



Scottish Information
Commissioner

**Decision 210/2006 Dr Donald Reid and Dumfries
and Galloway Council**

*Information relating to complaints lodged with the Council's Trading
Standards and Consumer Protection Service*

**Applicant: Dr Donald Reid
Authority: Dumfries and Galloway Council
Case No: 200502361
Decision Date: 28 February 2008**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 210/2006 Dr Reid and Dumfries and Galloway Council

Information relating to complaints about a specified company – whether the provisions of Part 9 of the Enterprise Act 2002 constitute a prohibition on disclosure for the purposes of section 26(a) of FOISA

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement) and 26(a) (Prohibitions on disclosure)

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision. (References are made to the text of the Enterprise Act 2002 within the decision, and are not set out separately in the Appendix.)

Opinion of the Court of Session in the case of Dumfries and Galloway Council v Scottish Information Commissioner dated 8 February 2008:

<http://www.scotcourts.gov.uk/opinions/2008CSIH12.html>

Facts

Dr Reid wrote to Dumfries and Galloway Council (the Council) requesting information relating to complaints made to its Trading Standards Service about a specified company (the company). The Council refused to supply this information on the grounds that the information was exempt from release under section 35(1)(g) of the Freedom of Information (Scotland) Act 2002 (FOISA). Dr Reid then sought a review. The Council concluded that it had been correct to withhold the information, but that the wrong exemption had been applied. The Council advised Dr Reid that the information was exempt from release under section 26(a) of FOSIA, because Part 9 of the Enterprise Act 2002 contained a prohibition on disclosure. Dr Reid asked the Commissioner to consider this case.

The Commissioner finds that the Council acted in accordance with Part 1 of FOISA, and, in particular, that the exemption in section 26(a) of FOISA had been correctly applied in this case.



This decision replaces Decision 210/2006, which was issued on 21 November 2006, and which was quashed by the Court of Session on 8 February 2008.

Background

1. This decision concerns the handling of a request for information concerning complaints made to the Council's Trading Standards Services. However, the same request was submitted by Dr Reid to each of Scotland's 32 local authorities. Ten of these requests were ultimately the subject of an application for a decision by me. Two of these ten cases were resolved informally, while the remaining eight were the subject of full investigation.
2. The key issue in each of these cases is whether or not provisions within Part 9 of the Enterprise Act 2002 (the EA) constitute a prohibition on disclosure that exempts relevant information from release under FOISA.

Background on section 26(a) of FOSIA and Part 9 of the Enterprise Act 2002

3. At this stage, it is helpful to outline the provisions of FOISA and the EA, interpretation of which is central to this decision.
4. In terms of section 26(a) of FOISA, information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) is prohibited by or under an enactment.
5. The EA enacts various provisions in relation to competition law, the enforcement of consumer legislation and insolvency. Part 9 of the EA introduces rules to govern the disclosure of certain types of information held by public authorities by creating restrictions on the handling of what is termed "specified information".
6. Section 238 of the EA defines the term "specified information". Information is specified information if it comes to a public authority in connection with the exercise of any function it has under, or by virtue of

a) the following Parts of the EA :

Part 1 (which establishes the Office of Fair Trading (OFT) as a corporate body and provides for arrangements for making "super-complaints");
Part 3 (which makes provisions for a new merger control regime);
Part 4 (which makes provision for market investigation references to be made by the OFT);



Part 6 (which creates a new criminal offence for individuals to be engaged in cartels, and provides the OFT with investigatory powers);

Part 7 (which deals with a number of miscellaneous competition provisions);
or

Part 8 (which outlines new procedures for enforcing certain consumer legislation and related matters)

b) any of the following enactments (specified in Schedule 14 of the EA):

- Parts 1, 2, 3, 4, 5, 6, 7, 8 and 11 of the Fair Trading Act 1973
- Trade Descriptions Act 1968
- Hallmarking Act 1973
- Prices Act 1974
- Consumer Credit Act 1974
- Customs and Excise Management Act 1979
- Estate Agents Act 1979
- Competition Act 1980
- Video Recordings Act 1984
- Consumer Protection Act 1987
- Consumer Protection (Northern Ireland) Order 1987
- Copyright, Designs and Patents Act 1988
- Property Misdescriptions Act 1991
- Timeshare Act 1992
- Clean Air Act 1993
- Value Added Tax Act 1994
- Trade Marks Act 1994
- Competition Act 1998
- Chapter 3 of Part 10 and Chapter 2 of Part 18 of the Financial Services and Markets Act 2000
- An order made under section 95 of that Act; or
- Fireworks Act 2003.

c) any such subordinate legislation as the Secretary of State may by order specify for the purposes of section 238(1) of the EA.

