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Commissioner  
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# Decision Notice 039/2023

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## Ernst & Young Project Golf report

**Applicant:**

**Authority: Scottish Ministers**

**Case Ref: 202100803**

### Summary

The Applicant asked the Authority for full disclosure of information that had been published in redacted form. The Authority stated that the report was due to be published and was therefore exempt from disclosure. The Commissioner investigated and found that the Authority did not have a settled intention to publish the report in full, and so the exemption did not apply. The Commissioner requires the Authority to respond anew to the Applicant's requirement for review.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 27(1) (Information intended for future publication); 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 25 April 2021, the Applicant made a request for information to the Authority. Referring to what they considered to be a fundamental change in circumstances since the response was made, the Applicant asked for full disclosure of the information contained within the response: [Ernst & Young LLP reports and guidance to Scottish Government: FOI release - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/foi-19-01414/)<sup>1</sup>.

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<sup>1</sup> <https://www.gov.scot/publications/foi-19-01414/>

2. The Authority responded on 24 May 2021. It disclosed redacted versions of the documents, withholding the remainder as it was intending to publish an updated release of the report, and therefore considered the information to be exempt under section 27(1) of FOISA. It assured the Applicant that, although an exact date of publication had yet to be set, the withheld information would be published on its website within the period of 12 weeks specified for the purposes of section 27(1).
3. Later the same day, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant referred to their reasons as set out in their original request and stated that they were seeking full disclosure and not a promised partial disclosure sometime in the future. The Applicant noted that there was considerable public interest in disclosure of the withheld information.
4. The Authority notified the Applicant of the outcome of its review on 22 June 2021. It upheld its response, and commented further that it intended to publish the original Ernst & Young report, edited to be FOI compliant, within 12 weeks of the date of the Applicant's initial request; it was considered reasonable to withhold the information until then. It had weighed up the public interest test, concluding that there is a greater public interest in taking the time necessary to ensure the information had been properly considered and checked before it is published as planned.
5. On 2 July 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated they were dissatisfied with the outcome of the Authority's review because they considered there should have been full disclosure of the information requested.

## **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 16 July 2021, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority 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 Authority was invited to comment on this application and to answer specific questions. These related to the Authority's reasoning for relying upon the future publication exemption, and its consideration of the public interest in this context. The Authority provided its response.
9. The Applicant was asked, and provided their comments on, why they did not consider the exemption applied and the public interest in disclosure of the withheld information.

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

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

### ***Section 27(1) – Information intended for future publication***

11. Section 27(1) of FOISA provides that information is exempt from disclosure where the following tests are met:
  - the information is held with a view to its being published, by a Scottish public authority or any other person, at a date not later than twelve weeks after that on which the request for the information is made;
  - when the request is made, the information is already being held with that view; and
  - it is reasonable, in all the circumstances, that the information be withheld from disclosure until the intended publication date.
12. Section 27(1) recognises that, where it is intended to make information available, public authorities should, within reason, have space to be able to determine their own publication timetables and deal with the necessary preparation, administration and context of publication. The exemption is subject to the public interest test laid down by section 2(1)(b) of FOISA.
13. Under this exemption, information intended for publication within twelve weeks is exempt from disclosure where it is “reasonable in all the circumstances” to withhold the information until the planned publication date. The authority should be able to demonstrate that a publication timetable has already been decided and that it is not simply delaying the release of information for twelve weeks.
14. It should be noted that there is no requirement within section 27(1) that publication must actually take place as planned, but the information must already be held with a view to publication at the time the request is received.
15. In order for section 27(1) to be upheld, the Commissioner must consider whether all of the tests required by this exemption can be met in the circumstances of a particular case.

#### *The Authority's submissions about the exemption*

16. The Authority stated that the request was received on 25 April 2021 and it published a redacted version of the report on 7 July 2021<sup>2</sup>, within 12 weeks of the request.
17. The Authority submitted that it did not hold any written evidence that the report would be published prior to receipt of the request, but it confirmed that discussions on the proactive publication of this information started around the time of increased press enquiries and information requests following the collapse of Greensill Capital in March 2021.
18. The Authority noted that key documents, including that on the due diligence, were routinely asked about around March 2021, and so the proactive publication was intended to provide what information could be released for the purposes of openness and transparency with the public. The report in question was part of the scheduled release material, and therefore this would cover the Applicant's request for this material.
19. At the time the request was received, whilst there was a planned publication of some information within the report, consideration of what information could be pro-actively published from the report was still ongoing.

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<sup>2</sup> [Gupta Family Group: documentation 2016 to 2020 - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/gupta-family-group-documentation-2016-to-2020/)  
(<https://www.gov.scot/publications/gupta-family-group-documentation-2016-to-2020/>)

20. The Authority acknowledged that the publication would not cover all of the information within the report, as advised to the Applicant in the initial and review responses. An exemption under section 27(1) would only apply to some of the information requested, before going on to set out the other exemptions applied to this report in response to the request. Information withheld other than under section 27(1) was, the Authority stated, identified during the course of preparing a response to this request.

