**Appendix A**

**Section 33(1)(b) Commercial Interests**

This section allows information to be withheld where its disclosure under the 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). This applies in this case to the full exclusivity agreement between SE and Flamingo Land and one other piece of correspondence which contain commercially sensitive information. Release of this information would have the result of causing real, significant and substantial prejudice to the parties involved.

Harm Test – Substantial Prejudice

Release of the information would reveal aspects of Flamingo Land’s current position which would substantially prejudice its bargaining power. This would have the result of substantially prejudicing their ability to compete against other businesses about whom similar information is not in the public domain. In my view, disclosure of the information would cause the companies real, significant and substantial prejudice.

The Public Interest Test

I recognise that there is a public interest in decision-making processes within public authorities being as open and transparent as is possible. I also recognise that making certain information available can increase the accountability of public authorities for decisions that are made that may have an impact on the wider public, and the expenditure of public money by SE.

However, balanced against these considerations, there is also a public interest in ensuring that SE can protect its assessments of business opportunities to enable it to spend public funds as effectively as possible. I must also have regard to the public interest in protection of the privacy of any individual which would be diminished by the release of the requested information. I consider that there is no public interest or benefit in releasing information which could have an adverse effect on the commercial interests of Flamingo Land. However, allowing commercial parties to maintain confidentiality in their commercial positions for prospective commercial transactions is important to maintaining and supporting the proper and efficient operation of free markets, which is of serious concern and benefit to the public. As such I consider that the public interest also favours the withholding of this information.

On public interest grounds, I have therefore concluded that, in respect of the commercially sensitive information requested, the public interest is better served in withholding the information.

**38(1) (b) - Personal Information**

**Section 38(1)(b)- Personal Information**

The exemption contained in section 38(1)(b) of FOISA has been applied to some of the withheld information you requested, in this case names, email addresses and contact details of Scottish Enterprise and Loch Lochmond & the Trossachs National Park staff.

Section 38(1)(b) together with Article 5(1) of the GDPR creates an exemption from disclosure where the information requested constitutes the personal data of a third party and disclosure of that data would breach any of the data protection principles set out in the Data Protection Act 2018 (“DPA”).  Article 5(1) states that “personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.” As an absolute exemption, there is no need to consider the public interest in the application of this exemption.

Information has been withheld from you under this exemption in respect of names of individuals which constitutes as personal data.  I am satisfied that the information that has been withheld constitutes the ‘personal data’ of the individuals concerned, as defined in section 1(1) of the DPA 2018.

SE has examined whether or not disclosure of the information you have requested, insofar as that is personal data, would breach the requirements of the first data protection principle.

Fairness

In assessing whether release of the information would be fair, we have had regard to the Scottish Information Commissioner’s Exemption Briefing Series on the section 38 exemption, and to guidanceproduced by the UK Information Commissioner, who has overall responsibility for data protection issues throughout the UK.  In line with that guidance, and in coming to the decision to withhold personal data on the basis that it would be unfair to release it, we have taken into consideration:

* seniority of individuals
* any potential damage or distress which may be caused by disclosure of the information;  and
* the expectations of the data subjects with regard to the release of the information.

The individuals concerned are not senior members of staff and they do not have public profiles. It would not be within the expectation of the individuals that their personal data would be put into the public domain under FOISA.  Disclosure of the individuals’ personal data into the public domain may cause them damage or distress.

Release of the information would therefore be unfair and consequently would be in breach of the first data protection principle and therefore also unlawful. Given that the disclosure would be unfair, and therefore unlawful, in terms of not complying with the first data protection principle, it is not necessary to go on to consider any of the conditions in schedules 2 or 3 of the DPA 2018, or other aspects of lawfulness.  The information must be withheld under section 38(1)(b) of FOISA, taken together with Article 5(1) of the GDPR.