7. Sections 237(1) and (2) of the EA provide that specified information relating to the affairs of an individual or any business of an undertaking must not be disclosed during the lifetime of the individual or while the undertaking continues in existence, *unless* disclosure is permitted under Part 9 of the EA.



8. Section 245(1) of the EA creates a criminal offence where a person discloses information to which section 237 applies in contravention of section 237(2). This criminal offence is punishable by imprisonment for a term up to two years, or a fine, or both.
9. There are a number of circumstances where the disclosure of specified information is permitted through “gateways” under Part 9. These can be summarised as follows:
 - if the individual or undertaking has given consent to the disclosure (section 239);
 - if disclosure is required for the purpose of a Community obligation (section 240);
 - if disclosure by the authority is for the purpose of facilitating the exercise of a statutory function of that authority (section 241(1));
 - if disclosure is in connection with investigating a criminal offence or for the purposes of criminal proceedings (section 242);
 - if disclosure is to an overseas public authority for the purposes of investigating an offence of pursuing criminal or civil proceedings (section 243).
10. Furthermore, it should be noted that section 237(6) states that “This Part [i.e. Part 9] (except section 244) does not affect any power or duty to disclose information which exists apart from this Part.”
11. Before disclosing any specified information, section 244 of the EA requires an authority to have regard to a number of considerations, i.e.:
 - the need to exclude from disclosure information which the authority thinks is contrary to the public interest;
 - the need to exclude from disclosure commercial information the disclosure of which the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or information relating to the private affairs of an individual the disclosure of which the authority thinks might significantly harm the individual’s interests; and
 - the extent to which disclosure of information relating to a business interest or the private affairs of an individual is necessary for the purpose for which the authority is permitted to make the disclosure.

Dr Reid’s request and the Council’s response

12. Dr Reid wrote to the Council’s Trading Standards Services on 9 February 2005, requesting details of any complaints lodged in the last 10 years against any or all of the following:



- a) a named company (which will be referred to as “the company” throughout this decision),
- b) any named directors of the company (whether the complaint related to the director in connection with the company or otherwise), and
- c) any named employee of the company.

Dr Reid’s request specified further that the details of the complaints that he was requesting were to include:

- i. the date on which the complaint was lodged,
- ii. against whom the complaint was lodged (in relation to a – c above),
- iii. a brief summary of the nature of the complaint, and
- iv. the outcome of any investigation undertaken.

13. The Council issued a refusal notice, dated 9 March 2005, in response to this request. This stated that, although the Council held some of the information, it would not be supplied because it was exempt from release under section 35(1)(g) of FOISA. This exemption applies where the release of information would, or would be likely to, prejudice substantially the exercise of its functions for any of the purposes specified in section 35(2).
14. In its refusal notice, the Council referred to the fact that the information is held by its Trading Standards Service in connection with the Council’s functions under the EA and that the information is therefore exempt from disclosure. The Council also stated that, given that the EA allows for information to be provided with the consent of a company, it had written to the company requesting permission to release the information to Dr Reid (no response was ever received by the Council).
15. Dr Reid did not receive this notice when it was first sent. He wrote to the Council on 5 May 2005 asking it to review its apparent failure to respond to his information request. In response to this letter, the Council supplied a copy of the refusal notice and asked Dr Reid to write again if he still wanted a review to be conducted.
16. Dr Reid then wrote to the Council seeking a review of the decision to withhold the information he had requested. This letter was received by the Council on 16 June 2005.



17. The Council convened a review panel on 28 June 2005 and a notice advising Dr Reid of the outcome of its review was issued on the same date. This notice stated that the Council had inappropriately cited the exemption in section 35(1)(g) of FOISA when first responding to Dr Reid's request. Following the review, the Council stated that the information instead fell under the exemption under section 26(a) (the exemption in section 26(a) is absolute in that it is not subject to the public interest test required by section 2(1)(b) of FOISA). The Council advised Dr Reid that the review panel had concluded that the provisions of Part 9 of the EA prohibited disclosure of the information requested.
18. Once again, Dr Reid appears not to have received this notice. He made an application for decision to me on 8 August 2005, noting that no response had been received following his request for review. Following an initial communication from my Office, the Council provided a copy of the letter stating the outcome of the review and this was forwarded by my Office to Dr Reid.
19. Although an unfortunate coincidence appears to have occurred in this case, I accept, on the balance of probabilities, that responses to both the initial request and request for review were issued to Dr Reid within the timescales required within FOISA. While these responses did not reach their intended recipient, the Council has supplied evidence which shows that it did, in good faith, prepare responses and send these within the appropriate timescales.

