

# Decision Notice

---

**Decision 178/2017: Mr X and Falkirk Council**

---

**Falkirk Council Pension Fund investments**

Reference No: 201700965

Decision Date: 20 October 2017



Scottish Information  
Commissioner

## Summary

---

The Council was asked for information about its Pension Fund investments, including whether it had sold any interests in the secondaries market. The request also asked for specified details of any interests sold.

The Council disclosed a small amount of information but withheld the majority on grounds of confidentiality.

The Commissioner was satisfied that all the information withheld was confidential and that, in the circumstances of this case, the Council was correct to withhold it.

## Relevant statutory provisions

---

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(c) (Effect of exemptions); 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 24 March 2017, Mr X made a request for information to Falkirk Council (the Council). Mr X's seven questions can be grouped into three parts as follows. He asked for:
  - (i) Any documents pertaining to whether you [the Council] have ever bought or sold any private equity, real estate or infrastructure interests in the secondaries market in the past.
  - (ii) More details relative to the response to the question above (questions 2 to 6)
  - (iii) Any documents pertaining to solicited or unsolicited in-bound "binding" offers or bids from you [the Council], buyers, sellers or intermediaries seeking to transact funds with [the Council] or [the Council] seeking to transact with them.
2. The Council responded on 24 April 2017, confirming that it had bought one infrastructure interest in the secondaries market and that there were no relevant sales. It withheld any remaining information caught by the request under two exemptions in FOISA, these being sections 33(1) (Commercial interests and the economy) and 36(2) (Confidentiality).
3. On 2 and 17 May 2017 Mr X wrote to the Council asking it to review its response. He stated that he still wanted all the information sought in his request and referred to the Commissioner's *Decision 077/2017 Mr A and Aberdeen City Council*<sup>1</sup> as justifying his view that it should be disclosed.
4. The Council notified Mr X of the outcome of its review on 26 May 2017, upholding its original decision and further explaining why it believed disclosure would prejudice the commercial interests of various persons substantially. It also addressed the public interest.

---

<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201700308.aspx>

5. On 26 May 2017, Mr X wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr X stated he was dissatisfied with the outcome of the Council's review because he considered the Council was under a legal obligation to disclose the financial performance of individual private equity funds in which it invested. He believed this should include the price at which any holding from such funds was sold.

## Investigation

---

6. The application was accepted as valid. The Commissioner confirmed that Mr X 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 14 June 2017 the Council was notified in writing that Mr X had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr X. The Council 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. The Council was invited to comment on this application and answer specific questions, focusing on the exemptions claimed by the Council in its correspondence with Mr X.

## 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 Mr X and the Council. He is satisfied that no matter of relevance has been overlooked.

### Section 36(2) - Confidentiality

10. Section 36(2) of FOISA provides that information is exempt 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 test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is necessary in the public interest.

#### *Submissions*

11. Mr X commented that, in his view, the Council was under a legal duty to disclose the financial performance of individual equity funds in which it had invested. He argued that if the Council sold shares in those funds, it followed that the sale price must also be disclosed. Mr X submitted that the price formed an integral part of the performance of that investment. He believed that the Council's arguments [in its responses] were demonstrably false and disingenuous.
12. Mr X referred to the UK Information Commissioner's (ICO's) Decision Notices FS50086121<sup>2</sup> and FS50083667<sup>3</sup>, which ordered private equity data to be disclosed by the public bodies

---

<sup>2</sup> [https://ico.org.uk/media/action-weve-taken/decision-notice/2007/391832/DECISION\\_NOTICE\\_FS50086121.pdf](https://ico.org.uk/media/action-weve-taken/decision-notice/2007/391832/DECISION_NOTICE_FS50086121.pdf)

involved. The information included the name of the fund invested in, the commitment to that fund, contributions into the fund, distributions to date and the current value of the fund. Mr X submitted that these were ongoing requirements and that pension funds had adapted over the years to publish this data proactively on their websites. To illustrate this point, Mr X provided a weblink to published information he had located for the West Yorkshire Pension Fund<sup>4</sup>.

