



G Scott
By email:
[request-675103-
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Our ref: 202100163167
17 March 2021

Dear Mr Scott,

REQUEST UNDER THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002
(FOISA)

Thank you for your request dated 22 February 2021 under the Freedom of
Information (Scotland) Act 2002 (FOISA).

Your request

“FOI Review 72943 FOI 202000058749 7 September 2020

*Can you now release all the information as the reason given in the original reply are
no longer valid”*

This request is linked to your previous request reference number 202000058749 &
2020000072943.

Response to your request

I note that in your request you highlight that you have submitted a fresh request for
this information following the developments explained in the letter from Cabinet
Secretary for the Economy, Fair Work and Culture addressed to the Economy,
Energy and Fair Work Committee dated 16 February 2021 (which you refer to in your
other request 202100163474).

In considering your request I have been mindful of the change of ownership and
passage of time when considering the information held. I concluded that the



information remains exempt from disclosure. Disclosing certain aspects of the content of these discussions with Burntisland Fabrications Ltd (BiFab) and other stakeholders would substantially inhibit such discussions in the future, because these stakeholders would be reluctant to provide their advice and views fully and openly if they believe that those views are likely to be made public. This is a particular risk when discussions relate to a sensitive issue such as commercial negotiations and contracts.

While our aim is to provide information whenever possible, in this instance we are unable to provide the information you have requested because exceptions under section 30(b)(i) – free and frank provision of advice; section 30(b)(ii) – free and frank exchange of views; section 33(1)(b) – commercial interests; and section 38(1)(b) – personal data of a third party apply to that information. The reasons why these exceptions apply are explained in the Annex A to this letter.

Your right to request a review

If you are unhappy with this response to your FOI request, you may ask us to carry out an internal review of the response, by writing to Reuben Aitken, Director, Covid Business Resilience and Support Directorate, reuben.aitken@gov.scot, 1N.01, St Andrews House, Regent Road, Edinburgh, EH1 3DG.

Your review request should explain why you are dissatisfied with this response, and should be made within 40 working days from the date when you received this letter. We will complete the review in accordance with FOISA as soon as possible, and not later than 20 working days from the day following the date we receive your review request. If you are not satisfied with the result of the review, you then have the right to appeal to the Scottish Information Commissioner. More detailed information on your appeal rights is available on the Commissioner's website at:

<https://www.itspublicknowledge.info/YourRights/Unhappywiththeresponse/>

Yours sincerely

Anna Thomson
Case Handler
Scottish Government



ANNEX A – EXEMPTIONS APPLIED

Exemptions under Sections 30(b)(i) (free and frank provision of advice) and 30(b)(ii) (free and frank exchange of views) of FOISA apply to some of the information requested. These exemptions apply because disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice and exchange of views for the purposes of deliberation.

Section 30(b)(i) recognises the need for Ministers and officials to receive advice within a private space before the Scottish Government reaches a settled public view. Similarly, Section 30(b)(ii) recognises the need for Ministers and officials to have a private space within which to discuss issues and options with external stakeholders before the Scottish Government reaches a settled public view. Disclosing certain aspects of the content of these discussions with Burntisland Fabrications Ltd (BiFab), DF Barnes, Grant Thornton, and our Enterprise Agencies would substantially inhibit such discussions in the future, because these stakeholders would be reluctant to provide their advice and views fully and frankly if they believe that those views are likely to be made public. This is a particular risk when discussions relate to a sensitive or controversial issue such as commercial negotiations.

These exemptions are subject to the ‘public interest test’. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable governance, and to inform public debate. However, there is a greater public interest in allowing Ministers and officials to have a private space within which to communicate with appropriate external stakeholders as part of the process of exploring and refining the Government’s position on commercial or financial information, until the Government as a whole can adopt a decision that is sound and likely to be effective.

This private space is essential to enable all options to be properly considered, so that good decisions can be taken based on fully informed advice and evidence. Premature disclosure is likely to undermine the full and frank discussion of issues between the Scottish Government and these stakeholders, which in turn will undermine the quality of the decision making process, which would not be in the public interest.

An exemption under section 33(1)(b) (commercial interests) of FOISA continues to apply to some of the information requested despite the change of ownership or passage of time. This exemption applies because disclosure of this particular information would, or would be likely to, prejudice substantially the commercial interests of BiFab and DF Barnes. Disclosing this information would be likely to give BiFab’s competitors an advantage in future similar tendering exercises, which would



substantially prejudice the company's ability to submit competitive tenders and could significantly harm their commercial business.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is a public interest in disclosing information as part of open and transparent government, and to help account for the expenditure of public money. However, there is a greater public interest in protecting the commercial interests of companies that enter into contracts with the Scottish Government, thus ensuring that we are always able to obtain the best value for public money.

Exemptions under Section 38(1)(b) (personal data of a third party) of FOISA applies to some of the information requested. This exemption applies to the names of third parties referenced throughout the documents that have been requested. The Scottish Government has a policy of not disclosing the names of officials who are not Senior Civil Servants, therefore the names of some Scottish Government, Scottish Enterprise, and Highlands & Islands Enterprise officials have been redacted. The names of BiFab and DF Barnes employees who are not BiFab board members, and the names of our commercial advisors, have also been redacted to protect their privacy.