Investigation

20. Dr Reid's application for decision on this matter was received by my Office on 15 August 2005. This application contained complaints about responses provided by ten of the 32 local authorities which were sent the request for information detailed in paragraph 12 above. These cases were allocated to an investigating officer.
21. The appeal concerning Dumfries and Galloway Council was then validated by establishing that Dr Reid had made an information request to a Scottish public authority under FOISA (i.e. the Council) and had applied to me only after asking the Council to review the response to his request.



22. The investigating officer wrote to the Council on 15 September 2005 to confirm that a valid application for decision had been received and that a full investigation would now commence. The Council was invited to comment on the case in terms of section 49(3)(a) of FOISA. The Council was asked to provide details of its reasoning when reaching the view that Part 9 of the EA created a prohibition on disclosure for the purposes of section 26(a) of FOISA.
23. During the investigation, I sought the Opinion of Senior Counsel on the interpretation of the provisions of Part 9 of the EA. This Opinion suggested that these provisions did not create a prohibition for the purposes of section 26(a) of FOISA. I invited comments from the Council on this Opinion and also invited submissions on any other exemption that the Council believed applied to the information withheld. In response, the Council disagreed with the Opinion, and sought also to rely upon the exemption in section 35(1)(g) of FOISA when withholding the information under consideration.
24. I also provided copies of the Opinion, and sought comments on this from a range of bodies that had an interest in the matters raised by this case, including the UK Government (the Department for Trade and Industry), the Office of Fair Trading, LACORS, (the Local Authorities Coordinating Office on Regulatory Services), the Scottish Consumer Council and the Information Commissioner (my counterpart responsible for enforcing the Freedom of Information Act 2000).

The Commissioner's analysis and findings

25. The primary exemption relied upon in withholding the information in this case is section 26(a).

Does the EA create a prohibition on disclosure?

26. Section 237(1) of the EA states that the provisions of section 237 apply only to information that is "specified information" as defined in section 238, and which relates to either the affairs of an individual or any business of an undertaking.. In order to determine whether the exemption in section 26(a) of FOISA has been correctly applied by the Council in this particular case, three separate questions must be addressed:
 - a) is the information requested by Dr Reid "specified information" for the purposes of the EA?
 - b) does the information relate to the affairs of an individual or any business of an undertaking?



- c) if the answers to both (a) and (b) are “yes”, does part 9 of the EA then prohibit its release?
27. In response to the first and second questions, I am satisfied that the requested information is specified information for the purposes of the EA, and that it relates to the business of an undertaking, namely that of the company. Dr Reid has requested information about a named company that has been gathered by the Council in the pursuit of its statutory functions under consumer legislation referred to in section 238 of the EA. This concurs with the view taken by the Council that the information is specified information, given that it is held by it with regard to its wide consumer protection function, the function of identifying problem traders and of taking possible enforcement action.
28. The question of whether the provisions of Part 9 of the EA create a prohibition on disclosure for the purposes of section 26(a) of FOISA has been the subject of a recent judgement of the Court of Session. This can be read online here: <http://www.scotcourts.gov.uk/opinions/2008CSIH12.html>.
29. The Court concluded that in this case the provisions contained in Part 9 of the EA do create a prohibition on disclosure for the purposes of section 26(a) of FOISA.
30. In line with the Court’s judgement (and for the reasons set out in the judgement), I find that the exemption in section 26(a) was correctly applied by the Council in this case.
31. As I have concluded that all the information requested by Dr Reid is exempt under the terms of section 26(a) of FOISA, it is not necessary for me to consider the application of the exemption in section 35(1)(g) of FOISA to this information.

Decision

I find that Dumfries and Galloway Council (the Council) acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) when responding to Dr Reid’s request for information.

In particular, I have concluded that the information requested by Dr Reid was appropriately withheld by the Council on the basis that it was exempt from disclosure under the terms of section 26(a) of FOISA. I therefore do not require any steps to be taken in response to this decision.



Appeal

Should either Dr Reid or the Council wish to appeal against this decision, there is an 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 notice.

Signed on behalf of Kevin Dunion, Scottish Information Commissioner, under delegated authority granted on 14 November 2007.

Margaret Keyse
Head of Investigations
28 February 2008



APPENDIX

Relevant statutory provisions

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.

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 –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - ...
 - (b) section 26

26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment