



Scottish Information
Commissioner

**Decision 217/2006 Dr Donald Reid and West
Dunbartonshire Council**

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

**Applicant: Dr Donald Reid
Authority: West Dunbartonshire Council
Case No: 200502423
Decision Date: 5 December 2006**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 217/2006 Dr Reid and West Dunbartonshire 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 – whether release would, or would be likely to, prejudice substantially the commercial interests of any person – section 33(1)(b) – whether disclosure of personal information would breach any of the Data Protection Principles – section 38(1)(b) read in conjunction with section 38(2)(a)(i)

Facts

Dr Reid wrote to West Dunbartonshire Council (the Council) requesting information relating to complaints made to the Consumer and 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 26(a) of the Freedom of Information (Scotland) Act 2002 (FOISA), because Part 9 of the Enterprise Act 2002 contained a prohibition on disclosure. The Council later upheld this decision following an internal review. Dr Reid then asked the Commissioner to consider this case. In the course of the investigation, the Council submitted that the information was also exempt under section 33(1)(b) of FOISA, and that the public interest in maintaining this exemption outweighed that in release. The Council also maintained that disclosure of the names of individuals in response to Dr Reid's request would breach the first data protection principle, and so this information was exempt under the terms of section 38(1)(b) of FOISA read in conjunction with section 38(2)(a)(i).

Outcome

The Commissioner found that the Council had failed to act in accordance with Part 1 of FOISA in refusing to supply the information requested by Dr Reid. The Commissioner concluded that provisions within Part 9 of the Enterprise Act 2002 did not constitute a prohibition on disclosure for the purposes of FOISA, and therefore the exemption in section 26(a) did not apply. The Commissioner also found that the exemption in section 33(1)(b) did not apply in this instance.



However, the Commissioner found that disclosure of the names of any individual employees of the company against whom complaints had been made would lead to a breach of the first data protection principle. He therefore accepted that the names of such individuals were exempt from disclosure under the terms of section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i)).

The Commissioner did not consider that the disclosure of the name of any director of the company against whom a complaint had been made would entail a breach of the first data protection principle, and so he concluded that the names of any directors complained about were not exempt from disclosure.

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 of receipt of this notice.

Background

1. This decision concerns the handling of a request for information concerning complaints made to the Trading Standards Services of West Dunbartonshire Council (the Council). 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. While the general issues raised by these cases were investigated together, separate decisions set out the particular circumstances of each case, and the submissions made by the relevant authority.

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. Section 26(a) of FOISA (below) makes information exempt from release under FOISA where disclosure by a public authority is prohibited by any legislation or statutory provision.

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.

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 23 February 2005, in response to this request. This confirmed that the Council held relevant information, but stated that it was subject to the absolute exemption in section 26(a) of FOISA. The Council stated that the information requested was specified information for the purposes of EA, and that disclosure of such information was prohibited by Part 9 of EA.
14. Dr Reid then wrote to the Council seeking a review of the decision to withhold the information he had requested. The request for review, in a letter dated 28 February 2005, suggested that the Council had failed to have regard to provisions within section 244 of EA when considering the request.
15. The Council's response to this request, dated 30 March 2005 upheld the initial decision in full.

Investigation

16. Dr Reid's application for decision 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.
17. The appeal concerning West Dunbartonshire 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 appealed to me only after asking the Council to review the response to his request.
18. 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 provisions within Part 9 of the EA created a prohibition on disclosure for the purposes of section 26(a) of FOISA.
19. In December 2005, I sought the advice of Senior Counsel on the question of whether Part 9 of the EA creates a prohibition on disclosure that engages section 26(a) of FOISA. In particular, I requested guidance on the interpretation of sections 237(2), 237(6) and 241(1) and 244 of the EA.



