



[Redacted]

[Redacted]

Sent by email to: [request-540360-4c86a154@whatdotheyknow.com](mailto:request-540360-4c86a154@whatdotheyknow.com)

Our ref: FOI/19/00022

February 2019

Dear [Redacted]

Further to my letter of 25 January 2019, I have now completed my review of our response to your request under the Freedom of Information (Scotland) Act 2002 (FOISA).

**Your request**

Provide a copy of the Subscription and Shareholders Agreement referenced in the June 2018 loan agreement to Ferguson Marine Engineering Limited (FMEL).

I have concluded that the original decision should be confirmed, with modifications. This information is attached at the end of this [letter](#).

[For the remainder of the information, I have concluded that the exemption was correctly applied and that the public interest test remains in favour of the information being withheld. It is my view that this information is sufficiently commercially sensitive such that it should not be released, for the reasons explained to you in our original response. It is not in the public interest that a company's competitors gain an advantage on future similar tendering exercises, to the detriment of that company, nor that the Scottish Government is left unable to ensure that we are always able to obtain the best value for public money when tendering for contracts. For these reasons I am content that this information has been correctly withheld.](#)

**Section 33(1)(b) – commercial interests**

~~An exemption under section 33(1)(b) of FOISA (commercial interests) applies to some of the information requested. This exemption applies because disclosure of this particular information would, or would be likely to, prejudice substantially the commercial interests of those parties to who this agreement applies. Disclosing this information would be likely to give Ferguson Marine Engineering Ltd's competitors an advantage in future similar tendering~~

**Commented [U1]:** As the exemption and the PI test have been reconsidered, there needs to be a brief explanation of your reasoning and why you have considered that the withheld information can now be released.

No need to insert para about exemption and PI test as that was done when the request was original responded to, but rather give reasoning as to why the remainder of the information should be withheld, as I have done.



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~~exercises, which would substantially prejudice Ferguson Marine Engineering Ltd's ability to submit competitive tenders and so 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 which tender for, or enter into, Scottish Government contracts, to ensure that we are always able to obtain the best value for public money~~

If you are unhappy with the outcome of this review you have the right to appeal to the Scottish Information Commissioner about our decision within 6 months of receiving this letter. Information on how to make an appeal, along with an application form, is available on the Commissioner's website at:

<http://www.itspublicknowledge.info/YourRights/Unhappywiththeresponse/AppealingtoCommissioner.aspx>.

You can also contact the Commissioner at:

The Scottish Information Commissioner  
Kinburn Castle  
Doubledykes Road  
St Andrews  
Fife  
KY16 9DS

Yours sincerely

[Redacted]

Subscription and Shareholders Agreement



EXECUTION - SSA -  
FME(H)L - 18.6.18 - F

Victoria Quay, Edinburgh EH6 6QQ  
www.gov.scot



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[Redacted]

[Redacted]

Sent by email to: [request-540360-4c86a154@whatdotheyknow.com](mailto:request-540360-4c86a154@whatdotheyknow.com)

Our ref: FOI/19/00022

February 2019

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**Your request**

Provide a copy of the Subscription and Shareholders Agreement referenced in the June 2018 loan agreement to Ferguson Marine Engineering Limited (FMEL).

I have concluded that the original decision should be confirmed, with modifications. [This is because most of this information is already in the public domain and not sufficiently commercially sensitive. A copy of the Subscription and Shareholders Agreement referenced in the June 2018 loan agreement to Ferguson Marine Engineering Limited can now be released in part.](#) -This information is attached at the end of this letter.

[For the remainder of the information, I have concluded that the exemption was correctly applied and that the public interest test remains in favour of the information being withheld. It is my view that this information is sufficiently commercially sensitive such that it should not be released, for the reasons explained to you in our original response. It is not in the public interest that a company's competitors gain an advantage on future similar tendering exercises, to the detriment of that company, nor that the Scottish Government is left unable to ensure that we are always able to obtain the best value for public money when tendering for contracts. For these reasons I am content that this information has been correctly withheld.](#)

**Section 33(1)(b) – commercial interests**

~~An exemption under section 33(1)(b) of FOISA (commercial interests) applies to some of the information requested. This exemption applies because disclosure of this particular~~

**Commented [U1]:** As the exemption and the PI test have been reconsidered, there needs to be a brief explanation of your reasoning and why you have considered that the withheld information can now be released.

