

# Decision Notice

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## Decision 026/2019: Mr N and the Scottish Ministers

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### Conversion of loan to equity

Reference No: 201802076

Decision Date: 28 February 2019



Scottish Information  
Commissioner

## Summary

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The Ministers were asked whether specific loans or loan facilities carried an option to convert the loans to equity and who had authority to do this.

The Ministers considered the information should be withheld as disclosure was likely to prejudice commercial interests.

The Commissioner investigated and found that the Ministers had identified and located all of the information falling within the scope of the request, but also found the Ministers had not been entitled to withhold information. The relevant information was disclosed during the investigation.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy)

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

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1. On 3 October 2018, Mr N made a request for information to the Scottish Ministers (the Ministers). Mr N asked the Ministers to confirm whether two specific loan facilities granted to Ferguson Marine Engineering Limited (FMEL) and one specific loan facility granted to Burntisland Fabrications Limited (BiFab) carried the option to convert the loan into equity.
2. Mr N also asked, for each loan / loan facility, whether the authority to convert the loan in to equity was held a) jointly by the agreement of the lender and borrower, b) solely by the borrower or c) solely by the lender.
3. The Ministers responded on 1 November 2018. In relation to the FMEL loan facilities, the Ministers provided Mr N with a link to their website, where certain terms and conditions of the loans could be found. The specific information requested, however, was considered exempt from disclosure under section 33(1)(b) of FOISA, on the basis that disclosure “may prejudice” the company.
4. In relation to the information requested regarding BiFab, the Ministers drew Mr N’s attention to their response to a separate request, where he had been advised that they considered information regarding this loan to be exempt from disclosure under sections 30(c) and 33(1)(b) of FOISA.
5. On 1 November 2018, Mr N wrote to the Ministers, requesting a review of their decision on the basis that he disagreed with the response, emphasising that “may prejudice” (as referred to in the Ministers’ response) was not the appropriate test. He also believed the public interest favoured disclosure of the information requested
6. The Ministers notified Mr N of the outcome of their review on 28 November 2018. The Ministers maintained that all of the information requested was exempt from disclosure under section 33(1)(b) of FOISA. They withdrew their reliance on section 30(c) of FOISA.

7. On 28 November 2018, Mr N wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr N stated he was dissatisfied with the outcome of the Ministers' review because he believed the response failed to comply with FOISA and the public interest favoured disclosure.

## Investigation

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8. The application was accepted as valid. The Commissioner confirmed that Mr N 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.
9. On 14 December 2018, the Ministers were notified in writing that Mr N had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr N. The Ministers provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application, and answer specific questions, with specific reference to the requirements of the exemption in section 33(1)(b) of FOISA. They were also asked to explain the steps they had taken to identify and locate the information requested.
11. The Ministers responded, explaining the steps taken to identify and locate the information held. They further advised the Commissioner that, having reconsidered their position, they accepted they had not been entitled to withhold the information from Mr N at the time they dealt with his request. They confirmed that the information held had been provided to Mr N.
12. Mr N confirmed receipt of the disclosure by the Ministers.

## Commissioner's analysis and findings

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13. 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 Mr N and the Ministers. He is satisfied that no matter of relevance has been overlooked.

### **Was all relevant information identified, located and provided by the Ministers?**

14. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to certain qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it.
15. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information the authority should hold.
16. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.

17. In their submissions to the Commissioner, the Ministers explained that any option to convert the loans / facilities in question into equity, and the authority to convert into equity, was contained in the loan agreements in question.
18. Having considered these agreements, the Ministers confirmed that they held no information other than that disclosed to Mr N during the investigation.
19. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that the Ministers interpreted Mr N's request reasonably and took adequate, proportionate steps with a view to identifying and locating the information requested by Mr N. It would be reasonable to expect any such information to be held in the loan agreements themselves. Consequently, the Commissioner is satisfied, on the balance of probabilities, that the Ministers identified and located all of the information they held and which fell within the scope of Mr N's request.

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

20. Initially, the Ministers submitted that information had been correctly withheld under section 33(1)(b) of FOISA, which provides that information is exempt if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). Section 33(1)(b) of FOISA is set out in full in Appendix 1. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
21. As mentioned above, during the investigation the Ministers withdrew their reliance on section 33(1)(b) of FOISA, accepting that they had not been entitled to withhold the information at the time they dealt with Mr N's request. In the absence of submissions from the Ministers as to why the information was initially considered exempt from disclosure, the Commissioner has no option but to find that disclosure of the information would not have had the substantially prejudicial impact required for section 33(1)(b) of FOISA to be engaged. Consequently, in this case, the Commissioner is not satisfied that the information requested was properly withheld under this exemption. Having reached that conclusion, he is not required to consider the public interest test in section 2(1)(b) of FOISA.
22. The Commissioner concludes, therefore, that the Ministers had not been entitled to rely upon section 33(1)(b) of FOISA to withhold the information, and by doing so breached Part 1 of FOISA.
23. Overall, the Commissioner cannot stress enough the importance of giving proper consideration to the tests that have to be met for an exemption (or exception, under the Environmental Information (Scotland) Regulations 2004 (the EIRs)) to apply, when dealing with requests under both FOISA and the EIRs.
24. While no useful purpose would be served by requiring the Ministers to take any specific action in this case, the Commissioner would urge them to ensure, in particular, when responding to future information requests, that they give adequate consideration to whether any applicable test of substantial prejudice can actually be met in the circumstances. In this case, it appears likely that such consideration would have led to earlier disclosure and a consequent saving of time and effort for all concerned.

## Decision

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The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr N. The Ministers were not entitled to withhold the information under the exemption in section 33(1)(b) of FOISA.

Given that the information was disclosed to Mr N, the Commissioner does not require the Ministers to take any action in respect of this failure, in response to Mr N's application.

## Appeal

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Should either Mr N or the Ministers 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.

**Margaret Keyse**  
**Head of Enforcement**

**28 February 2019**

### 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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

#### 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.

...

#### 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).

...

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