

# Decision Notice

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## **Decision 035/2016: Mr Paul Hutcheon and the Scottish Ministers**

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### **Rare Conditions Medicines Fund and New Medicines Fund**

Reference No: 201501689

Decision Date: 11 February 2016



Scottish Information  
Commissioner

## Summary

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On 6 June 2015, Mr Hutcheon asked the Scottish Ministers (the Ministers) for information relating to the Rare Conditions Medicines Fund and the New Medicines Fund. The Ministers withheld the information, claiming that disclosure would substantially prejudice the effective conduct of public affairs and the commercial interests of the pharmaceutical companies supplying NHS Scotland.

The Commissioner investigated and found that the Ministers had wrongly withheld the information covered by Mr Hutcheon's request. She did not accept that either exemption applied and required the Ministers to disclose the information.

## 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); 30(c) (Prejudice to effective conduct of public affairs); 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 6 June 2015, Mr Hutcheon made a request for information to the Ministers. He asked:  
*“Since the Rare Conditions Medicines Fund was established in March 2013, please state which ten drugs have taken up most of the budget from this fund. Please state how much funds have been used to provide each of these ten drugs.*  
  
*Since the New Medicines Fund was established, please state which ten drugs have taken up most of the budget from this fund. Please state how much funds have been used to provide each of these ten drugs.”*
2. The Ministers responded on 9 July 2015 and withheld the information under section 33(1)(b) of FOISA (Commercial interests and the economy).
3. On 20 July 2015, Mr Hutcheon wrote to the Ministers, requiring a review of their decision on the basis that he believed the exemption had been wrongly applied and that disclosure was in the public interest.
4. The Ministers notified Mr Hutcheon of the outcome of their review on 18 August 2015. They upheld the application of 33(1)(b) and also applied the exemption in section 30(c) of FOISA (Prejudice to effective conduct of public affairs).
5. On 14 September 2015, Mr Hutcheon wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Hutcheon stated that he was dissatisfied with the outcome of the Ministers' review because he believed the exemptions had been wrongly applied.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Hutcheon made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 21 September 2015, the Ministers were notified in writing that Mr Hutcheon had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr Hutcheon. The Ministers 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 Ministers were invited to comment on this application, with reference to the exemptions referred to in previous correspondence with Mr Hutcheon.
9. The Ministers provided submissions to the investigating officer. The Ministers were subsequently invited to provide additional information and further submissions, but they did not do so.

## Commissioner's analysis and findings

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10. 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 her by both Mr Hutcheon and the Ministers. She is satisfied that no matter of relevance has been overlooked.

### **Section 30(c) - Prejudice to effective conduct of public affairs**

11. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
12. As the Commissioner has said in previous decisions, the standard to be met in applying the tests in the section 30(c) exemption is high. In particular, the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, and not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
13. The Ministers argued that disclosure of the withheld information (consisting of two lists of drugs showing the amounts spent on each individual drug) could make it possible for third parties to estimate the level of discounts given to the NHS in Scotland by pharmaceutical companies. They submitted that disclosing even the names of the individual drugs (without the sums spent on them) could allow others to estimate the levels of discount being given, taking account of other information already in the public domain regarding list prices and

patient numbers receiving the drugs in question. Using all of this information, the Ministers argued, it would be possible through extrapolation to reveal the price paid by NHS Scotland in comparison with the UK list price.

14. In the Ministers' view, pharmaceutical companies would be reluctant to provide such discounts in future if this were to happen, as other organisations worldwide would put them under pressure to offer them the same level of discount as offered to NHS Scotland. This would in turn increase the cost of drugs to the NHS in Scotland significantly, affecting either the quantity of drugs the NHS could afford or the money available for other areas of patient care.
15. The Ministers stated that NHS Scotland was obliged to secure best value for money in procuring pharmaceutical products. They stated that this required reasonable expectations of confidentiality to be maintained in negotiating with pharmaceutical companies. For this reason, they considered section 30(c) of FOISA to apply. The Ministers submitted that disclosure of the financial information would substantially prejudice NHS Scotland's ability to achieve best value for new medicines in the future, by making pharmaceutical companies reluctant to provide a discount below list price.
16. The Ministers stated that experience had shown that pharmaceutical companies would be reluctant to provide commercial, in confidence, discounts where they were concerned that the level of discount would be revealed. They stated that the Scottish Government was called upon from time to time to provide reassurance to individual companies around commercial confidentiality. With reference to this, the Ministers were asked for evidence that discounts would be under threat.
17. The Ministers provided an email from one pharmaceutical company to the Health Quality and Strategy Directorate, expressing reassurance that the level of discount could not be calculated from information in the public domain. The Ministers advised that they had sought written comments from several other pharmaceutical companies in connection with Mr Hutcheon's request and would provide these when they became available. At the time of writing this decision, no further representations had been received from the Ministers on this point.
18. The Ministers were also asked to comment on related information they proposed to publish. They stated that they had been planning to publish a list of those drugs which had been eligible for support from the New Medicines Fund where the number of patients treated was more than five, together with patient numbers. They stated that disclosure of the withheld information would prohibit such publication.
19. Finally, the Ministers were asked by the investigating officer to provide an explanation and a worked example demonstrating how, and in what way, disclosure of the names of the drugs and/or the amounts spent could be linked to the price discount figures. The Ministers stated that they would ask the pharmaceutical industry to provide a worked example. Again, at the time of writing this decision, no such worked example had been provided by the Ministers.
20. The Commissioner has considered all the submissions provided by the Ministers but is still unclear as to how the withheld information could be used, by itself or with any other information in the public domain or proposed for publication, to calculate, or even estimate with any degree of certainty, the level of discount given in relation to the listed drugs. It is not even evident that there would be a direct link between the number of patients using a particular drug, were that available, and the quantity of that drug purchased.