No need to insert para about exemption and PI test as that was done when the request was original responded to, but rather give reasoning as to why the remainder of the information should be withheld, as I have done.



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~~information would, or would be likely to, prejudice substantially the commercial interests of those parties to who this agreement applies. Disclosing this information would be likely to give Ferguson Marine Engineering Ltd's competitors an advantage in future similar tendering exercises, which would substantially prejudice Ferguson Marine Engineering Ltd's ability to submit competitive tenders and so 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 which tender for, or enter into, Scottish Government contracts, to ensure that we are always able to obtain the best value for public money~~

If you are unhappy with the outcome of this review you have the right to appeal to the Scottish Information Commissioner about our decision within 6 months of receiving this letter. Information on how to make an appeal, along with an application form, is available on the Commissioner's website at:

<http://www.itspublicknowledge.info/YourRights/Unhappywiththeresponse/AppealingtoCommissioner.aspx>.

You can also contact the Commissioner at:

The Scottish Information Commissioner  
Kinburn Castle  
Doubledykes Road  
St Andrews  
Fife  
KY16 9DS

Yours sincerely

[Redacted]

Subscription and Shareholders Agreement



EXECUTION - SSA -  
FME(H)L - 18.6.18 - F

Victoria Quay, Edinburgh EH6 6QQ  
www.gov.scot



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-----Original Message-----

From: [Redacted] On Behalf Of Cabinet Secretary for Finance, Economy and Fair Work

Sent: 19 February 2019 17:16

To: [Redacted] Cabinet Secretary for Finance, Economy and Fair Work [Redacted]

Cc: [Redacted]

Subject: RE: FOI 19 00022 – [Redacted] - Draft Response - February 2019 (A23389365)

[Redacted]

The Cabinet Secretary is content to clear.

Thanks

[Redacted]

Private Secretary to Derek Mackay MSP, Cabinet Secretary for Finance, Economy and Fair Work The Scottish Government

[Redacted]

All e-mails and attachments sent by a Ministerial Private Office to any other official on behalf of a Minister relating to a decision, request or comment made by a Minister, or a note of a Ministerial meeting, must be filed appropriately by the recipient. Private Offices do not keep official records of such e-mails or attachments.

-----Original Message-----

From: [Redacted]

Sent: 13 February 2019 16:42

To: Cabinet Secretary for Finance, Economy and Fair Work [Redacted]

Cc: [Redacted]

Subject: FOI 19 00022 - [Redacted] - Draft Response - February 2019 (A23389365)

Cabinet Secretary for Finance, Economy and Fair Work

FOI REVIEW: FoI/19/000222

[Redacted]: Provide a copy of the Subscription and Shareholders Agreement referenced in the June 2018 loan agreement to Ferguson Marine Engineering Limited (FMEL).

Purpose

1. To seek your clearance of the attached response to [Redacted] request for an internal review. (Email below from SpAds refers).

Background

2. [Redacted] asked on 20 December that we - Provide a copy of the Subscription and Shareholders Agreement referenced in the June 2018 loan agreement to Ferguson Marine Engineering Limited (FMEL).

3. The response on 23 January 2019 explained that an exemption under section 33 (1(b)) of FOISA applied to all of the information requested because it related to commercial information that may prejudice the company..

4. [Redacted] requested a review on 23 January 2019; a response is due on 20 February 2019.

Consideration

5. As some of the information contained in the Subscription and Shareholders Agreement referenced in the June 2018 loan agreement to FMEL is already within the public domain it has been decided to release this document with redactions as appropriate. The draft response has been cleared by SpAds.

