

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 27 July 2018

**Public Authority:** Invest Northern Ireland  
**Address:** carol.keery@investni.com

#### **Decision (including any steps ordered)**

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1. The complainant has requested information in relation to a start-up grant given by Invest NI. Invest NI disclosed some information to the complainant, however it refused to disclose the remaining information ("the withheld information"), citing sections 40(2), 41, 43(1) and 43(2) as a basis for non-disclosure.
2. The Commissioner's decision is that Invest NI has correctly applied the section 40(2) and 43(2) exemptions which cover the entirety of the withheld information.
3. Therefore the Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 17 February 2017, the complainant wrote to Invest NI and requested information in the following terms:

"I would like to make a freedom of information request in accordance with the Freedom of Information of Act 2000

- A list of all successful and unsuccessful applicants for Techstart NI Concept grant (up to 10K)

- All online applications received for Techstart NI Concept grant (up to 10k) over the past 24 months

- Scoring methodology for the TechStart NI Concept grant (up to 10k)
- Judging panel names and their individual and / or collective scoring for all applications over past 24 months
- All and any miscellaneous notes taken by these people in relation to the scoring of applications in the 24 month period
- The judging panel disclose any relationship they hold with successful applicants during the 24 month period

The proof of concept grant is funded by the European Regional Development Fund.”

5. Invest NI responded on 16 March 2017. It provided the complainant with some information in relation to his request, however it stated that the remaining information was exempt from disclosure under sections 40(2) and 43(2) of the FOIA.
6. Following an internal review Invest NI wrote to the complainant on 14 April 2017. The reviewer disclosed some further information in response to the complainant’s request, however it refused to disclose the remainder, citing sections 21, 40(2) and 43(2) of the FOIA as a basis for non-disclosure. In relation to the names of the organisations who successfully applied for the grant, Invest NI disclosed all of these other than one who was a sole trader and whose name was withheld under section 40(2) of the FOIA. It later disclosed this as it realised that it was actually a limited company and not the name of the individual. It still continued to withhold details of unsuccessful applicants who were sole traders/partnerships.

## **Scope of the case**

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7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner wrote to Invest NI seeking its further submissions on 4 September 2017. Invest NI responded to the Commissioner on 2 October 2017, stating that it was no longer applying section 21 to specific withheld information, namely some general information contained in application forms. Instead, it now considered that such information would be exempt from disclosure under sections 41 and 43(2) of the FOIA and, in the case of sole traders and partnerships, under section 40(2) of the FOIA.

9. The Commissioner has considered whether Invest NI has correctly applied the exemptions as set out in sections 40(2), 41 and 43(2) of the FOIA as a basis for non-disclosure.

## Reasons for decision

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### Section 43 – commercial interests

10. Invest NI has applied both section 43(1) and 43(2) of FOIA to the withheld information.
11. The Commissioner will first consider whether this exemption is engaged for each element of the withheld information.

### Section 43(1)

12. Section 43(1) of FOIA provides that information is exempt information if it constitutes a trade secret. There is no statutory definition of a “trade secret” but the Commissioner will follow the Information Tribunal’s preferred view of the meaning of trade secret as outlined in the case of *Department of Health v Information Commissioner* at paragraph 50. The Tribunal referred to the *Lansing Linde V Kerr [1991] WLR 251, Staughton LJ* Court of Appeal case.
13. The Commissioner’s guidance on section 43 also refers to the above case and states that it is generally accepted that, for information to constitute a trade secret it must fulfil the following criteria:-
  - it must be information used in a trade or business
  - it must be information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret
  - the owner must limit the dissemination of the information, or at least, not encourage or permit widespread publication
14. Invest NI stated that the withheld information is exempt from disclosure and constitutes a trade secret for the reasons that the detail of the project for which the grant is awarded is information which a rival could not easily recreate or discover themselves. In this context, disclosure of the information would be liable to cause real and significant harm to the owner and be advantageous to any competitors.

15. It is the Commissioner's view that a trade secret implies that the information is more restricted than information which is commercially sensitive. It involves something technical, unique and achieved with a great deal of difficulty and investment. Although the Commissioner notes Invest NI's arguments, having reviewed a sample of the withheld information, she is not convinced that the withheld information has the highest level of secrecy which the term 'trade secret' would appear to merit. Therefore she is not satisfied that section 43(1) of FOIA would apply to the withheld information.