13. Mr X argued that previous decision notices had acknowledged the data might be confidential, but found that the public interest overrode any confidentiality. He questioned whether the information here was in fact confidential, given the Commissioner's findings in *Decision 077/2017* (see above) following an identical request to Aberdeen City Council. He also referred to a notice published by the Council in the London Gazette<sup>5</sup>, which he noted identified the buyer, seller, fund and date of transfer: he questioned whether disclosure of the remaining information sought in relation to the transaction could cause the harm required for the exemption to apply.
14. The Council explained that it administered a pension fund worth in the region of £2 billion, with an active programme to invest in infrastructure assets in the private markets (including secondary fund markets). In this, it was supported by Lothian Pension Fund, which operated through a subsidiary regulated by the Financial Conduct Authority: this subsidiary was therefore subject to both contractual and regulatory obligations in carrying out its investment work.
15. In support of its position, the Council provided detailed descriptions of the parties involved and the circumstances of the transaction in which the withheld information was generated. The Council also provided copies of non-disclosure agreements and clauses demonstrating that the withheld information remained confidential at the time of Mr X's request and could not be placed into the public domain. It provided details of the liability clauses which would apply in the event of breach of these agreements.
16. The Council stated it obtained the information from third parties, all of whom it identified in its submissions [and none of which are Scottish public authorities under FOISA]. It confirmed, with copies of supporting correspondence, that the parties concerned did not agree to disclosure.
17. The Council contended the withheld information would constitute an actionable breach of confidence for the following reasons:
  - (i) The sensitive commercial pricing nature of the information means it had the necessary quality of confidence;
  - (ii) The relevant agreements imposed an obligation to keep such information confidential and demonstrated an intention that the information remain so;
  - (iii) Unauthorised disclosure would be to the detriment of the persons who communicated the relevant information (as well as the Council and Lothian Pension Fund), and
  - (iv) In the Council's view, there was no court-identified public interest defence.

---

<sup>3</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2007/389088/DECISION\\_NOTICE\\_FS50083667.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2007/389088/DECISION_NOTICE_FS50083667.pdf)

<sup>4</sup> <http://www.wywf.org.uk/Member/Investments/PrivateEquityPortfolio/2015/PrivateEquityPortfolio2015.aspx>

<sup>5</sup> <https://www.thegazette.co.uk/notice/2684008>

### *Obtained from another person*

18. Section 36(2) contains a two stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
19. In light of the Council's submissions above, and having considered carefully the withheld information itself, the Commissioner is satisfied that the withheld information can be said, in the circumstances of the transaction in question, to have been "obtained" from another person or persons. The Commissioner is therefore satisfied that the first test can be fulfilled.

### *Actionable breach of confidence*

20. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
21. Generally, there are considered to be three key requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
  - (i) the information must have the necessary quality of confidence;
  - (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality, and
  - (iii) unauthorised disclosure must be to the detriment of the person who communicated the information.
22. With regard to Mr X's references to the Commissioner's *Decision 077/2017*, referenced above, it should be noted that the Commissioner's conclusions in that case hinged on the adequacy of the submissions offered by the public authority for withholding the information in question. The Commissioner did not exclude the possibility of a public authority being able to justify the withholding of equivalent information, given more substantial and focused arguments for doing so.
23. The Commissioner also notes Mr X's reference to the two ICO decisions, which required the disclosure of information (under the Freedom of Information Act 2000) relating to the overall performance of specific private equity funds held by the authorities in question. Where relevant, he will take these decisions into account, particularly in relation to the public interest, but he would note that the information under consideration in these cases did not extend to financial details of individual transactions from the funds in question.

### Necessary quality of confidence

24. For information to have "the necessary quality of confidence", it must be information which is not a matter of public knowledge. The information must have the basic attribute of inaccessibility. The Commissioner is satisfied in the circumstances described in the submission here that the specific withheld information is not common knowledge and could not readily be obtained by Mr X through any other means.
25. Although Mr X provided a weblink to information about the same transaction, the information withheld in this case was not disclosed there and could not be worked out from what was

published. The published information simply gives notice that the transaction has taken place, when and who was involved, without providing further details specific to that transaction. Consequently, while the Council should have acknowledged that the seller, in particular, was identified in that notice, he is satisfied that further information relating to the transaction (including the price and information specific to the intermediary) has the necessary quality of confidence.

#### Obligation to maintain confidentiality

26. An obligation to maintain confidentiality can be either "express" or "implied". An implied obligation of confidentiality can arise as a result of the relationship between the parties or the particular circumstances in which the information was obtained. An express obligation could be stipulated in various forms, including by contract.
27. The Council has provided evidence of confidentiality clauses in agreements related to the transaction under consideration. The Commissioner accepts that there were current express obligations to maintain confidentiality in respect of the withheld information, at the time the Council dealt with Mr X's request and requirement for review.

