

# Decision Notice 174/2019

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## Account management plans: Raytheon Systems Ltd and Chemring Energetics

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**Applicant: The Applicant**

**Public authority: Scottish Enterprise**

**Case Ref: 201900691**



Scottish Information  
Commissioner



## Summary

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Scottish Enterprise was asked for information regarding the account management of Raytheon Systems Ltd and Chemring Energetics.

Scottish Enterprise disclosed some information, but withheld the remainder, arguing that it was either commercially sensitive or that disclosure would lead to an actionable breach of confidence. Some of this information was later disclosed during the Commissioner's investigation.

The Commissioner investigated and found that the information disclosed during the investigation had been wrongly withheld, but that the remaining information had been correctly withheld as its disclosure would, or would be likely to, prejudice substantially the commercial interests of the two companies.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (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 8 January 2019, the Applicant made two requests for information to Scottish Enterprise. The information requests were as follows:
  - (i) I would like (a) to know how long Scottish Enterprise has account managed Raytheon Systems Ltd for, (b) a copy of the Terms of Engagement Letter issued to Raytheon Systems Limited prior to Scottish Enterprise's relationship with them being formalised, and (c) a copy of any reviews or evaluations undertaken of Scottish Enterprise's relationship with Raytheon Systems Limited, including the Company Review Workbook for Raytheon.
  - (ii) I would like (a) to know how long Scottish Enterprise has account managed Chemring Energetics for, (b) a copy of the Terms of Engagement Letter issued to Chemring Energetics prior to Scottish Enterprises relationship with them being formalised, and (c) a copy of any reviews or evaluations undertaken of Scottish Enterprise's relationship with Chemring Energetics, including the Company Review Workbook for Chemring.
2. Scottish Enterprise responded on 5 February 2019. It:
  - provided the Applicant with answers in response to part (a) of each request
  - gave the Applicant notice, in terms of section 17(1) (Notice that information is not held) of FOISA, in response to part (b) of each request, and
  - provided the Applicant with two company account plans, with information redacted under sections 33(1)(b) (Commercial interests and the economy) and 38(1)(b) (Personal information) of FOISA, in response to part (c) of each request.

3. On 6 February 2019, the Applicant wrote to Scottish Enterprise requesting a review of its decision to withhold information from him under section 33(1)(b) of FOISA.
4. Scottish Enterprise notified the Applicant of the outcome of its review on 6 March 2019. It upheld its application of section 33(1)(b) of FOISA and also applied the exemption contained in section 36(2) (Confidentiality) to the withheld information.
5. On 25 April 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner 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 believed it was incorrectly applying exemptions in order to withhold information that is in the public interest.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to him for a decision.
7. On 31 May 2019, 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.

## **Commissioner's analysis and findings**

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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.

## **Information disclosed to the Applicant**

10. During the investigation, the investigating officer advised Scottish Enterprise that some of the information it was withholding from the Applicant was in the public domain when he made his information requests. Scottish Enterprise subsequently disclosed this information to the Applicant and withdrew its reliance on exemptions it had previously applied to this information.
11. Scottish Enterprise was also questioned about its decision to withhold some information that seemed to relate to its own objectives in working with these companies, rather than relating to the companies' commercial interests.
12. Scottish Enterprise subsequently provided the Applicant with this information and indicated that it no longer sought to rely on the exemptions it had previously applied to this information.
13. As Scottish Enterprise has disclosed the above specified information to the Applicant, the Commissioner must conclude that it was not entitled to withhold this information as exempt under section 33(1)(b) and 36(2) of FOISA.

## **Withheld information**

14. Scottish Enterprise is withholding the information it has redacted from both of the company account plans under sections 33(1)(b) and 36(2) of FOISA.

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

15. As noted above, Scottish Enterprise withheld all 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). 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.
16. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to identify:
  - (i) whose commercial interests would (or would be likely to) be harmed by disclosure;
  - (ii) the nature of those commercial interests; and
  - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
17. 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.
18. In its submissions, Scottish Enterprise argued that disclosure would harm the commercial interests of the two companies (Raytheon and Chemring).
19. Scottish Enterprise submitted that the withheld information provides details of:
  - the internal operations of each company,
  - financial information which is not publicly available,
  - information on plans for growth and key technology areas/products/markets being explored, and projects underway,
  - each company's strategy for future growth,
  - specific challenges being faced by each company and other opportunities in the pipeline.
20. Scottish Enterprise explained that this information is provided to its Account Managers in order to give them insight into the companies' performance and challenges, and to enable them to provide tailored and appropriate advice and assistance.
21. Scottish Enterprise submitted that the Aerospace, Defence and Marine Industry is highly competitive and that the number of companies active in this market in Scotland is quite small. It argued that the information contained in the Account Plans, if released, would give an insight into Chemring and Raytheon's growth strategies, the particular projects and opportunities being pursued and, in some cases, the specific technologies and projects being explored. Scottish Enterprise contended that disclosure of this information would give a

significant advantage to the companies' competitors and would substantially prejudice their ability to compete in the market place.

22. Scottish Enterprise argued that disclosure of the information would also allow competitors an insight into what could be perceived as areas of weakness and they could use this information to their advantage. If this occurred, it would have a reputational impact on the company itself which could lead to loss of confidence from their stakeholders and customers.