#### *The Applicant's submissions about the exemption*

21. The Applicant argued that the Authority should have responded to their request by providing the report at response or review stages.
22. The Applicant stated that they did not consider the report entered the public domain or was publicly accessible on 7 July 2021, as claimed by the Authority. They suggested that this might be because the document was not engaged with the search engine on the Authority's webpage. The Applicant requested that evidence be provided to the Commissioner that it was publicly accessible when claimed. The Applicant suggested that the document entered the public domain at least three months after the date claimed, possibly by engagement of the Scottish Government's webpage search engine with the document.
23. The Applicant noted that the version of the report published online was heavily redacted, and the Authority had not indicated what exemption applied to what information.
24. The Applicant advised that, when they did find out that the report had been published in redacted form, they submitted a new request to the Authority, which was also refused (but in this new response the Authority had relied upon a number of exemptions to withhold information within the report).

#### *The Commissioner's view about the exemption*

##### Terms of the request

25. As stated above, the Authority submitted that publication would not cover all of the information within the report, and section 27(1) of FOISA would only apply to some of the information within the report, with other exemptions applying to other information within the report.
26. The Commissioner has considered the terms of the Applicant's request fully, and concludes that the Applicant was seeking a copy of the report in its entirety. The Applicant has maintained this quite clearly throughout.
27. The Authority may consider that it made it clear in its responses to the Applicant that future publication would only apply to some of the report, not the report in its entirety.
28. The Commissioner acknowledges that an authority can publish non-exempt information at some point in the near future, and would not have to be specific as to when the information would be published. However, a request under FOISA must be considered in its entirety and an ordinary reading of the request under consideration must crystallise that intention and set a (statutory) timescale for applying any relevant exemptions and disclosing the rest. The provisions for giving notice in section 16 of FOISA (Refusal of request) certainly expect that degree of certainty.
29. Although the Authority considers it was reasonable for it to state that it only had a settled intention to publish some of the information within the report, the request must be considered

in its entirety and a response (and the exemption, in this case section 27(1) of FOISA) must apply to the entirety of the publication.

30. The Commissioner's briefing on section 27 of FOISA<sup>3</sup>, in particular paragraph 7, states that the exemption applies to document, minutes etc. There is no reference in this briefing to partial disclosure of a document. To accept such an interpretation would be absurd, in any situation where (as here) section 27(1) was intended as the sole response to the request.
31. In the review outcome, the Authority did not inform the Applicant which other exemptions applied to the information that was not going to be published and only referred to section 27(1) of FOISA. This upheld its position in responding to the request, where no mention of other exemptions was made either. In all the circumstances of this case, it is reasonable for the Commissioner to reach a finding on whether the exemption applied to the entirety of the request for the full report – and, if the Authority intended to publish something less, how could that be said to meet the request the Applicant had actually made?

#### Settled intention to publish

32. The next and main question for the Commissioner is whether the Authority had a settled intention to publish the report.
33. The Authority submitted, and the Commissioner accepts, that it had engaged in discussions around the proactive disclosure of information before the request in this case was received, but there was no specific date identified for disclosure and nor does there appear to have been a settled view reached at that time over what particular information could or should be published.
34. From the submissions received, it appears to the Commissioner that the Authority's sole purpose in delaying publication was to allow it to identify what information was (or was not) suitable for publication.
35. If the Commissioner were to allow section 27(1) to apply in such circumstances, that would enable authorities to rely on this exemption as a broad instrument to extend the timescales for responding to requests. That does not appear to sit happily with the considerations of public policy envisaged in the Commissioner's briefing as making a delay in publication reasonable in all the circumstances (indeed, a discretionary measure allowing the extension of statutory timescales would appear to run counter to any legitimate considerations of public policy in the context of the statutory scheme established under FOISA).
36. Having considered all of the facts and submissions in relation to the exemption, the Commissioner concludes that the exemption in section 27(1) of FOISA did not apply to the Applicant's request for the Ernst & Young report. There was no clear, settled intention to publish the report at the time the request was received – and there does not appear to have been an intention of any kind, at any time, to publish what the Applicant actually asked for (i.e. the full, unredacted report). That being the case, the exemption could not apply.
37. The Commissioner requires the Authority to issue the Applicant with a revised review outcome, otherwise than in terms of section 27(1) of FOISA.

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<sup>3</sup> [FOISA exemptions | Scottish Information Commissioner \(itspublicknowledge.info\) - https://www.itspublicknowledge.info/foisa-exemptions](https://www.itspublicknowledge.info/foisa-exemptions)

## **Decision**

The Commissioner finds that the Authority failed to comply with Part 1 (and, in particular, section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant. Specifically, he finds that the Authority was not entitled to withhold the requested report under the exemption in section 27(1) of FOISA.

The Commissioner therefore requires the Authority to issue a revised review response in terms other than section 27(1) of FOISA, by **Monday, 19 June 2023**.

## **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.

## **Enforcement**

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

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

...

#### **27 Information intended for future publication**

- (1) Information is exempt information if-
  - (a) it is held with a view to its being published by-
    - (i) a Scottish public authority; or
    - (ii) any other person,at a date not later than twelve weeks after that on which the request for the information is made;
  - (b) when that request is made the information is already being held with that view; and
  - (c) it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).

...

#### **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).

...