



# Decision Notice 073/2023

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## Refusal to confirm or deny: default on a loan

**Applicant:**

**Authority: Highlands and Islands Enterprise**

**Case Ref: 202200764**

### Summary

The Applicant asked the Authority whether a company had defaulted on a loan, and for other related information. The Authority refused to confirm or deny whether it held information it had been asked for. The Commissioner investigated and upheld the Authority's response.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1) (Effect of exemptions); 18(1) (Further provision as respects responses to request); 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 19 April 2022, the Applicant made a request for information to the Authority. It asked:
  - a. whether [Company A] had defaulted on its loan from the Authority, secured by a charge created in [date]
  - b. if [Company A] had not defaulted but the original loan repayment date had expired, how much additional state aid (or "subsidy") had been provided to the company since [date], either in cash or in kind through extending the repayment date.

2. The Authority responded on 17 May 2022. It refused, under section 18(1) of FOISA (in conjunction with section 33(1)(b) of FOISA), to confirm or deny whether it held the information or whether the information existed.
3. On 17 May 2022, the Applicant wrote to the Authority, requesting a review of its decision. It considered the Authority should state whether the information was held (or not) and, as public funds had been made available, the information should be disclosed.
4. The Authority notified the Applicant of the outcome of its review on 17 June 2022. It upheld its original decision, stating that even to confirm or deny the existence of such information would be prejudicial to the commercial interests of recipients, and therefore the exemption under section 33(1)(b) of FOISA would apply and the public interest test did not favour disclosure.
5. On 11 July 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant explained in detail why it did not agree that the Authority was entitled to refuse to confirm or deny whether the information asked for existed or was held.

## **Investigation**

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 2 August 2022, the Authority was notified in writing that the Applicant had made a valid application. 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 Authority was invited to comment on this application and to answer specific questions (focusing on the application of section 18(1) of FOISA). The Authority did so.
9. The Applicant was provided with an opportunity to submit any further comments in addition to those provided with the application, as why it was in the public interest for the Authority to confirm or deny whether the requested information was held. It did not choose to do so.

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

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### ***Section 18(1) – “neither confirm nor deny”***

11. The Authority refused to confirm or deny whether it held any information falling within the scope of the Applicant's request.
12. Section 18(1) of FOISA allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
  - (i) a request has been made to the authority for information which may or may not be held by it;

- (ii) if the information existed and was held by the authority (and it need not be), it could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 38, 39(1) or 41 of FOISA; and
  - (iii) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
13. It is not sufficient simply to claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that the authority must be able to give a refusal notice under section 16(1), on the basis that any relevant information, if it existed and were held, would be exempt information under one or more of the listed exemptions.
14. In any case where section 18(1) is under consideration, the Commissioner must ensure that his decision does not confirm or deny whether the information requested actually exists or is held by the authority. This affects the ability of the Commissioner to comment on the reliance by the public authority on any of the exemptions listed in relation to section 18(1), or on other matters which could have the effect of indicating whether the information existed.
15. In this case, the Authority submitted that, if it held any information falling within the scope of the Applicant's request, it would be exempt from disclosure under section 33(1)(b) of FOISA.

*Section 33(1)(b): commercial interests and the economy*

16. 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.
17. 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.
18. 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.

*The Authority's submissions*

19. The Authority submitted that both Company A's and its own commercial interests would be affected by disclosure of the requested information (if held).
20. It stated that its remit is to act as the Economic and Community Development agency for the Highlands and Islands on behalf of the Scottish Government. This requires it to provide funding to businesses and other clients throughout the Highlands and Islands. This will normally require it to receive, consider and hold commercially sensitive information, and a trusted relationship with its clients is (the Authority submitted) fundamental to enable it to fulfil its remit.

21. The Authority submitted that its relationships with organisations, including Company A, was as a client and not a supplier, so it had a detailed understanding of such organisations' concerns with the disclosure of commercial information. The Authority submitted that, as part of the due diligence process to manage Company A's account, it continuously reviewed and evaluated any financial information provided. It also has the necessary in-house expertise to understand the impact and harm disclosure of the type of information requested (if held) would have on the client.
22. In general terms, the Authority submitted that disclosing the type of information requested (if held) would be highly likely to result in a company having difficulties managing their finances appropriately, potentially experiencing problems with both creditors and debtors. This would compound the harm caused by disclosure and could ultimately result in, or at least contribute to, a company going into liquidation.

#### Submissions from the Applicant

23. The Applicant submitted that, as the Authority had confirmed the size and term of the loan (it considered that information to be in the public domain already), there were no commercial interests to be protected in disclosing any further information about the loan (if held).
24. The Applicant argued that companies which accepted funding did so on the basis that details of awards would be made public. The Applicant considered that the information requested could not be withheld, as the only reason for doing so would be that disclosure might result in embarrassment to the Authority or the company, and as opposed to any harm being caused to their commercial interests.