#### *The Commissioner's conclusions*

23. The Commissioner has carefully considered the content of the withheld information, along with the submissions provided by Scottish Enterprise. He accepts that the commercial interests of Raytheon and Chemring would, or would be likely to, be prejudiced substantially if the redacted information was to be disclosed. The Commissioner notes that the withheld information comprises information about the companies' ongoing work and research development as well as highlighting potential opportunities and challenges. The Commissioner accepts that none of this information is in the public domain.
24. He also accepts that this type of information, if disclosed, could prejudice substantially the commercial interests of the two companies by allowing competitors an insight into their present and future planning, including information on current challenges facing the companies and areas of future research and development. The withheld information identifies the companies' aims and weaknesses and the Commissioner is satisfied that disclosure of this information would give an unfair advantage to their competitors.
25. Given this, the Commissioner has concluded that the exemption in section 33(1)(b) of FOISA applies to all of the information that is being withheld.

#### *Public interest test*

26. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied to the information under consideration, he has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the 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).

#### Applicant's comments on the public interest

27. The Applicant believes that Scottish Enterprise has redacted key information regarding its relationship with both companies and that disclosure of this information would be in the public interest. The Applicant stated that Scottish Enterprise has a close relationship with Raytheon and Chemring both of which, he commented, are involved with the arms trade and have a well-publicised link to human rights abuses abroad. He notes that, while Scottish Enterprise has stated that it does not directly fund the manufacture of munitions, it has consistently withheld information regarding the details of its support for and relationship with these companies. The Applicant submitted that some 94% of Raytheon's business is from the arms trade, so clarifying exactly what Scottish Enterprise are supporting is an important area of scrutiny.
28. The Applicant stated that Scottish Enterprise has provided £200,590 of grants to Raytheon and £196,355 to Chemring since 2007, and that it currently provides account management services to both companies. He argued that the company account plan documents held by Scottish Enterprise for these two companies include key information on the agency's history with both companies, their objectives, expectations from the relationship and the nature of

their support. However, the Applicant submitted that this key information has been redacted and is currently not publicly available.

29. The Applicant argued that disclosure would allow the public and their elected representatives to scrutinise services being delivered on their behalf by a public body, and which involves not insubstantial sums of public money being awarded to multi-billion dollar multinational corporations. He submitted that disclosure would also enable scrutiny of the Scottish Government's claims that they do not fund the manufacture of munitions, which until now has been effectively impossible due to the opaque information previously provided on what the funding and services have been given in aid of. The Applicant contended that disclosure would allow an assessment of the compatibility of the Scottish Government's economic policies with other aspects of their policy agenda, particularly the work delivered through their international development department in the fields of human rights and peace building.

#### Scottish Enterprise's comments on the public interest

30. Scottish Enterprise stated that there has been increased interest politically and in the media over the past year in relation to public sector support for companies in the Defence sector. It explained that it has, through responses to information requests,, Ministerial enquiries, Parliamentary Questions and media enquiries, released a great detail of information about the support it has provided to these companies, including the financial support given, an outline of the specific projects supported, due diligence undertaken, etc.
31. In light of this political and media interest, Scottish Enterprise acknowledged that there is a public interest in how the funding to these companies is being used and it submitted that it has been as open and transparent as it can, without releasing information that is commercially sensitive or confidential. Scottish Enterprise argued that the public interest has been served by the information already in the public domain.
32. Scottish Enterprise argued that release of the information would cause significant harm to the companies and their ability to compete in the market. In order to maintain and support the proper and efficient operation of free markets, it is, in Scottish Enterprise's view, critical that these companies are allowed to maintain confidentiality in their commercial positions.
33. Scottish Enterprise submitted that there is also a public interest in it maintaining the confidence of third parties and to avoid taking any steps that could lead to a court action. It submitted that relationships with private sector partners and customers are critical to Scottish Enterprise meeting its objectives of growing and strengthening Scotland's economy. It argued that these relationships would be diminished if those parties were concerned that information may be disclosed in circumstances where it is not appropriate to do so and where it would cause harm to do so.

#### Commissioner's conclusions on the public interest

34. The Commissioner has considered all of the arguments and facts in this case. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to the allocation of public funds, and notes that the data which is already in the public domain (described by Scottish Enterprise) goes some way towards this.
35. That said, it is important that the public understand the nature of Scottish Enterprise's relationship with these two companies especially when they have been provided with money from the public purse. The Commissioner has reviewed the withheld content carefully and he is satisfied that, while some of the headings in the reports suggest that the information will

focus solely on Scottish Enterprise's role in supporting these firms, the actual content contains information about the commercial activities of each firm.

36. The Commissioner notes that all of the information that solely discussed Scottish Enterprise's role was disclosed to the Applicant during his investigation. The remaining information does contain some information about Scottish Enterprise's relationship and activities, but it is interlinked with the commercial aims of the two companies and it could not be disclosed without causing harm to the commercial interests of Raytheon and Chemring.
37. While there will be circumstances in which the public interest requires the disclosure of information even if substantial prejudice might result, the Commissioner recognises that it would be contrary to the public interest in this case to risk damaging the commercial success of these two companies. The Commissioner notes that both companies employ staff in Scotland and he considers that disclosure could well result in these firms losing their competitive edge which, in turn, could lead to job losses.
38. 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 under consideration.
39. The Commissioner therefore finds that Scottish Enterprise was entitled to withhold the information under section 33(1)(b) of FOISA. As the Commission has concluded that all of the information has been correctly withheld under section 33(1)(b) of FOISA, he is not required to consider whether it is also exempt under section 36(2) of FOISA.

## Decision

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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 Scottish Enterprise was entitled to withhold some information under section 33(1)(b) of FOISA.

However, by wrongly withholding information under section 33(1)(b) and 36(2) of FOISA, Scottish Enterprise failed to comply with section 1(1) of FOISA.

Given that the information that was wrongly withheld from the Applicant was disclosed to him during the investigation, the Commissioner does not require Scottish Enterprise to take any action in respect of this failure in response to the Applicant's application.



## **Appeal**

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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.

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

**29 November 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.

...

- (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.

...

#### 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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