

# Decision Notice

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**Decision 117/2018: Mr Michael Russell and Highland Council**

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**Licence agreement – storage of wind turbine blades**

Reference No: 201800270

Decision Date: 26 July 2018



Scottish Information  
Commissioner

## Summary

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The Council was asked for a copy of an agreement between it and Scottish and Southern Energy (SSE) relating to the storage of wind turbine blades.

The Council responded by providing a copy of the agreement, but with payment figures withheld on the basis that disclosure would prejudice SSE's commercial interests.

The Commissioner agreed the payment figures were exempt from disclosure and properly withheld.

## 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 Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 18 September 2017, Mr Russell made a request for information to Highland Council (the Council). Mr Russell requested:  
*"... a copy of the contract/agreement between Highland Council and Scottish Southern Energy regarding the storage of wind turbine blades at Ashaig aerodrome, on the Isle of Skye"*
2. The Council responded on 12 October 2017, providing a copy of the licence agreement between it and Scottish and Southern Energy (SSE), subject to the redaction of payment figures. The Council considered the exemption at section 33(1)(b) of FOISA applied, stating that disclosure would prejudice the commercial interests of SSE.
3. On 2 November 2017, Mr Russell wrote to the Council, requesting a review of its decision. Mr Russell argued that as a public agency the Council should not withhold details of payments made for the use of public assets. He argued that the revitalisation of Ashaig aerodrome, and the restoration of scheduled flights, is of great local interest.
4. The Council notified Mr Russell of the outcome of its review on 30 November 2017. The Council upheld its original decision that section 33(1)(b) of FOISA applied to the payment figures redacted from the licence agreement. It confirmed that the public interest favoured withholding the information.
5. On 8 February 2018, Mr Russell wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Russell stated he was dissatisfied with the outcome of the Council's review because he did not accept that the Council was entitled to withhold the payment figures.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Russell 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 7 March 2018, the Council was notified in writing that Mr Russell had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Russell. 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 Council's application of section 33(1)(b) of FOISA.

## Commissioner's analysis and findings

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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 Russell and the Council. He is satisfied that no matter of relevance has been overlooked.

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

10. The exemption in section 33(1)(b) of FOISA applies to information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person. "Person" must be interpreted widely, to include a legal person (such as a company) as well as an individual: specifically, in this context, it includes a Scottish public authority. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b).
11. There are certain elements which an authority must demonstrate are present when relying on this exemption. In particular, it must indicate 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. The prejudice must be substantial: in other words, of real and demonstrable significance.
12. The information withheld under this exemption comprises the payment figures contained within the licence agreement.
13. In his application, Mr Russell explained that he asked how much in total SSE paid the Council to store wind turbine components on the Ashaig Airstrip and, as a public agency, he did not accept that the Council should be withholding the level of payments for the use of public assets from council tax payers.
14. The Council explained that it had consulted with SSE regarding Mr Russell's request and the disclosure of these payment figures. In response, SSE explained to the Council that it regularly negotiates agreements with landowners in order that it can undertake projects such as this, line upgrades and other types of activity around the country. Although SSE owns infrastructure, the Council went on to explain, it will not always own sufficient land near a project to enable it to store its equipment and therefore may have to come to individual agreements with landowners, depending on the type of land and equipment.

15. SSE had expressed concern that disclosure of the fees agreed in one case could adversely affect the negotiation of future agreements. If other landlords discovered that the Council was being paid a higher rate (for example), it was likely that they would attempt to increase the rates that they received. This would be likely to cost SSE more, prolong negotiations and have an impact on their timescales and planning. The Council stated that it was satisfied it was being paid a reasonable amount for the use of the airstrip, but it did not know whether this was more or less than another landowner would receive.
16. The Council therefore accepted SSE's position that disclosure of the payment figures would prejudice substantially SSE's commercial interests, or would be likely to have that effect.
17. When questioned how long the commercial sensitivities surrounding this information would last, the Council stated that the agreement in question runs until 1 November 2018 but includes clauses allowing for a possible extension and associated fees. The Council believed that its arguments would still apply even after the expiry of the licence agreement, but was unable to determine how long it would be before the sensitivity of the information would reduce.