Recommendation

6. That you confirm you are content to clear this draft response.

[Redacted]

[Redacted] Head of Performance and Governance | European Structural Funds | 3rd Floor | 150 Broomielaw | Glasgow | G2 8LU | [Redacted]

-----Original Message-----

From: [Redacted] On Behalf Of Fol SpAds PO

Sent: 13 February 2019 15:39

To: [Redacted]

Cc: Fol SpAds PO [Redacted]

Subject: RE: 9 - FOI 19 00022 - [Redacted] - Draft Reponse - February 2019 (A23389365)

SpAds are content. This requires Ministerial clearance before issue.

Thanks,

[Redacted]

**The attached draft document has been sent separately – Document 2.**

-----Original Message-----

From: [Redacted]

Sent: 12 February 2019 18:33

To: [Redacted]

Cc: Fol SpAds PO [Redacted]

Subject: FW: 9 - FOI 19 00022 - [Redacted] - Draft Reponse - February 2019 (A23389365)

Hi [Redacted],

I've just re-jigged the wording of the first para and confirmed that the document is being released in part.

Hope that helps,  
[Redacted]

**The attached draft document has been sent separately – Document 1.**

-----Original Message-----

From: [Redacted]

Sent: 08 February 2019 12:00

To: [Redacted]

Cc: Fol SpAds PO [Redacted]

Subject: 9 - FOI 19 00022 - [Redacted] - Draft Reponse - February 2019 (A23389365)

Hi [Redacted],

Thanks for sending us your draft review response and the extra documentation. I have amended the response slightly to remove the paras on s33(1)(b) and the PI test as these aren't required, and instead I've inserted an explanation as to why some of the information should continue to be withheld.

Regarding the release of the other information, you just need to insert a short para saying why you feel the information should now be released. If you could please do that then send the draft back to us, after which we'll be able to clear it. Thanks.

Kind regards,  
[Redacted]

**This attached document falls under Section 25 of FOISA as it is otherwise accessible at <https://www.gov.scot/publications/foi-19-00022-review/>**

**From:** [Redacted]

**Sent:** 04 February 2019 17:29

**To:** [Redacted]

**Cc:** [Redacted] Rollison R (Richard) [Redacted] Ritchie D (David) Energy [Redacted]

**Subject:** FMEL Subscription and Shareholders Agreement

[Redacted]

You are reviewing an FOI case from [Redacted] who requested release of the Subscription and Shareholders Agreement relating to the FMEL loan.

[Redacted]

I'm copying this to [Redacted] who I believe may have similar review from [Redacted] in relation to other Shareholders Agreements. [Redacted] and I in AQ tomorrow if you want to speak in person.

[Redacted]

-----Original Message-----

From: Central Enquiry Unit <[CEU@gov.scot](mailto:CEU@gov.scot)>

Sent: 28 January 2019 11:59

To: [Redacted]

Subject: FOI - Internal review of Freedom of Information request - Ferguson Marine - 'Subscription & Shareholders Agreement' - [Redacted]

The email enquiry below was received at the Central Enquiry Unit today.

I would be grateful if you would deal with this or forward it to the appropriate person / area of business.

You may wish to acknowledge receipt of this email to the enquirer.

Thank you

[Redacted]

Reminder: If this email contains a request for information please remember that the Scottish Government is required to respond to all requests for information including e-mails, within 20 working days of receipt in accordance with the Freedom of Information (Scotland) Act. Please refer to the FOI Guidance. All FOI requests received must be registered on either Micase or the FOI Tracker.

All FOI responses where information is released must be emailed to the FOI Unit immediately after issue, with 'FOI/EIRs TO PUBLISH' in the subject line

If the request is sensitive, it will require Ministerial clearance. Guidance on this is available at Steps 33 and 34 of the Step-by-Step Guide to Handling FOI/EIRs Requests.