### **Section 43(2)**

16. Invest NI has also applied section 43(2) of FOIA to the withheld information, therefore the Commissioner has considered the application of that section.
17. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
18. Broadly speaking, section 43(2) protects the ability of a party to participate competitively in a commercial activity, for example the purchase and sale of goods or services. The successful application of section 43(2) is dependent on a public authority being able to demonstrate that the following conditions are satisfied –
  - Disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it).
  - In all the circumstances, the weight of the public interest in maintaining the exemption outweighs the public interest in disclosure.
19. In order for a prejudice based exemption such as section 43(2) to be engaged the Commissioner considers that three criteria must be met:
  - Firstly, the actual harm which the public authority alleges would – or would be likely – to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;

- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
20. Invest NI considers that disclosure of the withheld information in this case would be likely to prejudice the commercial interests of the applicants for the grant.
  21. Invest NI considers that the application forms and scoring sheets fall within the scope of the exemption, as they specifically contain business proprietary information (applications) and judgement comments on these (scoring sheets).
  22. Invest NI has explained to the Commissioner that the very nature of the Proof of Concept grant is to support the exploration of the viability and commercial potential of innovative ideas that are of commercial value to the applicants. As such the applications contain details of the applicants' future plans in conducting their commercial activities. Disclosure of this information would give an unprecedented insight into their business to their competitors and potential investors and would be likely to prejudice their ability to participate in commercial activities (such as the purchase and sale of goods and services). It is Invest NI's view that disclosure would likely provide an unfair advantage to the companies' competitors operating within the same competitive environments and as such could result in financial loss to those companies.
  23. The Commissioner's guidance states that a public authority can withhold information that has been provided to it by a third party on the basis of prejudice to the commercial interests of that party. However, to do so it must follow the same steps and arguments that it would for its own information.

24. When a public authority wants to withhold information on the basis that to disclose the information would or would be likely to prejudice the commercial interests of a third party or parties, it must have evidence that this does in fact represent the concerns of that third party. It is not sufficient for the public authority to speculate on the prejudice which may be caused to the third party by the disclosure.
25. Invest NI has explained to the Commissioner that there were 284 applicants for the grant, and it has not consulted each applicant directly due to the operational practicalities of such a mass consultation, especially given the time constraints. In making the judgement that disclosure of the withheld information would be likely to prejudice the commercial interests of those applicants, Invest NI has relied upon its own professional judgement, based on its vast experience and prior knowledge of private sector companies with whom it regularly engages. It has also consulted with the professional organisation that it procured to manage this programme on its behalf. That organisation has confirmed that it agrees with Invest NI's assessment and is of the view that disclosure of such information would be likely to prejudice the commercial interests of the applicants to the scheme as it would reveal proprietary commercial information which could be used by competitors to give them an advantage.
26. Invest NI is of the view that there are various ways in which disclosure could assist the applicants' competitors. It could be used to undermine applicants in their efforts to compete for business by giving competitors access to an unparalleled amount of commercially sensitive information which they would not normally have on them, thus placing the companies at a disadvantage in the markets in which they operate. Competitors could use the ideas generated by the applicants to their own commercial advantage, again to the detriment of the applicants. Business critique, such as low scores or specified business weaknesses, would also likely place the companies at a disadvantage whilst engaging with potential investors.

27. Invest NI is satisfied that the harm/prejudice to the applicants' interests which would be likely to be caused by disclosure of the application form and scoring sheet is clearly one that section 43(2) is designed to protect. The disclosure of this information, which is not in the public domain, would be likely to prejudice the applicants' ability to participate competitively in commercial activity given that their competitors would have an unprecedented insight into their business, and potentially cause damage to their reputation and the confidence that potential customers, suppliers or investors may have in the company and/or project.
28. Invest NI is of the view that the prejudice would be likely to occur given that there is clearly some causal link between disclosure of the withheld information and harm occurring to the applicants' commercial interests. Disclosure of the information would provide an insight into their current and future commercial operations as set out within their applications. This information would not otherwise be placed into the public domain. Thus in Invest NI's opinion it is sustainable to argue that disclosure risks having a real and significant impact on the applicants' commercial interests.
29. The Commissioner accepts that one of the most important things that an up and coming business must have is innovation. This means that the business is continuously moving forward in finding ways to do things better, to create better products/services and to find better ways to meet customers' needs. But to do this, the proprietary information used in developing those business ideas must stay private. It's these intangible and proprietary assets that enable a company to distinguish itself from competitors. Intangible assets such as intellectual property, trade secrets, pricing formulas, customer lists, business plans and the like are typically the foundation upon which a company is built in a business world full of copycat competitors.
30. The Commissioner also accepts Invest NI's representations regarding the interests of third parties, i.e. the applicant companies, and accepts that its vast knowledge and experience of dealing with such companies places it in a strong position as to what would be in their interests. She also accepts the impracticality of obtaining representations from all 284 parties involved, and considers that, by the very nature of the application process for the grant, they would have a reasonable expectation that their commercial information would not be disclosed to the public.

