

# Decision Notice

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## Decision 170/2014 Mr Harry Corton and City of Edinburgh Council

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### **Pension fund investments**

Reference No: 201401025

Decision Date: 1 August 2014



Scottish Information  
Commissioner

## Summary

On 7 March 2014, Mr Corton asked City of Edinburgh Council (the Council) for details of specified investments in the Lothian Pension Fund (the LPF). The Council provided some information, explaining that it was withholding the remainder as disclosure would substantially prejudice the commercial interests of the LPF. The Commissioner accepted this argument from the Council.

## 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 the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. In December 2013, Mr Corton wrote to the Council requesting full details of the investments in the LPF (which is administered by the Council). Following further correspondence, on 28 February 2014, the Council provided Mr Corton with a spreadsheet containing information on the investments.
2. On 7 March 2014, Mr Corton wrote to the Council and requested full details of specified categories of investments from the spreadsheet. He also sought confirmation that, with the exception of these investments identified only by category, the spreadsheet contained full details of the LPF's investments.
3. The Council responded on 3 April 2014, providing Mr Corton with information on the investments referred to in his request. It stated that it was withholding the valuations of a limited number of Private Equity Partnerships, as the LPF had confirmed that disclosing these values would be prejudicial to its commercial interests. It informed him the information was being withheld in terms of sections 30(c) and 33(1)(b) of FOISA.
4. On 4 April 2014, Mr Corton wrote to the Council and requested a review of its decision. He did not agree that disclosure would cause substantial prejudice as claimed. He referred to other pension funds providing full disclosure.
5. The Council notified Mr Corton of the outcome of its review on 7 May 2014. It upheld the original decision without modification.
6. On 15 May 2014, Mr Corton wrote to the Commissioner, stating that he was dissatisfied with the outcome of The Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Corton made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## **Investigation**

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8. On 19 June 2014, the Council was notified in writing that an application had been received from Mr Corton and was asked to provide the Commissioner with the information withheld from him. The Council provided the information and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, in particular its reliance upon sections 30(c) and 33(1)(b) of FOISA.
10. The Council responded with submissions in support of its position that the information was properly withheld from Mr Corton under sections 30(c) and 33(1)(b) of FOISA.

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

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11. 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 her by both Mr Corton and the Council. She is satisfied that no matter of relevance has been overlooked.
12. The Commissioner will first of all consider the application of section 33(1)(b) of FOISA.

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

13. The Council submitted that it was withholding information under section 33(1)(b) of FOISA. This 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). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
14. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
  - a) whose commercial interests would (or would be likely to) be harmed by disclosure,
  - b) the nature of those commercial interests and
  - c) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
15. 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.
16. The Council provided a background to its administration of the LPF and the investment strategy required for the LPF's success. It also provided submissions more specific to the information it was withholding.
17. In the circumstances, the Commissioner accepts that the LPF and the Private Equity Partnerships had relevant commercial interests in the investment information withheld by the Council.

18. Having reached this conclusion, the Commissioner must go on to consider whether the Council was correct to conclude that these commercial interests would, or would be likely to, be prejudiced substantially by the disclosure of the information. Substantial prejudice is described in paragraph 15 above: such prejudice must be at least likely before the exemption can apply.
19. The Council described why the information was considered commercially sensitive, and the associated risks should it be disclosed, at the time it dealt with Mr Corton's information request and requirement for review. These submissions focused on the actual content of, and circumstances specific to, the withheld information and the Commissioner cannot describe them in detail without disclosing commercially sensitive information.
20. The Commissioner has considered the information withheld under this exemption, along with the submissions received. Based on the submissions made by the Council, it is evident that disclosure of the information withheld would have had, or would have been likely to have, a substantially prejudicial effect on the commercial interests of the LPF and the Private Equity Partnerships as argued by the Council. She is therefore satisfied that the information withheld is exempt under section 33(1)(b): its disclosure would, or would be likely to, prejudice substantially the commercial interests of the Lothian Pension Fund.

*Public interest test - section 33(1)(b)*

21. As mentioned above, the exemption in section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

*Submissions by the Council*

22. The Council accepted that there was a clear public interest in the investments made by the LPF. This related to accountability and transparency as to the nature and extent of the LPF's investments. There was a particular concern in the event of failure to meet the required investment return, as shortfalls might require to be met from public funds.
23. The Council also acknowledged that there was a public interest in the LPS's investment strategies being in the public domain, to allow other organisations to replicate them where they were successful and to facilitate the management of investment risk where they were not.
24. While acknowledging these public interest considerations, the Council highlighted the extent to which it published information on the LPF's investments (although not their current value) on its website.
25. The Council went on to highlight its obligations in relation to invested funds, with specific reference to the withheld information and the perceived detrimental consequences of disclosure. Given the extent to which these submissions focused on the actual content of, and circumstances specific to, the withheld information, the Commissioner cannot describe them in detail here without disclosing commercially sensitive information.
26. The Council concluded that, at the point at which it dealt with the applicant's request and requirement for review, the public interest arguments in favour of disclosure were outweighed by those for maintaining the exemption.

### *Submissions by Mr Corton*

27. Mr Corton noted the strong public interest in showing how public money was being spent and invested. He therefore believed that information which helped the public evaluate and scrutinise government procurement decisions – such as full investment information on the LPF – should generally be disclosed. Referring to the (United Kingdom) Information Commissioner’s Awareness Guidance on commercial interests, he highlighted the importance of such transparency to public confidence in the integrity of the relevant procedures.
28. Mr Corton also referred to the importance attached by the above guidance to the public interest in securing value for money when purchasing goods and services. The guidance considered this particularly relevant in the light of the ongoing public debate around the increasing role of private companies in delivering public services. He also identified a potential public interest in allowing access to information which would help protect the public from unsafe products or dubious practices, even where this might involve revealing information that was likely to harm the commercial interests of a company.

### *Commissioner’s conclusion*

29. The Commissioner acknowledges the general public interest in transparency and accountability, as noted by both parties, particularly where this involves actual and potential spending from the public purse. This is a significant area of expenditure and there will be circumstances in which information on public pension fund investments should be disclosed in the public interest. However, the Commissioner must consider the particular circumstances of each case when considering an application for a decision.
30. The Commissioner has also taken full account of the submissions made by the Council in support of maintaining the exemption. She has already acknowledged the risk of substantial commercial prejudice in this case. She accepts that this would not be in the public interest. 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.
31. In all the circumstances of this case, the Commissioner finds there to be a strong public interest in maintaining the exemption in section 33(1)(b), in order to maintain the effectiveness of the Council’s administration of the LPF. To counteract this, there would need to be a compelling specific public interest in disclosure. While acknowledging the validity of Mr Corton’s arguments, the Commissioner does not consider such a compelling specific case to have been made here.
32. Taking account of all the circumstances, the Commissioner is satisfied that the public interest in the exemption being maintained outweighs that in disclosure. Consequently, she finds that the Council was entitled to withhold the information under section 33(1)(b) of FOISA. As a result, she is not required to (and will not) go on to consider whether the exemption in section 30(c) also applied to the information.

## **Decision**

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

## **Appeal**

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Should either Mr Corton or City of Edinburgh 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**  
**1 August 2014**

## Appendix

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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.

...

- (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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