an unfair advantage in tendering processes or the potential to specifically target opportunities in order to undermine Company A. In addition, much of the information is very detailed and relates to specific trading activities, their plans to improve income generation, the business structures that will enable those plans, and the economic impact of the pandemic and how they plan to address that. It also details analysis of the current situation and options and opportunities for revenue generation.

Third Party Consultation

72. HIE explained that Company A is “account managed” which means that HIE is regularly in contact with this company and has a good understanding of commercially sensitive information. HIE considered it was vital that it has a good understanding of what is

² <https://www.itspublicknowledge.info/decision-2232013>

commercially sensitive to each and every client; without having this understanding HIE would not be able to perform its public function.

73. Company A is not a supplier or bidder but a service user that has an ongoing relationship with HIE.
74. HIE advised that Company A had repeatedly reiterated its concern about its discussions with HIE being disclosed outwith HIE.

Substantial prejudice and when likely to happen

75. HIE submitted that disclosure of the withheld information would significantly disadvantage Company A by making commercially sensitive information available that will result, among other things in:
 - Highly commercially sensitive information being made available to competitors. They would be able to use this in a number of ways including improving a competitor's own performance based on outcomes at Company A;
 - Reducing Company A's ability to operate to negotiate with suppliers and customers in an already competitive environment by knowing budgets, previous spend and strategies with regard to investment;
 - The use of ideas and strategies to compete with the client and taking their market share.

Submissions from the Applicant

76. The Applicant did not dispute that the exemption in section 33(1)(b) would apply to some of the information, but considered that the information should be disclosed in the public interest.
77. The Applicant also recognised that some of the information it had requested would probably not be relevant to what it was seeking to achieve/evidence. The Applicant noted it was open to excluding such information from the investigation and decision. During the investigation, the Applicant confirmed that certain financial information could be excluded from consideration.
78. Overall, the Applicant considered that Company A's financial position, and its requests for and approval of loans and funds from the public purse, would override any prejudice in disclosure of the remaining withheld information.

The Commissioner's findings on section 33(1)(b)

79. The Commissioner has taken the Applicant's concerns seriously. His role here is not to reach a view on Company A's financial position, or on whether it should have been given funding, but to determine whether, in this instance, disclosure would, or would be likely to prejudice substantially HIE's and/or Company A's commercial interests.
80. It is also noted that many of the general update financial spreadsheets from Company A were excluded during the investigation, so the information to be considered comprises of financial commentary both within funding applications, HIE's assessment of them, and correspondence between HIE and Company A. The Commissioner is satisfied that the interests of Company A identified by HIE are commercial interests for the purposes of this exemption.

81. Having accepted that these commercial interests are engaged, the Commissioner must now consider whether they would, or would be likely to, be prejudiced substantially by disclosure of the withheld information. As indicated above, such prejudice must be at least likely before the exemption can apply.
82. The Commissioner notes that the situation in this case is different from that usually considered under this exemption, i.e. that of tenderer and supplier. As noted by HIE, its purpose is to engage, promote and support companies to prosper and develop within the Highlands and Islands region.
83. HIE's relationship with such organisations is more akin to a commercial company in a client relationship, as opposed to a bidder and tenderer. However, as noted by HIE, funds are provided from the public purse, and this is where the Commissioner's decision lies and whether disclosure of the withheld information would damage both the individual Company A's relationship with HIE, but also with other businesses it supports.
84. The withheld information comprises Company A's funding application, HIE's assessment of those applications and correspondence between both parties.
85. The Commissioner does not accept HIE's arguments that disclosure of all of the information withheld under the exemption would impact significantly on its ability to engage with and provide support to Company A and other businesses, or for the companies its support to engage in candid and open discussions with HIE. He finds this argument somewhat speculative and overstated.
86. In particular, the Commissioner finds HIE's reasoning for withholding some of the information in document 3 (part 4 of the request), to be over-stated, and it is not apparent to the Commissioner how this information would impact negatively on Company A's commercial interests, as its HIE's assessment, and was not provided by Company A.
87. The Commissioner also concludes that some of the correspondence withheld in part 5 of the request, would not result in the prejudice required by the exemption.
88. Having reached the conclusion that some of the information requested was not properly withheld under this exemption, 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 provide HIE with an annotated copy of document 3 and the emails falling within part 5 of the request, identifying the information he does not consider are exempt, under section 33(1)(b) of FOISA and should accordingly be disclosed to the Applicant.
89. With respect to the remaining information and correspondence, the Commissioner is satisfied that this information if disclosed, would prejudice substantially Company A's commercial interests. This information relates to Company A's day to day commercial information such as staffing arrangements or proposed book deals. This information is unique to Company A, and has been provided for the exclusive use by HIE to engage in discussions with Company A, so that it can provide advice and support.
90. Such correspondence is specific to Company A, and the Commissioner has identified nothing within the correspondence that would dissuade him from reaching a view that such information is rightly in the purview of a private company, and are not matters that would fall within scope of a public relationship.

91. Therefore, the Commissioner is satisfied that the exemption in section 33(1)(b) of FOISA was engaged, and disclosure of the remaining withheld information would prejudice substantially Company A's commercial interests. Having found this, he is not required to consider whether it would prejudice substantially HIE's commercial interests.

Public interest test

92. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied to the remaining withheld information, he has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires a consideration of whether, in all circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).

