

# Decision Notice

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## Decision 245/2016: Company A and Aberdeen City Council

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### Pension fund investments

Reference No: 201601753

Decision Date: 10 November 2016



Scottish Information  
Commissioner

## Summary

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The Council was asked for information about its Pension Fund investments, including whether it had sold any interests in the private equity secondaries market and, if so, at what discount to NAV (Net Asset Value).

The Council initially withheld information on the discount to NAV, arguing that it was confidential. During the Commissioner's investigation, the Council withdrew its reliance on confidentiality and disclosed the information.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) 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

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1. On 17 July 2016, Company A asked Aberdeen City Council (the Council) for information about its Pension Fund, including whether the Council had ever sold any interests in the private equity secondaries market and, if so, at what discount to NAV (Net Asset Value).
2. The Council responded on 16 August 2016. It confirmed it had sold some interests in the private equity secondaries market in the past, but told Company A it was unable to disclose at what discount to NAV, as this was confidential and exempt from disclosure under section 36(2) of FOISA.
3. On 16 August 2016, Company A asked the Council to review its decision. It argued that the public interest in disclosure outweighed any confidentiality that may exist.
4. The Council notified Company A of the outcome of its review on 21 September 2016. The Council upheld its original decision.
5. On 24 September 2016, Company A applied to the Commissioner for a decision in terms of section 47(1) of FOISA.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Company A made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 3 October 2016, the Council was notified in writing that Company A had made a valid application. The Council was asked to send the Commissioner the information withheld from Company A. 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.
9. The Council was also reminded that the exemption in section 36(2) of FOISA only applies if:
  - (i) the information was obtained from another person and
  - (ii) disclosure would constitute a breach of confidence actionable by that person or any other person.
10. The Council responded on 2 November 2016. It advised the Commissioner that, having reconsidered its position, it no longer wished to rely on section 36(2) of FOISA and had disclosed the information on discount to NAV to Company A.
11. Company A acknowledged receipt of the information, but said it wanted the Commissioner to issue a decision on the matter.

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

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12. In coming to a decision on this matter, the Commissioner considered the withheld information and the relevant submissions, or parts of submissions, made to her by both Company A and the Council. She is satisfied that no matter of relevance has been overlooked.

### **Section 36(2) - Confidentiality**

13. Section 36(2) of FOISA is set out in full in Appendix 1. The tests are also summarised in paragraph 9.
14. In the absence of submissions from the Council as to why the exemption applied, and given that the Council has disclosed the information to Company A, the Commissioner must conclude that the information in question was not exempt from disclosure under section 36(2) of FOISA.

## **Decision**

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The Commissioner finds that Aberdeen City Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Company A. The information in question was not exempt from disclosure under section 36(2) of FOISA. In refusing to disclose it, the Council breached section 1(1) of FOISA.

The Council has disclosed the information to Company A, so the Commissioner does not require the Council to take any action in response to this breach.

## **Appeal**

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Should either Company A or the 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**10 November 2016**

### 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

(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

(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.

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