

Decision Notice 036/2020

Businesses in Scotland 2018: publicly owned companies

The Applicant

Public authority: The Scottish Ministers

Case Ref: 201901228



Scottish Information
Commissioner

Summary

The Ministers were asked for the names of the companies which appeared as statistics in the Businesses in Scotland Report 2018.

The Ministers withheld the information on the basis that disclosure was prohibited by other legislation. Following an investigation, the Commissioner agreed with the stance taken by the Ministers. He also found that the Ministers had provided reasonable advice and assistance to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(b) (Effect of exemptions); 6(1) (Publicly-owned companies); 15(1) (Duty to provide advice and assistance); 26(a) (Prohibitions on disclosure)

Statistics of Trade Act 1947 (the 1947 Act) section 9(1) and (6)

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

1. On 26 April 2019, the Applicant made a request for information to the Scottish Ministers (the Ministers). The Applicant made the following request:
I have read the tables in your recent statistical publication 'Business in Scotland 2018' and I am interested in the names of publicly owned companies. In the attached tables there are statistics rather than the names of the companies publicly owned in 2018. Can you provide me with the names as you have produced the statistical analysis?
If you wish to seek clarification then I am content to be contacted by email or just phone me.
2. The Ministers responded on 29 April 2019 and advised the Applicant that disclosure of the names of the companies was prohibited under the Statistics of Trade Act 1947 (the 1947 Act). The Ministers did not apply any exemption or give the Applicant notice of her right to seek a review under FOISA.
3. On 3 May 2019, the Applicant wrote to the Ministers requesting a review of their decision.
4. The Ministers notified the Applicant of the outcome of their review on 23 May 2019. They confirmed their original decision and advised the Applicant that the names of the companies were exempt under section 26(a) of FOISA because of the prohibition in the 1947 Act.
5. Noting that she was specifically interested in publicly owned companies which were subject to FOISA, the Ministers also advised the Applicant that they did not hold a comprehensive list of publicly owned companies under section 6(1) (Publicly-owned companies) of FOISA. However, they did provide the Applicant with a website link to a directory where a summary of key information on Scotland's national devolved bodies could be found.
6. On 22 July 2019 (and clarified on 5 August 2019), the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that she was

dissatisfied with the outcome of the Ministers' review because she felt that the information should be in the public domain and that an annual list of publicly owned companies was necessary for the public, journalists and NGOs to access their right under FOISA.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to him for a decision.
8. On 8 August 2019, the Ministers were notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
9. 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 and to answer specific questions. These related to the Ministers' application of section 26(a) of FOISA and to the level of advice and assistance given to the Applicant with her request.
10. The Applicant was also asked for any further submissions that she wished to make. Submissions were received from both the Applicant and the Ministers.
11. On 20 September 2019, the Ministers advised the investigating officer that they considered it more appropriate to rely on section 17(1) of FOISA (Notice that information is not held) in this case. They explained that they now interpreted the Applicant's request as asking for a comprehensive list of all publicly owned companies in Scotland, as defined under section 6(1) of FOISA. The Ministers do not hold such a list.
12. However, the Applicant confirmed, on 25 October 2019, that she was in fact only looking for the names of those companies which had been represented statistically in the Business in Scotland 2018 statistical publication¹ (BiS) and not a comprehensive list of all publicly owned companies in Scotland.
13. The Ministers therefore stated that they wished to revert to their previous reliance on section 26(a) of FOISA.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Section 26(a) - Prohibitions on disclosure

15. Under section 26(a) of FOISA, information is exempt information if its disclosure by a Scottish public authority is (otherwise than under FOISA) prohibited by or under an enactment.
16. This is an absolute exemption, in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA.

¹ <https://www.gov.scot/news/businesses-in-scotland-2018/>

Submissions from the Ministers

17. In this case, the Ministers argued that such a prohibition was created by section 9(1) of the 1947 Act (see Appendix 1).
18. The Ministers explained that they obtain the information they use in their BiS reporting from the Office of National Statistics (ONS). The BiS is periodically updated when ONS provides updated information.
19. The Ministers provided the Commissioner with a copy of their Data Access Agreement with the ONS, which prevents disclosure of any information that would be likely to identify an individual or organisation, unless specifically agreed with the person or organisation.
20. The Ministers went on to explain that the BiS data is sourced from the Inter-Departmental Business Register (IDBR). The IDBR is a database of businesses/organisations that is maintained by the ONS. The ONS carries out surveys under the terms of the 1947 Act, to keep the IDBR up to date in terms of business structure and key metrics such as employment and turnover. The names of all private sector and public sector businesses/organisations are provided to the Ministers as part of the IDBR data transfer from the ONS.

Section 9(1) of the 1947 Act

21. Section 9(1) of the 1947 Act provides (among other things) that no information relating to an individual undertaking obtained under the 1947 Act may be disclosed without the previous consent, in writing, of the person carrying on the undertaking, subject to limited exceptions. Disclosure contrary to section 9(1) is a criminal offence (see section 9(6)). The exceptions are:
 - (i) disclosure by one government department to another (or to the Scottish Ministers) for the purpose of exercising their functions (section 9(1)(a))
 - (ii) disclosure by the Scottish Ministers to a government department for the purpose of exercising its functions (section 9(1)(aa)), or
 - (iii) for the purposes of any proceedings for an offence under the 1947 Act or a report of those proceedings (section 9(1)(b)).
22. For the avoidance of doubt, the Ministers stated that they considered that disclosing the names of individual undertakings (and, by necessary implication, the fact that a given undertaking was wholly owned by either the Scottish Ministers or a Scottish public authority listed in schedule 1 to FOISA) would involve disclosing information which related to an individual undertaking and which had been obtained under the 1947 Act. They submitted that section 9(1) was therefore engaged.
23. The Ministers did not consider that any of the exceptions set out in section 9(1) would be satisfied by disclosure to the Applicant. Disclosure of the information to the Applicant would not constitute disclosure by a government department to another department or to the Scottish Ministers, or disclosure by the Ministers to a government department (section 9(1)(a) and (aa)). Nor would it be for the purposes of proceedings for an offence under the 1947 Act or reporting on such proceedings (section 9(1)(b)).
24. The only remaining exception would entail obtaining consent in writing from the person carrying on each affected undertaking to the disclosure of the information. The Ministers stated that obtaining consent from all of the parties concerned would not be practicable,