20. The conclusion of Senior Counsel was that Part 9 of the EA did not create a prohibition on disclosure for the purposes of FOISA, and therefore that section 26(a) did not apply.
21. Following the receipt of this advice, copies were provided to both Dr Reid and the Council, and further submissions were invited. I also asked the Council to confirm whether, in the light of this advice, it believed any further exemptions in Part 2 of FOISA applied to the information requested by Dr Reid.
22. In response, the Council confirmed that it still considered the information to be exempt under section 26(a) of FOISA, and explained why it disagreed with the advice of Counsel. The Council suggested that Counsel's interpretation of section 237(6) of the EA was not the same as that contained within the Explanatory notes to the EA. The Council also questioned whether, under section 241(1) of the EA, compliance with FOISA should be considered a function of a local authority. Instead, it suggested that while a local authority has an obligation to comply with FOISA, this cannot be said to be a function of that authority.
23. The Council also submitted that it now considered the information requested by Dr Reid to be exempt from release under section 33(1)(b) of FOISA, which applies where release would, or would be likely to, prejudice substantially the commercial interests of any person. Finally, the Council informed me that where individual members of staff were named in relation to particular complaints, these names should be considered exempt under the terms of section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(ii).
24. I have taken all of the Council's comments into consideration in reaching my conclusions set out below.
25. Before reaching a final decision on this matter, I also invited comment 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). Although I will not list all comments that were made in the course of this investigation, I welcome and have noted the points made by these organisations and I have taken them into consideration in reaching my decision on this case.
26. I have also noted a recent decision by the Information Commissioner in which he expressed the view that Part 9 of the EA creates a prohibition on disclosure for the purposes of the exemption in section 44(1)(a) of the Freedom of Information Act 2000, which is framed in near-identical terms to that contained in section 26(a) of FOISA.



The Commissioner's analysis and findings

27. The primary exemption relied upon in withholding the information in this case is section 26(a). I will first consider whether this exemption was correctly applied, before turning to the exemptions in sections 33 and 38 of FOISA.

Does the EA create a prohibition on disclosure?

28. Part 9 of the EA applies only to information that is “specified information”, as defined in section 238. In order to determine whether the exemption in section 26(a) of FOISA has been correctly applied by the Council in this particular case, two separate questions must be addressed:
- a) is the information requested by Dr Reid “specified information” for the purposes of the EA?
 - b) if it is, does part 9 of the EA then prohibit its release?
29. In response to the first question, I am satisfied that the requested information is specified information for the purposes of the EA. Dr Reid has requested information 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 functions under Part 8 of the EA and other specified functions.
30. I now turn to the second question. Sections 237 (1) and (2) of the EA state:
- (1) This section applies to specified information which relates to –
 - (a) the affairs of an individual;
 - (b) any business of an undertaking.
 - (2) Such information must not be disclosed –
 - (a) during the lifetime of the individual, or
 - (b) while the undertaking continues in existence,unless the disclosure is permitted under this Part.
31. This is quite clear. If no mechanism exists within Part 9 of the EA that would allow disclosure, then specified information must not be released. I must consider the remaining provisions of Part 9 to confirm whether any of the gateways allowing disclosure apply where a request has been made under FOISA.



32. Having considered the gateways as set out in paragraph 9 above, I have reached the conclusion that section 237(6) does allow disclosure following a request under FOISA. This states:
- (6) This Part (except section 244) does not affect any power or duty to disclose information which exists apart from this Part.
33. I understand the effect of this subsection (intended or otherwise) to be to subordinate the restrictions on disclosure of specified information contained within Part 9 of the EA to any duty or power that exists through rules found somewhere other than in Part 9 of the EA. To interpret section 237(6) in this way is, I believe, to give it its ordinary and natural meaning. The subsection does not merely say that Part 9 does not affect any power or duty to disclose information which exists because of provisions contained in some other part of the EA. While the subsection could have been limited in that way, Parliament has not done so. I do not find this interpretation of section 237(6) of FOISA to be incompatible with that set out in paragraph 596 of the explanatory notes to the EA (available online here: <http://www.opsi.gov.uk/acts/en2002/02en40-j.htm>)
34. Thus, if FOISA creates either a duty or a power to disclose information, it will override the provisions of Part 9 of the EA, and no prohibition on disclosure will exist where a request for information is made under FOISA and the information is not exempt under one of the exemptions contained in Part 2 of FOISA (or the information request does not have to be complied with because of rules set down in FOISA relating to, for example, vexatious or repeated requests).
35. I must then ask whether FOISA creates a power or duty to disclose information. Section 1(1) of FOISA creates a right to access information, stated in the following terms:
- “A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.”
36. This clearly obliges authorities to provide that information. If there was no duty corresponding to the right contained in section 1 then it would be meaningless. In addition, FOISA refers to things which an authority “shall” or “must” do when a request for information is received (e.g. comply within a certain time, provide advice and assistance to an applicant and issue one of the appropriate notices when responding to a request). I am therefore of the view that FOISA imposes a duty to disclose information on public authorities and therefore qualifies as a duty to disclose information for the purposes of section 237(6) of the EA.