HIE's comments on the public interest

93. HIE recognised the public interest in the need for transparency in public funding of commercial undertakings and accountability and public scrutiny of HIE's funding arrangements.

94. HIE considered that there were strong competing public interests in:

- ensuring that the commercial viability of undertakings such as Company A is not unfairly substantially prejudiced;
- ensuring that Company A is not put at a competitive disadvantage in any future competitive tendering exercise, application for public funding and/or commercially competitive exercise in which it is subsequently involved;
- ensuring that companies are able to compete fairly and in ensuring that there is fair competition for funding and / or business opportunities of this nature;
- ensuring the public has access to properly considered, verified and contextualised information regarding matters of this nature, which is sufficient, complete, accurate and not misleading;
- ensuring the public has access to such sufficient, complete, accurate and not misleading information in order to ensure informed public debate and discourse; and
- ensuring that undertakings are not dissuaded from applying for public sector funding from HIE on the basis of concerns that information regarding their applications for funding and/or their wider business and finances are made publicly available, following concerns raised by another company.

95. HIE concluded that, on balance, the public interest lay in maintaining the exemption, as disclosure would have an adverse impact on the creative arts sector in Scotland. HIE considered that companies such as Company A should not be exposed to the risk of substantial prejudice to its commercial interests as a result of it having received an award of financial assistance from HIE.

The Applicant's comments on the public interest

96. The Applicant made a number of arguments in favour of the public interest in disclosure of the withheld information. The Applicant's submissions describe in detail its concerns with the information disclosed and that withheld, and provided its own finding where the Applicant considers that there are questions over Company A's reporting of its finances and HIE's

assessments. Not all of these arguments are detailed here, but they have all been taken in to account.

97. The Applicant submitted that it had serious concerns about Company A's finances. It commented that significant public money had been lost as a result of HIE's funding of Company A.
98. In conclusion, the Applicant considered that, for the most part, disclosure under FOISA would not alter the general understanding of Company A's commercial or financial position, it would merely evidence it.

The Commissioner's conclusions on the public interest

99. The Commissioner has considered all of the arguments and facts in this case. He acknowledges the general public interest in transparency and accountability, particularly in relation to the scrutiny of public finances.
100. The Commissioner notes that, when commercial companies engage with public authorities, they cannot expect all information provided to a public authority during the course of its business, to never be requested or disclosed. As noted in section 8.4 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities:³
When beginning any new procurement exercise, public authorities should ensure that bidders/suppliers understand the extent to which their information may be disclosed by the authority (either proactively or in response to an information request).
101. The effect of FOISA is that any recorded information held by a Scottish public authority can be requested under FOISA, but it does not mean that it is automatically disclosed.
102. As noted in previous decisions, each case is decided on its own merits, and generally there is no categorical approach to exemptions or certain types of information.
103. The Applicant has made serious allegations regarding Company A's financial situation, HIE's assessments of its financial situation and the awarding of funding to Company A. The Commissioner has taken the matters seriously. However, he must balance the arguments made for and against disclosure by both parties, and reach an informed decision.
104. The Commissioner recognises that it would be contrary to the public interest to place the Company A in a disadvantageous position with respect to its competitors.
105. Furthermore, the Commissioner considers the public interest in disclosure is met, to some extent, by the release of some of the information during the investigation.
106. The Commissioner has taken into consideration HIE's role in providing support and funding to commercial companies in the Highlands and Islands region. The support and advice provided by HIE is of a technical nature, in that its mission is to help and assist organisations to grow. Consequently, both parties are more candid and open than in a traditional bidder / supplier relationship.
107. The Commissioner has already acknowledged the submissions made by HIE in support of maintaining the exemption, and has already concluded that disclosure of the majority of the

³ [FOI+-+section+60+code+of+practice.pdf](#)

withheld information in this case would, or would be likely to, prejudice the commercial interests of Company A. That would not be in the public interest.

108. That said, the Commissioner accepts that there is also a public interest in Scottish public authorities ensuring projects are funded appropriately. The public interest in disclosure needs to be balanced against the public interest in ensuring there is reasonable protection of Company A's commercial interests and that Company A is not treated differently simply as a result of having requested and received funding from a public body.
109. The Commissioner has considered the withheld information in detail when reaching his decision.
110. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of this case, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure of the information.

Section 36(2) - Confidentiality

111. The Commissioner has considered the withheld information, and the submissions made by HIE. He notes that HIE relied upon section 36(2) in conjunction with section 33(1)(b) of FOISA in relation to some withheld information. As the Commissioner is satisfied that section 33(1)(b) applies to the information also withheld under section 36(2), he is not required to consider whether section 36(2) of FOISA applies to this information.

Decision

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

While the Commissioner agrees that much of the information withheld by HIE was exempt from disclosure, he also finds that HIE failed to comply with Part 1 of FOISA (and, in particular, section 1(1)), by withholding some information under the exemptions in sections 30(c) and 33(1)(b).

The Commissioner therefore requires HIE to disclose the information he has found was wrongly withheld by **Monday, 12 June 2023**. The Commissioner will identify separately to HIE the information which he requires to be disclosed.

Appeal

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

Daren Fitzhenry
Scottish Information Commissioner

27 April 2023

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
- ...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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).
- ...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or

- (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

Scottish Information Commissioner

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