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

25. The Commissioner's role here is to determine whether, in this instance, disclosure of the information (if held) would, or would be likely to, prejudice substantially the Authority's and/or Company A's commercial interests.
26. Having considered the information requested, the loan provided, and the Authority's relationships with its clients, the Commissioner is satisfied that both Company A and the Authority would have commercial interests in relation to the information requested (if held).
27. Having accepted that these commercial interests would be engaged, the Commissioner must consider whether they would, or would be likely to, be prejudiced substantially by disclosure of the withheld information. As indicated above, such prejudice would have to be at least likely before the exemption could apply.
28. 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 the Authority, its purpose is to engage, promote and support companies to prosper and develop within the Highlands and Islands region.
29. The Authority's relationship with such organisations is more akin to a commercial company in a consultant / client relationship, as opposed to a bidder and tenderer. The Commissioner has also taken cognisance of the argument that the Authority's responsibility to ensure returns from loans are in the best interest for the public purse and that disclosure of information pertaining to a company's loan repayments could have significant detrimental impact on its viability.

30. In the circumstances, the Commissioner is satisfied that disclosure of the information (if held) would, or would be likely to, prejudice substantially the Authority's and Company A's commercial interests, and consequently the exemption in section 33(1)(b) of FOISA would be engaged (were any relevant information to exist and be held).

#### *Public interest test*

31. As the Commissioner has found that the exemption in section 33(1)(b) would have been correctly applied to the requested information (if held), 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 the circumstances of the case, the public interest in disclosing the requested information (if held) would be outweighed by the public interest in maintaining the exemption in section 33(1)(b).

#### The Authority's comments on the public interest

32. The Authority acknowledged the significant public interest in allocating public funding, whether through loans or grant funding. However, that public interest related to the way in which the Authority carried out its functions and ensured best value for money, not in providing public access to extremely sensitive commercial information which (if held) would not be accessible by any other route.
33. Disclosing the information (if held) would impact on the Authority's relations with its clients, as it would not be able to deliver its function as a public body if organisations had concerns that, should trading conditions become challenging for them, it would put information disclosing that fact into the public domain.

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

34. The Applicant considered it was strongly in the public interest to confirm whether Company A had defaulted on the loan and whether further monies had been loaned.
35. The Applicant submitted that the Authority had not weighed up the competing interests; commercial and public, it simply asserted that the public interest did not favour disclosure.

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

36. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to the scrutiny of public finances.
37. The Commissioner considers that it is important to the public purse that any loans or grants return best value for the public sector. It is also important, in general, that this is open to public scrutiny. It is also in the public interest that companies receiving support from the Authority can do so without all of their operations and interactions necessarily being disclosed. As confirmed above, disclosing such information (if held) would, or would be likely to, prejudice substantially the interests of company concerned and other companies that have or are seeking funding and support from the Authority.
38. The Commissioner is satisfied that there are mechanisms in place, coupled with reporting requirements, which contribute adequately to ensuring there is scrutiny of the awarding of any grants or loans (and any repayments), without the need for further specifics of a loan (or repayments) (if held) to be disclosed.
39. In reaching a decision, 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 detailed nature, given its remit to assist

organisations to grow. Consequently, both parties are more candid and open than in a traditional bidder / supplier relationship.

40. The Commissioner has already acknowledged the submissions made by the Authority in support of maintaining the exemption, and has already concluded that disclosure of the requested information (if held) would, or would be likely to, prejudice the commercial interests of Company A. That would not be in the public interest.
41. 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) would outweigh that in disclosure of the information (if held).

*Section 18(2): public interest test*

42. The Commissioner must now consider whether the Authority was entitled to conclude that it would be contrary to the public interest to reveal whether the requested information about the loan is held or not.
43. In the Authority's view, revealing whether or not the requested information was held would be extremely damaging to any business and highly likely to cause significant harm.
44. The Authority considered that there was a strong public interest in supporting the viability of businesses and employers, in maximising the ability of the Authority to recover loans of public money wherever possible, and in ensuring potential beneficiaries of the Authority's loans were not dissuaded from seeking support, where appropriate, by the fear of inappropriate exposure of their commercial information.
45. Confirming whether this information was held or not, the Authority submitted, would not only seriously damage its relationship with its clients (making it much more difficult to ensure the best possible outcome for the investment of public money), it would also have an extremely detrimental impact on the Authority's reputation in general and its ability to work with clients. Consequently, there would be a significant impact on the Authority's ability to undertake its purpose.
46. In addition, the Authority considered that it could not be the case that any business would expect this type of information to be placed in the public domain and the Authority should not be publishing any information that would have an adverse impact on not only the client but also the local economy and those other businesses working with these clients.
47. The Applicant submitted there is an overwhelming public interest in obtaining the information he has requested.
48. Having considered the submissions from both parties in detail, the Commissioner accepts that revealing whether the information existed or was held would be contrary to the public interest. It is clear that either confirming or denying whether the information was held would not only be detrimental to the company concerned, but also to the other companies supported by the Authority.
49. The Commissioner is therefore satisfied that the Authority was entitled neither to confirm or deny, in line with section 18(1) of FOISA, whether the requested information was held or existed.

## **Decision**

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

## **Appeal**

Should either the Applicant or the Authority 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**  
**Scottish Information Commissioner**

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

#### **18 Further provision as respects responses to request**

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 38, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.
- (2) Neither paragraph (a) of subsection (1) of section 16 nor subsection (2) of that section applies as respects a refusal notice given by virtue of this section.
- ...

#### **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).