If the request is from a journalist, responses should be issued by the relevant communications team ☐  
Please consider the environment before printing this e-mail

[Redacted]

-----Original Message-----

From: Central Enquiry Unit <[CEU@gov.scot](mailto:CEU@gov.scot)>

Sent: 28 January 2019 10:28

To: [Redacted]

Subject: FOI - CEA - More information - Internal review of Freedom of Information request - Ferguson Marine - 'Subscription & Shareholders Agreement' - [Redacted]

The email enquiry below was received at the Central Enquiry Unit today.

I would be grateful if you would deal with this or forward it to the appropriate person / area of business.

You may wish to acknowledge receipt of this email to the enquirer.

Thank you

[Redacted]

Reminder: If this email contains a request for information please remember that the Scottish Government is required to respond to all requests for information including e-mails, within 20 working days of receipt in accordance with the Freedom of Information (Scotland) Act. Please refer to the FOI Guidance. All FOI requests received must be registered on either Micase or the FOI Tracker.

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If the request is from a journalist, responses should be issued by the relevant communications team ☐  
Please consider the environment before printing this e-mail

[Redacted]

-----Original Message-----

From: [Redacted] <[request-540360-4c86a154@whatdotheyknow.com](mailto:request-540360-4c86a154@whatdotheyknow.com)>

Sent: 27 January 2019 11:35

To: Central Enquiry Unit <[CEU@gov.scot](mailto:CEU@gov.scot)>

Subject: Re: Internal review of Freedom of Information request - Ferguson Marine - 'Subscription & Shareholders Agreement'

Dear Scottish Ministers,

FoI/19/00022

Message for [Redacted] | Head of Performance and Governance | European Structural Funds

Correction

I would like to amend by message of 23 January 2019 as follows:

Please replace:

“There is no exemption available under FOISA to completely withhold all information.”

With:

“Section 33 (1)(b) of FOISA does not allow all information to be withheld”

Add:

I ask you to classify Ministers' original response to my FOI request as vexatious for non-compliance with FOISA.

Yours faithfully,

[Redacted]

-----Original Message-----

From: [Redacted] <[request-540360-4c86a154@whatdotheyknow.com](mailto:request-540360-4c86a154@whatdotheyknow.com)>

Sent: 26 January 2019 07:51

To: Central Enquiry Unit <[CEU@gov.scot](mailto:CEU@gov.scot)>

Subject: Re: Internal review of Freedom of Information request - Ferguson Marine - 'Subscription & Shareholders Agreement'

Dear Scottish Ministers,

[Redacted] | Head of Performance and Governance | European Structural Funds

FOI: 19/00022

Thank you for acknowledging receipt of my request for internal review.

In addition to the matters set out in my request for internal review, I would like to add the following matters as support for full disclosure:

1. False use of section 33(1)(b) by Ministers to prevent public and political scrutiny of government decision making and the use of £30 million of public funds.

Scottish Ministers are transferring large sums of public money into the private sector without public and political scrutiny. A loan of £30 million is being converted into share warrants with a nominal value of just 10% of the loan value. In turn, the value of the shares, given the financial condition of Ferguson Marine Engineering Limited, will be negligible. The £30m loan is retained by the company and used to fund cost overruns on an onerous contract for the construction of two public-use ferries (a £97m contract with Caledonian Maritime Assets Limited – a company wholly owned by Scottish Ministers).

Ministers are misleading (including through material omission) Parliament and the public in representing the transaction as a 'loan'. It is, therefore, in the public interest that full circumstances of the subscription / shareholding arrangement are disclosed.