37. If there is a duty to disclose under FOISA, then the effect of section 237(6) of the EA is that this duty is unaffected by the prohibition in section 237(1) and (2).
38. I am aware that bodies such as the Department of Trade and Industry and the Department of Constitutional Affairs are firmly of the view that both the intention and effect of Part 9 of the EA is that it creates a prohibition on disclosure that prevents release of specified information in response to an information request under either FOISA or the Freedom of Information Act 2000. However, giving section 237(6) its ordinary and natural meaning, I have not found it possible to interpret the EA in this manner.
39. As mentioned in paragraph 9 above, there is a further gateway to disclosure contained in section 241(1) of the EA. This states:
 - (1) A public authority which holds information to which section 237 applies may disclose that information for the purpose of facilitating the exercise by the authority of any function it has under or by virtue of this Act or any other enactment.
40. While I do not find it necessary, given the result of my consideration of section 237(6), to discuss the effect of section 241(1) of the EA in great detail in this decision, I take the view that it could be argued that it is a function of a Scottish public authority to provide information in response to a request made under FOISA. A function, to my mind, conveys the notion of a duty peculiar to an office or job or to an activity appropriate to a person. As I have decided above, a Scottish public authority has a duty to comply with requests made to it under FOISA and the reference in section 241(1) to “any function” under “any other enactment” would appear to be wide enough to cover the duty under FOISA to comply with information requests.
41. As a result, it can be argued that the effect of section 241(1) of the EA is to permit Scottish public authorities to disclose “specified information” in response to requests made under FOISA. The effect of the provision, as with the effect of section 237(6), is such that there could not be said to be a prohibition constituted by Part 9 of the EA for the purposes of section 26(a) of FOISA.
42. In the light of the above observations, I conclude that Part 9 of the EA can only be interpreted in a way that enables disclosure in line with the requirements of FOISA. I do not find that the EA creates a prohibition on disclosure for the purposes of FOISA, and therefore I find that the exemption in section 26(a) has been wrongly applied in this case.



The effect of section 244 of the EA

43. I would also like to comment briefly on the effect of section 244 of the EA. This reads as follows:

- (1) A public authority must have regard to the following considerations before disclosing any specified information (within the meaning of section 238(1)).
- (2) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest.
- (3) The second consideration is the need to exclude from disclosure (so far as practicable) –
 - (a) commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or
 - (b) information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests.
- (4) The third consideration is the extent to which the disclosure of the information mentioned in subsection (3)(a) or (b) is necessary for the purpose for which the authority is permitted to make the disclosure.

44. This section continues to apply alongside the duty to release under FOISA. However, I note that it has little practical relevance when considering a request for information under FOISA. The obligation for public authorities to “have regard” to the various specified considerations can have an effect only where the person considering release or otherwise has some discretion. Under FOISA, information must be released unless an exemption applies. Therefore, the only relevant considerations when addressing whether or not specified information should be released in response to a request under FOISA are those set out in Part 2 of FOISA (and any other provision of FOISA which sets aside the duty to release information such as those dealing with vexatious or repeated requests).

Conclusion on the application of section 26(a) of FOISA

45. I conclude that the information requested by Dr Reid is not exempt from release under section 26(a) of FOSIA. I find that the provisions of Part 9 of the EA have no effect on the right to access information set out in section 1(1) of FOISA, and the corresponding duty on public authorities to supply information in response to requests made under its terms.



46. Despite the terms of section 244 of the EA, I have found that when specified information is the subject of a request under FOISA the only relevant considerations are those set out in Part 2 of FOISA, which defines the various categories of exempt information. If no exemption within Part 2 of FOISA applies (or if there is no provision which sets aside the duty to release information, such as those dealing with vexatious or repeated requests), then the public authority has no discretion in relation to its duty to supply information in compliance with Part 1 of FOISA.

Is the requested information exempt under section 33(1)(b) of FOISA?