#### *The Commissioner's conclusions*

18. Having considered the Council's submissions, the Commissioner is satisfied the interests of SSE identified by the Council are commercial interests for the purposes of this exemption. The information comprises payment figures contained within a current licence agreement, which relates to a commercial activity carried on by SSE.
19. Having accepted that these commercial interests are engaged, the Commissioner must now consider whether they would, or would be likely to, be prejudiced substantially by disclosure of the withheld information. As indicated above, such prejudice must be at least likely before the exemption can apply.
20. The Commissioner has considered the Council's submissions carefully. As in any case, he must consider the position as it stood when the Council notified Mr Russell of the outcome of his review, on 30 November 2017.
21. The Commissioner notes that the licence agreement in question commenced on 1 September 2017 and Mr Russell's request was made on 18 September 2017, when it remained in force. It is clear that the payment information Mr Russell sought would still be current when Mr Russell sought it and when he asked for a review. It is apparent from the Council's submissions that such agreements are negotiated individually and the Commissioner accepts that it is likely that these figures would have been relevant (and advantageous) to other landowners engaged in such negotiations at the time of the request or the requirement for review.
22. Taking into account the Council's submissions, the Commissioner accepts that disclosing the payment information, would have caused, or would have been likely to cause, substantial prejudice to SSE's commercial interests at the time of the request and requirement for review. The harm would be to SSE's negotiating position and ability to secure advantageous rates in the circumstances, with the possibility of prolonging the negotiating process to the detriment of the projects in question.
23. Accordingly, the Commissioner is satisfied that the exemption in section 33(1)(b) of FOISA is engaged in relation to this information.

### *The public interest*

24. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied to the information under consideration, he has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).
25. Mr Russell explained that the revitalisation of Ashaig aerodrome, and the restoration of scheduled flights, is of great local interest and will require substantial investment, indicating that there is a public interest in knowing how much the Council has ringfenced for this purpose (money received from SSE).
26. Furthermore, Mr Russell submitted that the movement of these components to various SSE windfarms causes considerable road traffic issues for local drivers, stating that the inconvenience and damage to drivers and roads is being borne primarily by residents of Skye and Lochalsh and, for this reason, local tax payers should be told how much their own Council is being given by SSE.
27. The Council accepted that there is a public interest in knowing how much money the Council will receive in this case and what the money will be used for. The Council explained to Mr Russell (in its review outcome) that the income would be used to enhance the airfield, in line with the aim for scheduled air services between Skye and Glasgow.
28. For this reason, the Council stated that the income from SSE was very welcome and, with this in mind, it was likely to be open to further agreements of this nature. Consequently, the Council not only took account of the public interest in protecting SSE's commercial interests but also identified a public interest in securing its relationship with SSE and not providing SSE with a reason to avoid entering such agreements with the Council in future.
29. The Council concluded that the public interest in disclosure of the figures was outweighed by the substantial prejudice to SSE's commercial interests and the public interest in ensuring the potential for further future income to the Council, which it could invest locally.
30. The Commissioner has considered all of the arguments and facts in this case. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to scrutiny of public finances.
31. The Commissioner recognises that the provision of the terms of the licence agreement, subject to redaction of the payment figures, goes some way in satisfying this public interest – although not, obviously, in relation to any income received from the agreement. In this case, there is clearly a public interest in knowing what funds this arrangement is generating for the revitalisation of the airfield.
32. Nevertheless, the public interest in disclosure needs to be balanced against the public interest in ensuring there is reasonable protection of SSE's commercial interests and that SSE is not treated unfairly simply as a result of having entered a contractual arrangement with a public body, with a consequential adverse impact on its ability to negotiate fairly with other landowners.
33. 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) outweighs that in disclosure of the information. There are

clearly arguments of substance on both sides, but the Commissioner is satisfied in the circumstances that those in favour of maintaining the exemption are stronger.

34. The Commissioner therefore finds that the Council was entitled to withhold the information under section 331(1)(b) of FOISA.

## **Decision**

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

## **Appeal**

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Should either Mr Russell or Highland 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**

**26 July 2018**

### 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).

...

**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)**