2. Information already in the public domain

Some information about the subscription and shareholding arrangement is in the public domain as it is publicly available at Companies House – Ferguson Marine Engineering (Holdings) Limited Annual Financial Statements 2016 (published 19 December 2018) and Articles of Association (published 2 July 2018). The following is an extract:

“On 25 June 2018, Ferguson Marine Engineering (Holdings) Limited (“Holdings”) entered into a £30m secured loan agreement with The Scottish Ministers. The loan has a repayment date of 25 June 2028. The loan accrues interest at a fixed rate of 13% per annum. On the same day, a Warrant Instrument was entered into which provides for Holdings to issue warrants to The Scottish Ministers on a quarterly basis (commencing 30 September 2018) in respect of every £10 of principal amount of loan drawn down in the preceding quarter. Once warrants are issued in respect of any part of the loan, interest ceases to accrue on that part of the loan. Each warrant gives The Scottish Ministers the option to subscribe for one share in Holdings. On the exercise of the warrant the principal amount of loan outstanding will be reduced by an amount equal to the subscriptions price paid by way of set-off against the loan value. At the date of signing of these accounts £ 17 m of the loan has been drawn and £1.7m warrants issued.

On 25 June 20 18 a subscription and shareholders' agreement was entered into by Holdings, The Scottish Ministers and CBC. This agreement requires CBC, under certain conditions, to invest additional monies of up to £8.5m into Holdings. These additional monies are in two tranches with the first being £0.1 for every £ 1 of loan drawn from the 25 June 2018 loan agreement up to a maximum of £3m and a second tranche of £5.5m to be invested to support the enhancement to the capabilities of the business or support the business development initiatives of the business but by no later than 25 June 2019. To date CBC have not provided additional equity funding under these arrangements.”

3. Improved stakeholder confidence

Rather than prejudice the commercial interests of an entity, disclosure of a government shareholding would be commercially beneficial for the entity's existing / prospective customers, suppliers, employees and local communities in providing longer term confidence in the future of the business.

Yours faithfully,

[Redacted]

-----Original Message-----

From: [Redacted]

Sent: 25 January 2019 14:39

To: [Redacted]

Subject: FW: FOI - E - REVIEW - Ferguson Marine Subscription & Shareholders Agreement  
FOI/19/00022 - [Redacted]

Hi [Redacted]

Here you go - please see below.

Apologies I usually reply on back on this email so you have the original.

Many thanks in advance.

[Redacted]

**From:** [Redacted]  
**Sent:** 23 January 2019 16:10  
**To:** [Redacted]  
**Cc:** Economic Development Business Management Unit [Redacted]  
**Subject:** FOI review - urgent responses required  
**Importance:** High

Hi [Redacted]

I hope your well. I am responsible for assigning C band staff FOI's to take on for our Directorate. This year we are running on an alphabetical order, therefore you are next on the list. **Are you able to take on this FOI review please for DED?** If so, I can assign through FOI tracker.

A quick response would be much appreciated. I have attached link to guidance, local guidance and also timeline for tracking your FOI review.

**FOI REVIEW TEMPLATE EMAIL**

Link to review guidance -

<http://sgsharepoint/sites/freedomofinformation/FOIEIR%20Wiki/ReviewsIndex.aspx>

Reference	Owner	Summary	Date Received / Referred	Draft created Day 1-5	Deadline for DD/Director return confirmation of approval Day 5-10	Deadline to send to SpAds Day 10	Deadline for SpAds to return comments/approval Day 10-15 (5 days to comment)	Deadline for sending to Ministers to comment/approve Day 15-18 (3 days to comment)	Last opportunity for official/FOI unit to revise	Date Due*
<a href="#">Fol/19/00022</a>		REVIEW: Provide a copy of the Subscription and Shareholders Agreement referenced in the June 2018 loan agreement to FMFL.	23/01/2018	30/01/2018	06/02/2018	06/02/2018	13/02/2018	13/02/2018	16/02/2018	20/01/2019

DED local handling guidance



DED\_ Directorate Fol  
 Desk Instructions - De

Many thanks in advance.

[Redacted]  
 Business Support Officer to Deputy Director, Richard Rollison  
 Innovation, Industries and Investment Division  
 Directorate for Economic Development  
 Scottish Government  
 [Redacted]

PA to Deputy Director, [Redacted]

5 Atlantic Quay | 150 Broomielaw | Glasgow | G2 8LU

From: [Redacted]  
Sent: 23 January 2019 14:26  
To: [Redacted]  
Cc: [Redacted]  
Subject: RE: FOI - E - REVIEW - Ferguson Marine Subscription & Shareholders Agreement  
FOI/19/00022 - [Redacted]

Please copy me into requests for C Band to pick up this review, [Redacted].