31. The Commissioner is satisfied that the nature and likelihood of the prejudice envisaged to the commercial interests of the applicant companies fall within the scope of the exemption provided by section 43(2). She is further satisfied that there is a causal link between the disclosure of the withheld information and the likely prejudice caused to the applicant companies. She has therefore gone on to consider the public interest factors in favour of maintaining the exemption and of disclosing the withheld information.

### **Public interest arguments in favour of maintaining the exemption**

32. Invest NI is of the view that there is an inherent public interest in ensuring fairness of competition and, as the 'Proof of Concept Fund Techstart NI' applicants have legitimate economic interests, it would thus not be in the public interest to put them at a disadvantage in a commercially competitive market by disclosure of business proprietary information. It would be unfair for the commercial interests of third parties to be undermined simply because they engaged with, and shared information with, a public sector body.

### **Public interest arguments in favour of disclosing the withheld information**

33. Invest NI accepts there is a public interest in the disclosure of information which would aid the public's understanding of a decision making process in the use of public funds. However, it believes that this can be done in a way that does not prejudice the commercial interests of those private sector companies who engage in support programmes.

34. It is the view of Invest NI that this public interest in the openness and transparency of the decision-making process has been met by the disclosure of the actual mechanics of the application and decision making process through disclosure of the scoring methodology used in assessing the Proof of Concept grant, the names of the Pentech Ventures LLP employees who sit on the judging panel, and the fact that there are no declared conflicts of interest.

35. Also, although Invest NI withheld the application forms requested, Invest NI has disclosed the names of the successful applicants of the competitive process (bar one erroneously, which has now been corrected) to aid transparency into the outcomes of the grant process.



## **Balance of the public interest arguments**

36. The Commissioner recognises that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. However, she accepts that Invest NI has strived to meet this as far as possible through disclosure of information such as successful applicants and details of the scoring methodology and judging panel for the grant.
37. The Commissioner also recognises that there is a strong and legitimate public interest in private companies being able to compete in a commercial market on a level playing field, and that disclosure of the withheld information, which would be likely to prejudice that ability to compete, would undermine that public interest.
38. On balance, the Commissioner considers that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption. She further considers that section 43(2) applies to the entirety of the withheld information, so she has not gone on to consider Invest NI's application of sections 40(2) and 41 to the withheld information.

## **Section 40(2) of the FOIA**

### **Is the withheld information personal data?**

39. Invest NI has applied the exemption at section 40(2) to the names of unsuccessful sole traders and partnerships who applied for the grant, and also the scoring sheet for those applicants. It has already disclosed, by consent, the names of the 20 successful sole traders/partnerships. Invest NI considers that these fall within the definition of personal data as set out in Section 1(1) of the Data Protection Act 1998 (DPA) as it is data which relates to living individuals who can be identified from the data. The Commissioner accepts that the information falls within the definition of personal data.

### **What would be the consequences of disclosure?**

40. Invest NI considers that disclosure of this personal data would breach the first principle of the DPA in that the disclosure would be considered unfair as the data subjects would have no expectation that this information would be placed into the public domain. Therefore disclosure may also be considered an intrusion into their privacy and an unfair use of the information provided to Pentech Ventures LLP/ Invest NI for specific limited purposes (breaching the second principle).

**Would there be any legitimate public interest in disclosure?**

41. Invest NI also considers that disclosure of this personal information would also serve no public interest and as such Invest NI believes there is no legitimate interest in disclosure and therefore no Schedule 2 of the DPA condition exists to permit disclosure of the information.
42. The Commissioner has considered the above arguments and accepts that the individuals who constitute the sole traders and partnerships who applied for the grant would have a reasonable expectation that their personal details would be kept confidential and not disclosed into the public domain. Those who were successful have already consented to having their information disclosed, however those who were unsuccessful have not. The Commissioner accepts that disclosure of these details would be an unfair intrusion into the privacy of those individuals and would be likely to cause distress and damage to them.
43. The Commissioner agrees that there is some legitimate public interest in transparency within Invest NI and in the processes whereby it selects businesses who are allocated funds such as the grant. However, she considers that this public interest has been met to a large extent by disclosure of the processes and methodology of awarding the grant, and the details of the successful applicants. There is no further public interest in disclosure of unsuccessful applicants' details which would outweigh the rights of the individuals to privacy in these circumstances.

## Right of appeal

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44. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

45. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Deirdre Collins**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**