



# Decision Notice 070/2023

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## Amendment to a loan

**Authority: Highlands and Islands Enterprise**  
**Case Ref: 202201442**

### Summary

The Applicant asked the Authority for confirmation that a loan provided to Company A was amended during a specific timescale. The Authority notified the Applicant that some of the information was not held, and other information was being withheld as its disclosure would prejudice substantially the effective conduct of public affairs and harm the commercial interests of Company A.

As part of his investigation, the Commissioner considered what information the Authority actually held. He concluded it did not hold any of the information requested by the Applicant.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 17(1) (Notice that information is not held); 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 18 October 2022, the Applicant made a request for information to the Authority. It referred to an email the Authority had sent it on 24 December 2021, which had stated that no amendment had been approved in respect of its 3-year, £175,000 state aid loan to Company A. The Applicant asked the Authority to confirm:

- (i) that the 24 December 2021 statement was correct (i.e. no amendment had been approved); and
  - (ii) whether any amendment was approved 24-31 December 2021 inclusive?
2. The Authority responded on 27 October 2022. It notified the Applicant that it was withholding the information under section 33(1)(b) of FOISA, as disclosure would substantially prejudice the commercial interests of Company A.
3. On 28 October 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant did not agree that the exemption applied and it argued that this recent response contradicted the information contained in the Authority's email of 24 December 2021.
4. The Authority notified the Applicant of the outcome of its review on 24 November 2022. It explained that it did not hold information falling within the scope of part (i) of its information request. The Authority maintained that the information it held, and that fell within the scope of part (ii) of the information request, was exempt from disclosure under section 33(1)(b) of FOISA, and that it was also applying the exemption contained in section 30(c) of FOISA to this information.
5. On 14 December 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated it was dissatisfied with the outcome of the Authority's review because the exemptions did not apply to the information and the Authority had not properly considered the public interest test.

## **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 22 December 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The Authority was also asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information
9. The case was subsequently allocated to an investigating officer.

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

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

### ***Information held by the Authority***

11. 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 qualifications which are not applicable in this case.
12. 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 the information an applicant believes an authority should hold. If no relevant information is held by the

authority, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.

13. 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 lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
14. In its submissions, the Authority reiterated that it did not hold any information falling within the scope of part (i) of the request, and it maintained that it was withholding information that fell under the scope of part (ii) of the request under section 30(c) and 33(1)(b) of FOISA. The Applicant challenged this, arguing that the exemptions did not apply.

#### *Commissioner's conclusions*

15. As noted above, the Commissioner's role is to determine whether or not information is held, and if it is held, whether any exemption relied on by an Authority has been correctly applied.

#### Request (i)

16. In this case, in its review outcome, the Authority notified the Applicant, under section 17(1) of FOISA, that it did not hold recorded information that fulfilled part (i) of its request. In submissions to the Commissioner, the Authority maintained that compliance with request (i) would require it to create new information, and that the information requested by the Applicant in request (i) was not held.
17. The Commissioner has carefully considered the specific terms of the request, and the submissions provided by the Authority and the Applicant, and he is satisfied that the Authority was correct to give the Applicant notice, under section 17(1) of FOISA, that it did not hold any information falling within the scope of request (i).

#### Request (ii)

18. The Authority submitted that it did hold information falling under the scope of part (ii) of the request, and it considered this to be exempt under section 30(c) and 33(1)(b) of FOISA. The Authority also provided the Commissioner with a copy of this information.
19. The Commissioner has reviewed the information that was provided to his office, and which the Authority claimed to fall within the scope of part (ii) of the Applicant's information request. The Commissioner is not satisfied that the information is relevant or that it meets the terms of the Applicant's request.
20. The Commissioner notes that in part (ii) of its request, the Applicant asked the Authority to confirm that no amendment "...was approved 24-31 December 2021 inclusive". While acknowledging that there might be some ambiguity around the wording of this request, the Commissioner considers that a plain English reading of the request suggests that the Applicant is asking whether the Authority holds any information that confirms that an amendment of the loan was approved between the dates 24 to 31 December 2021 (both dates inclusive).

21. The Commissioner considers part (ii) of the request to be very particular and limited in scope, as it is only asking if the loan was amended during a short timeframe in December 2021. Having considered the information provided to this office, the Commissioner is not satisfied that the information fulfils the terms of this request, and he finds that the Authority failed to notify the Applicant, under section 17(1) of FOISA, that it does not (and did not, on receipt of the request) hold any information falling within the scope of part (ii) of the request.
22. Because the Commissioner has concluded that no relevant, recorded information was held by the Authority, he is not required to go on to consider whether the Authority was entitled to rely on the exemptions in section 30(c) or 33(1)(b) of FOISA.

## **Decision**

The Commissioner finds that the Authority 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 by giving the Applicant notice, under section 17(1) of FOISA, that it did not hold any information falling with the scope of part (i) of its request, the Authority complied with Part 1.

However, by failing to give the Applicant notice, under section 17(1) of FOISA, that it did not hold any information that fell within the scope of part (ii) of its information request, the Authority failed to comply with Part 1 (and specifically section 1(1)).

Given that the Commissioner has found that the Authority did not hold any recorded information which would fulfil the Applicant's request, he does not require the Authority to take any action in relation to these failures, in response to the Applicant's application.

## **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**  
**Head of Enforcement**

**13 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.

#### **17 Notice that information is not held**

- (1) Where-
  - (a) a Scottish public authority receives a request which would require it either-
    - (i) to comply with section 1(1); or
    - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),if it held the information to which the request relates; but
  - (b) the authority does not hold that information,it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.
- ...

#### **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).

...