particularly given the requirement to respond to the request for information promptly, and not later than the twentieth working day.

Submissions from the Applicant

25. The Applicant did not provide any arguments as to why section 26(a) of FOISA did not apply in this case. She provided a number of compelling arguments outlining why she felt it to be in the public interest for the information to be disclosed. However, as noted above, the exemption in section 26(a) of FOISA is not subject to the public interest test.

The Commissioner conclusions on 26(a) of FOISA

26. The Commissioner accepts that this is information of a description covered by section 9(1) of the 1947 Act. He also accepts that section 9(1) creates a prohibition on the disclosure of information that engages section 26(a) of FOISA.
27. He agrees that it would not have been reasonably practicable for the Ministers to have sought written consent for disclosure from all of the parties involved.

Section 15(1) – Duty to provide advice and assistance

28. Under section 15(1) of FOISA, a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
29. During the investigation, the Applicant stated that neither the Ministers nor the Commissioner had provided her with advice or assistance as to where a complete list of publicly owned Scottish companies under section 6 of FOISA could be sourced. She later qualified this by stating that she was of the view that “at least a partial list” must be held by the Ministers and/or the Commissioner.

Advice and assistance provided by the Ministers

30. The Commissioner notes that the Applicant had previously confirmed that her request of 26 April 2019 was only for a list of those companies which were statistically represented in the BiS 2018 and not for a complete list of publicly owned companies under section 6 of FOISA.
31. Although, in her request of 26 April 2019, the Applicant asked the Ministers to contact her if they needed clarification, the wording of the request was clear and there was nothing to suggest that clarification was necessary or that the Applicant was looking for a fuller list of publicly owned companies.
32. However, following a telephone call from the Applicant, during which the Ministers established that the Applicant’s primary interest was in a full list of publicly owned companies, the Ministers advised the Applicant that they did not hold a comprehensive list of all publicly owned bodies in Scotland as per the definition set out in section 6 of FOISA, but provided her with information which would go some way towards her information needs.
33. The Ministers considered that the provision of this information fulfilled their duties under section 15(1) of FOISA.

The Commissioner’s conclusions on 15(1) of FOISA

34. The Commissioner is satisfied that the Ministers provided reasonable advice and assistance to the Applicant. As noted above, the request itself was clear and did not need further clarification. When, at a later stage, the Applicant made it known that her interest was in

obtaining a full list of publicly owned companies, the Ministers explained it did not hold such a list but gave information which could help the Applicant.

Additional comments

35. Clearly, a decision which considers whether the Ministers complied with FOISA in responding to the request from the Applicant is not the place to consider whether the Commissioner separately complied with the duty to provide reasonable advice and assistance. However, as useful background as to whether the Ministers complied with their duty to advise and assist, it is relevant that, during the investigation, in response to an information request from the Applicant, the Commissioner provided the Applicant with the list of Scottish publicly owned companies held on his case management system. This information is not exempt from disclosure under section 26(a) of FOISA as it was not obtained by the Commissioner under the 1947 Act.
36. When responding, the Commissioner emphasised that this list was not an accurate representation of how many publicly owned bodies under section 6 of FOISA are in existence: such a list would be constantly evolving as new companies come on to the list and companies which are no longer in business drop off.

Decision

The Commissioner finds that the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant 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.

Margaret Keyse
Head of Enforcement

20 February 2020

Appendix 1: 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.

...

- (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 –

- (a) the provision does not confer absolute exemption; and

...

- (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

...

6 Publicly-owned companies

- (1) A company is a "publicly-owned company" for the purposes of section 3(1)(b) if it is wholly owned-

- (a) by the Scottish Ministers; or

- (b) by any other Scottish public authority listed in schedule 1, other than an authority so listed only in relation to information of a specified description.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

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;

...

Statistics of Trade Act 1947

9 Disclosure of information.

- (1) No individual estimates or returns, and no information relating to an individual undertaking, obtained under the foregoing provisions of this Act, shall, without the previous consent in writing of the person carrying on the undertaking which is the subject of the estimates, returns or information, be disclosed except –
 - (a) where the estimates, returns or information are in the possession of a government department and the Minister in charge of the department so directs, to a government department or the Scottish Ministers for the purposes of the exercise by the department or, as the case may be, the Scottish Ministers of any of their functions,
 - (aa) where the estimates, returns or information are in the possession of the Scottish Administration and the Scottish Ministers so direct, to a government department for the purposes of the exercise by the department of any of their functions,
 - (b) for the purposes of any proceedings for an offence under this Act or any report of those proceedings.

...

- (6) If any person discloses any individual estimates or returns or any information contrary to the provisions of this section, or of any order made under this section, he shall be liable, on summary conviction, to imprisonment for a term not exceeding three months or to a fine not exceeding the prescribed sum, or on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or, in either case, to both such imprisonment and such a fine.

...

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