47. When asked to consider whether further exemptions applied to the information requested by Dr Reid, the Council submitted that section 33(1)(b) applied to this information.
48. In terms of section 33(1)(b), information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). The exemption is subject to the public interest test required by section 2(1)(b) of FOISA.
49. Certainly, this exemption is one which might be appropriately invoked in circumstances where disclosure of information relating to trading standards activities would reveal information that would, or would be likely to, harm substantially a trader's ability to continue to engage in its commercial activities.
50. Trading standards departments generate and gather considerable amounts of information about traders in the course of their work, and it is important to the continued effective operation of these functions that traders do not fear that damaging information will be routinely released.
51. However, the nature of the particular information must be considered when determining whether the test of substantial prejudice in section 33(1)(b) of FOISA is met. In this case, Dr Reid has sought broad information about complaints about a particular company, including the date, nature and outcome. He has not asked what action was taken in response to particular complaints, to see communications between the Council and the trader, or the details of the complainants' specific concerns.
52. The Council's submission on this exemption noted that bad or adverse publicity could create a situation where there could be a prejudicial effect on a company. The Council also noted that the cumulative effect of release of the information by all Councils to which Dr Reid's request was made could be substantially prejudicial in relation to the commercial viability of the company in question.



53. In considering the application of this exemption, I have considered the likely effect both of release by this one Council, and of wider release of information relating to complaints by other trading standards departments around Scotland. In doing so, I have the benefit of hindsight, and can see that release by a number of other local authorities appears not to have led to bad publicity, or any apparent change in the standing of the company to which Dr Reid's requests relate.
54. I also note that by some simple searching on the internet, it is relatively easy to find examples of consumers expressing their dissatisfaction with their experience of using this particular company. The fact that such information can be found creates an expectation that at least some complaints might have been made to local authorities. Therefore, the release of information that confirmed the number, (broad) nature and outcome of those made to the Council would not, in my view, create any greater potential for negative publicity than is already in the public domain.
55. Having considered the particular information requested by Dr Reid, I have concluded that the exemption in section 33(1)(b) does not apply in this case. As I have found that this exemption does not apply, there is no need for me to consider whether the public interest in maintaining this exemption outweighs that in disclosure of the information.

Is any information exempt under section 38(1)(b) of FOISA?

56. I finally turn to consider whether details of any individual members of the company's staff who are named in relation to complaints to the Council should be released in response to Dr Reid's request. The Council has only cited the exemption in section 38(1)(b) in relation to the names of individual employees. However, for the sake of completeness I will also consider below the question of whether this exemption should be applied to the names of any named directors against whom complaints have been made.
57. I should first of all note that Dr Reid's request only seeks the names of individual employees or directors where these are the subject of a complaint. I do not consider the names of individuals to fall under the scope of Dr Reid's request where they are named in the Council's records as a result of their simple association with a transaction that has led to a complaint, or where it is not clear from the information held that the complaint to the Council is (in part) a complaint about that individual's conduct.
58. Under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i)), information is exempt information if it constitutes personal data and the disclosure of the information to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the Data Protection Act 1998 (DPA).



59. In this case, the Council has suggested that the release of the names of individual employees against whom complaints had been made would be unfair. I understand this to mean that the Council believes release would breach the first data protection principle, which states that personal data shall be processed fairly and lawfully.
60. I am therefore required to consider two separate matters: firstly, whether the information naming individuals in relation to complaints about the company is personal data and, if so, whether the release of the information to Dr Reid would breach the first data protection principle.
61. “Personal data” is defined in section 1(1) of the DPA as “data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”
62. The definition of what amounts to “personal data” for the purposes of the DPA was considered in the case of *Durant v Financial Services Authority* [2003] EWCA Civ 1746. In that case, the (English) Court of Appeal decided that whether or not data constituted “personal data” for the purposes of the legislation depended on the relevance or proximity of the data to the data subject. The court considered that the information required to be biographical in a significant sense and that the information should have the subject as its focus.
63. I agree that the names of both individual employees and directors specified in relation to complaints to the Council that fall under the scope of Dr Reid’s request are personal data for the purposes of DPA.

Would disclosure of the names of individual employees breach the first data protection principle?