21. In the absence of any remotely substantial explanation of the link, and in the absence of evidence supporting risks of the kind described by the Ministers, the Commissioner cannot accept that disclosure of the withheld information would, or would be likely to, prejudice substantially the effective conduct of public affairs. Having considered all the relevant submissions, therefore, the Commissioner does not accept that the Ministers were correct to withhold the information under the exemption in section 30(c) of FOISA.

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

22. The Ministers submitted that any information held was also exempt in terms of section 33(1)(b) of FOISA, which provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.

23. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to identify:

- (i) whose commercial interests would (or would be likely to) be harmed by disclosure;
- (ii) the nature of those commercial interests; and
- (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.

24. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would be (or would be likely to be) harmed, it must make this clear: generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.

25. In their submissions to the Commissioner, the Ministers considered that disclosure of the information would be likely to significantly harm the commercial interests of the pharmaceutical companies providing commercial, in confidence, discounts to NHS Scotland.

26. As in relation to section 30(c), the Ministers argued that the level of discount could be worked out from the withheld information and other available information. With regard to the means of achieving this, the Commissioner is in the same position as in relation to section 30(c).

27. Regarding section 33(1)(b), the Ministers went on to argue that if the discount levels were available to third parties this would be likely to harm the current pharmaceutical suppliers' global profits, as it would significantly prejudice their ability to secure an advantageous price for the product in other areas of the worldwide pharmaceutical market. The Ministers submitted that this constituted substantial prejudice to the existing suppliers' commercial interests.

28. In seeking to protect their global profits, the Commissioner accepts that the current pharmaceutical suppliers have commercial interests which would be relevant for the purposes of section 33(1)(b).

29. Having reached this conclusion, the Commissioner must go on to consider whether the commercial interests she has identified would be, or would be likely to be, prejudiced substantially by the disclosure of the information withheld. Substantial prejudice is described above: such prejudice must be at least likely before the exemption can apply, and therefore

the Commissioner will expect to be satisfied that there is a significant probability of its occurrence.

30. In addition to what is set out in paragraph 27, the Ministers' submissions as to the harm they believe would, or would be likely to, occur as a result of disclosure are basically those set out above in relation to section 30(c).
31. The Commissioner has carefully considered the submissions received, along with the withheld information. It is the responsibility of the Ministers to persuade the Commissioner that the harm they identify is at least likely. As indicated above, the Commissioner is not persuaded that the discounts offered by the suppliers could be worked out in the event of disclosure. In addition, it is not clear from the submissions received from the Ministers why availability of the discounts should have such a significantly detrimental effect on the suppliers' ability to obtain advantageous prices elsewhere. That suggests that the NHS in Scotland is in a uniquely advantageous purchasing position, which can hardly be a realistic proposition (and is not, in any event, borne out by any more substantial submissions).
32. In the circumstances, as with section 30(c) of FOISA, the Commissioner is not satisfied that the Ministers have demonstrated the prejudice required for the exemption in section 33(1)(b) to apply.
33. In conclusion, therefore, the Commissioner has not been persuaded by the Ministers that the exemptions in either section 30(c) or section 33(1)(b) of FOISA were correctly applied to the withheld information. Given that the Commissioner does not accept the application of either exemptions, she is not required (in either case) to consider the public interest test in section 2(1)(b) of FOISA. The Commissioner therefore requires the Ministers to disclose the withheld information to Mr Hutcheon.

## Decision

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The Commissioner finds that the Scottish Ministers 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 Mr Hutcheon. The Ministers were not entitled to withhold the information under the exemptions in sections 30(c) or 33(1)(b) of FOISA.

The Commissioner therefore requires the Ministers to provide Mr Hutcheon with the information requested, by **29 March 2016**.

## Appeal

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Should either Mr Hutcheon or the Ministers 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

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

**Rosemary Agnew**  
**Scottish Information Commissioner**

**11 February 2016**

### 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.

#### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

#### 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).

...



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