#### Unauthorised disclosure would cause detriment

28. The authorised disclosure of the information must be to the detriment of the person who communicated it. To meet this requirement, the damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence.
29. The Council stated that it considered the withheld information to be highly confidential, market-sensitive information. As indicated above, it provided evidence of objections to disclosure from the other parties to the transaction in question, and highlighted the potential contractual liability in the event of a breach. For the purposes of an actionable breach of confidence, the Commissioner is satisfied that disclosure would be unauthorised and detrimental.
30. Having considered the submissions put forward by both the Council and Mr X, the Commissioner is satisfied that the tests for an actionable breach of confidence are met here, and that the Council correctly applied the exemption in section 36(2) of FOISA to the withheld information.

#### *Public Interest*

31. As stated above, if the conditions of section 36(2) are fulfilled, an absolute exemption is created. However, it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest. The law of confidence recognises that there is a strong public interest in ensuring that people respect confidences and the burden of demonstrating that a failure to maintain confidentiality would be in the public interest is therefore a heavy one. However, in certain circumstances, the public interest in maintaining confidences may be outweighed by the public interest in the disclosure of certain information.
32. For example, if disclosure would expose wrongdoing, such as a public figure misleading the public, or where journalists wish to publish information on a matter of pressing public concern, it would be difficult to maintain confidentiality in such circumstances. There is no evidence of any such circumstance here.
33. The Commissioner has taken into account the ICO decisions cited by Mr X. He accepts that there is a public interest in understanding the performance of individual funds invested in by

the Council as part of the Pension Fund under its management, to allow effective scrutiny of its stewardship of that Fund. He must question, however, whether information about one specific purchase made by the Council, as opposed to the overall performance information sought in these other cases, would contribute significantly to that public interest.

34. As the ICO has also recognised (see its Decision Notice FS50617015<sup>6</sup>, upheld by the Information Rights Tribunal under reference EA/2016/0228<sup>7</sup>), not all requests for information relating to this kind of investment are the same. Some will be for different kinds of information, revealing more about an authority's private equity investments than others. It cannot follow from disclosure of the relatively high-level performance information required by the two decisions cited by Mr X that all data about an authority's private equity investments will require to be disclosed in the public interest.
35. Here, while the information under consideration is not of exactly the same character as that sought in the case which went to the Information Rights Tribunal, it is clearly more detailed than that under consideration in the other two ICO cases. It is specific to one individual transaction. Each case needs to be considered on its own merits, and here the Commissioner must bear in mind that the withheld information can only provide a "snapshot" of one event. The information is clearly of some commercial sensitivity, to the seller at least and potentially to others, and there are considerable potential liabilities should the relevant confidentiality agreements be breached. Confidentiality is not to be set aside lightly in any event, if its integrity is to be maintained.
36. In *Decision 170/2014 Mr Harry Corton and City of Edinburgh Council*<sup>8</sup>, the Commissioner considered the withholding of certain Private Equity Partnership valuations from the Lothian Pension Fund. Although that decision was made in relation to section 33(1)(b) (Commercial interests and economy) of FOISA rather than section 36(2), the Commissioner considers the findings on the public interest to be of relevance here. In that decision, noting the absence of a compelling specific public interest justifying disclosure, the Commissioner concluded that:

*It is in the public interest for the Council, in common with other Scottish public authorities, to be able to administer pension funds effectively in a competitive market, with a view to implementing an appropriate investment strategy and securing best value for the public purse.*
37. The situation appears similar here, to the extent that the Commissioner can identify no public interest argument sufficiently compelling to outweigh those in maintaining confidentiality and allowing this Pension Fund to be managed effectively.
38. The Commissioner finds that the Council was entitled to withhold the information under section 36(2) of FOISA.
39. Given this finding, the Commissioner does not require to go on to consider the exemption in section 33(1) of FOISA.

---

<sup>6</sup> [http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2062/X,%20Kishore%20EA.2017.0228%20\(23.08.17\).PDF](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2062/X,%20Kishore%20EA.2017.0228%20(23.08.17).PDF)

<sup>7</sup> [http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2062/X,%20Kishore%20EA.2017.0228%20\(23.08.17\).PDF](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2062/X,%20Kishore%20EA.2017.0228%20(23.08.17).PDF)

<sup>8</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201401025.aspx>

## **Decision**

---

The Commissioner finds that Falkirk Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr X.

## **Appeal**

---

Should either Mr X or Falkirk Council 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**

**20 October 2017**



### 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

...

- (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);

...

#### 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.

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**