64. The first data protection principle states that personal data must be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 of the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met. (I have considered the definition of “sensitive personal data” in section 2 of the DPA and do not consider that any of the information sought by Dr Reid falls into this category.)
65. In its comments to my Office, the Council has noted in particular that the people named in relation to complaints are named in their capacity as employees of the company, and not as public sector employees. The Council has noted that there is a greater expectation of disclosure where public sector employees are named in relations to actions in the course of their work.



66. According to guidance from the Information Commissioner (“Freedom of Information Awareness Guidance 1”, which can be viewed at <http://www.ico.gov.uk/documentUploads/AG%201%20personal%20info.pdf>), the assessment of fairness includes looking at whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private.
67. In the context of the information requested by Dr Reid, it is not possible to determine whether any complaint about an individual was warranted or otherwise. However, disclosure of their name could, rightly or wrongly, affect their professional standing and privacy.
68. I have concluded, in the light of the above observations, that disclosure of the names of the employees against whom complaints were made would be unfair and that a breach of the first data protection principle would follow should the names be disclosed in response to Dr Reid’s request. Therefore, I agree with the Council that these names are exempt from release under section 38(1)(b), read in conjunction with section 38(2)(a)(i) of FOISA.
69. However, I do not believe that there would be a breach of any of the data protection principles should the Council disclose the name of any named director of the company against whom a relevant complaint had been made. The identity of any director of a company is publicly available from Companies House, and a company’s directors collectively act as the representatives of that company. As such, I consider the expectation of privacy for a company director in relation to their professional activity to be less than for individual company employees and that disclosure of their names would be fair.
70. As noted above, I am also required to consider whether any of the conditions in Schedule 2 can be met. Condition 6 of Schedule 2 permits processing to take place if the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
71. I must therefore be satisfied that Dr Reid has a legitimate interest in seeking this information and, if so, must weight up that legitimate interest against the rights of the data subjects, in this case the directors, about whom complaints have been made. I must also be satisfied that the disclosure of the information is necessary for the purposes of the legitimate interests pursued by Dr Reid.



72. I am satisfied that there is a legitimate interest in finding out details of complaints against directors of a particular company offering services to the public and that, accordingly, Dr Reid has a legitimate interest in this information. Given the public role which directors play in the running of a company, I do not consider the processing would be unwarranted in this particular case.
73. I have also considered the question of necessity and whether Dr Reid's interests might be met equally effectively by any alternative means. There does not appear to me to be any route for Dr Reid to obtain this information except by making an information request under FOISA and, in all the circumstances, I have concluded that disclosure of the personal data is necessary for the purposes of Dr Reid's legitimate interests.
74. The Council did not argue that the release of the information would be unlawful (except in relation to section 26 and I have discounted that argument above). I am satisfied that the release would be lawful, inasmuch as a condition in Schedule 2 can be met.
75. Given that I am satisfied that the disclosure would be fair, lawful and is permitted by a condition in Schedule 2 to the DPA, I am satisfied that the release of the names of the directors would not breach the first data protection principle.
76. For any complaint that names an individual employee, the Council should withhold this name, and specify only that the complaint had been made in relation to an employee. All other information about this complaint requested by Dr Reid should be provided. Where a complaint relates to a director of the company, the name of the director should be specified within the information supplied to Dr Reid.

Decision

I find that West Dunbartonshire Council (the Council) failed to deal with Dr Reid's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA).

In particular, I have concluded that it misapplied section 26(a) and section 33(1)(b) of FOISA to the information withheld and, therefore, that the Council failed to deal with the application properly in terms of section 1(1) of FOISA.



I agree with the Council that the names of any individual employees that fall under the scope of Dr Reid's request are exempt from release under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i). Although not argued by the Council, I confirm that I do not consider the names of any directors of the company that fall under the scope of Dr Reid's request to be exempt under section 38(1)(b) of FOISA.

I now require the Council to supply to Dr Reid the information he has requested, as described in paragraph 12 of this decision. Where an individual employee (other than a company director) is named as the subject of a complaint, this name should not be supplied. Instead, the information supplied to Dr Reid should simply confirm an employee of the company was the subject of the complaint. Where a complaint relates to a director of the company, the name of this person should be supplied along with other relevant details about the complaint.

I require this information to be provided to Dr Reid within 2 months of the date of receipt of this decision.

Kevin Dunion
Scottish Information Commissioner
5 December 2006