H

[Redacted]

-----Original Message-----

From: [Redacted]

Sent: 23 January 2019 14:19

To: [Redacted]

Cc: [Redacted]

Subject: FW: FOI - E - REVIEW - Ferguson Marine Subscription & Shareholders Agreement  
FOI/19/00022 - [Redacted]

[Redacted]

To see the below request for an internal FOI Review.

Many thanks

[Redacted]

-----Original Message-----

From: [Redacted] <[request-540360-4c86a154@whatdotheyknow.com](mailto:request-540360-4c86a154@whatdotheyknow.com)>

Sent: 23 January 2019 14:05

To: Central Enquiry Unit <[CEU@gov.scot](mailto:CEU@gov.scot)>

Subject: Internal review of Freedom of Information request - Ferguson Marine - 'Subscription & Shareholders Agreement'

Dear Scottish Ministers,

Message for Mary McAllan, Director of Economic Development

Request for internal review: FOI/19/00022

The response to my request is unsatisfactory. The response falls considerably short of expectations and shows contempt for FOISA and information users.

There is no exemption available under FOISA to completely withhold all information.

“may prejudice” is not an exemption available under FOISA.

I draw your attention to guidance from the Scottish Information Commissioner:

“The exemption in section 33(1)(b) can only be applied where disclosure would, or would be likely to, cause substantial prejudice. There must be at least a significant probability that substantial prejudice would occur in order for the exemption to be properly applied. There must also be a genuine link between disclosure and the harm: it cannot simply be a remote or hypothetical possibility.”

Further:

“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, and must indicate the nature of those commercial interests and how these interests would, or would be likely to, be prejudiced substantially.”

Public interest test:

“I am not comfortable with the view that the public interest test is purely subjective. It is not simply a “finger in the air” exercise. When carrying out the test, an authority must identify and set out the competing arguments as to how the public interest would be served by disclosure of the information and how it would be served by withholding the information. Having identified the public interest arguments on each side, the authority must then carry out a balancing exercise to determine where the public interest lies. Where the balance is even, the information should be disclosed.”

Clearly there are substantial public interest arguments for full disclosure as part of a transparent and accountable government. Public interest arguments for disclosure have been ignored in the response.

Please acknowledge my request for internal review.

Yours faithfully,

[Redacted]

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Please use this email address for all replies to this request:  
[request-540360-4c86a154@whatdotheyknow.com](mailto:request-540360-4c86a154@whatdotheyknow.com)

Disclaimer: This message and any reply that you make will be published on the internet. Our privacy and copyright policies:  
<https://www.whatdotheyknow.com/help/officers>

For more detailed guidance on safely disclosing information, read the latest advice from the ICO:  
<https://www.whatdotheyknow.com/help/ico-guidance-for-authorities>

Please note that in some cases publication of requests and responses will be delayed.

If you find this service useful as an FOI officer, please ask your web manager to link to us from your organisation's FOI page.

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For more information please visit <http://www.symanteccloud.com>  

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-----Original Message-----

From: [Redacted]

Sent: 23 January 2019 12:13

To: [Redacted]

Subject: RE: FoI 19 00022 - [Redacted] - Response Letter (A23204130)

This looks good to me.

[Redacted]

-----Original Message-----

From: [Redacted]

Sent: 23 January 2019 09:29

To: [Redacted]

Subject: FoI 19 00022 - [Redacted] - Response Letter (A23204130)

[Redacted] has sent you a link to "FoI 19 00022 - [Redacted] - Response Letter" (A23204130) from Objective.

Open in Navigator

Double click on the attachment

Open in Your Browser

Latest: <https://erdm.scotland.gov.uk/id:A23204130/document/versions/latest>

Published: <https://erdm.scotland.gov.uk/id:A23204130/document/versions/published>