



Scottish Information
Commissioner

**Decision 088/2007 Mr Alan Keith, Chairman of the
Association of Dumfries and Galloway
Accommodation Providers**

*Contracts between VisitScotland and visitscotland.com (eTourism
Ltd)*

**Applicant: Mr Alan Keith, Chairman of the Association of
Dumfries and Galloway Accommodation Providers
Authority: VisitScotland
Case No: 200503319
Decision Date: 20 June 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 088/2007 Mr Alan Keith, Chairman of the Association of Dumfries and Galloway Accommodation Providers and VisitScotland

Contracts between VisitScotland and visitscotland.com (eTourism Ltd) – information withheld – Commissioner found that Visit Scotland had failed to comply with the requirements of Part 1 of FOISA in responding to Mr Keith’s information request – disclosure of information required.

Relevant statutory provisions and other sources

Freedom of Information Scotland Act 2002 (FOISA) sections 1(1) (General entitlement), 36(2) (Confidentiality)

Facts

Mr Keith asked the Scottish Tourist Board (then generally known as VisitScotland, which is now the body’s legal name – it is described throughout this decision as VisitScotland) to supply full details of current and previous contracts between VisitScotland and visitscotland.com (eTourism Ltd). VisitScotland provided copies of some relevant contracts, but refused to supply others on the basis that these were exempt under the terms of section 36(2) of FOISA.

The Commissioner found that VisitScotland had failed to act in accordance with Part 1, and particularly section 1(1), of FOISA by refusing to supply copies of the contracts between VisitScotland and eTourism Ltd to Mr Keith. The Commissioner found that disclosure of these would not constitute an actionable breach of confidence.

In order to comply with Part 1 of FOISA, the Commissioner required VisitScotland to provide the information it had withheld from Mr Keith.



Background

1. The visitscotland.com web portal and booking service is operated as a public private partnership by eTourism Ltd (eTourism), a joint venture company established in 2002. eTourism's shareholders include TourCo Ltd, a company set up by VisitScotland and participating Area Tourist Boards (ATBs) for the purposes of becoming a shareholder in eTourism. (The Area Tourist Boards have since ceased to exist separately and become part the unified VisitScotland network). Other shareholders in eTourism were initially Partnerships UK plc and Sema UK Ltd. Atos Origin IT Services UK Ltd later acquired Sema UK Ltd, and with this also purchased Sema's interest and investment in eTourism Ltd. Tiscover later became a fourth shareholder in eTourism Ltd.
2. In 2002, eTourism entered into a series of contracts and agreements with VisitScotland and the (then) ATBs, which established the financial and operational arrangements for the visitscotland.com website and booking system, and established the relationship between the VisitScotland network and eTourism Ltd.
3. Mr Keith, Chairman of the Association of Dumfries and Galloway Accommodation Providers, wrote to VisitScotland on 29 September 2005, asking it to supply "full details of all current and previous contracts between VisitScotland and visitscotland.com (eTourism Ltd)".
4. On 12 October 2005, Mr Keith emailed VisitScotland noting that his request had been posted on 29 September and asking for confirmation of its receipt and when the information would be provided. A further email was sent on 4 November 2005 noting that no response had yet been received and more than 20 working days had passed since the request was first sent.
5. A subsequent email from VisitScotland noted that the initial letter appeared not to have been received, and confirmed that a response would be issued by 8 November. In the absence of evidence to confirm either the sending or receipt of this letter, I accept on the balance of probabilities that Mr Keith's initial request was not received by VisitScotland.
6. A response to Mr Keith's request was supplied on 8 November 2005, the 19th working day following the receipt of Mr Keith's email of 12 October. This provided copies of five contracts relevant to the request, but withheld others on the grounds that they were exempt under section 36 of FOISA. VisitScotland noted that these contained information provided by third parties and disclosure would entail an "actionable" breach of confidence on the part of VisitScotland.



7. Mr Keith emailed VisitScotland to request a review of this response in an email dated 9 November 2005. He noted that the Association of Dumfries and Galloway Accommodation Providers believed it to be essential that all details of these agreements be made known.
8. VisitScotland notified Mr Keith of the outcome of its review in a letter dated 7 December 2005. This upheld VisitScotland's initial refusal on the grounds of section 36 of FOISA.
9. Mr Keith then made an application for a decision in relation to this matter in a letter dated 13 December 2005, which was received by my Office on 19 December 2005.
10. In his application, Mr Keith provided background information about his case. He stated that accommodation providers had been affected since the inception of visitscotland.com in respect of the promotion of their businesses on that website, and by the booking system operated as a commercial venture by eTourism. He noted that providers, who in the past had been members of ATBs, believed that a duty of care existed within ATBs and VisitScotland when providing advice and guidance to members.
11. Mr Keith suggested that the nature of the agreement between VisitScotland and visitscotland.com might now mean that VisitScotland could no longer be expected to be impartial in its dealings with providers. In particular, he noted that it was believed that service agreements required VisitScotland to promote aspects of eTourism's business and act as agents for that company. Mr Keith submitted that the details of this agreement should be disclosed to allow businesses to assess under what circumstances advice and recommendations from VisitScotland could be trusted.
12. Mr Keith also noted that VisitScotland provided advertising for eTourism Ltd in regional accommodation and other guides. He noted that it was not clear whether these were paid for or included within the service agreement(s). He also submitted that it was also important to determine whether this advertising was paid for as its value was estimated to be greater than the de minimis level in respect of EC law relating to State Aid.
13. Mr Keith's case was allocated to an investigating officer. It was then validated by establishing that Mr Keith had made a valid information request to a Scottish public authority (i.e. VisitScotland) under FOISA and had appealed to me only after asking VisitScotland to review the response to his request.



Investigation

14. The investigating officer wrote to VisitScotland on 5 January 2006 informing it that an appeal had been received and that an investigation into the matter had begun. VisitScotland was invited to comment on the case in terms of section 49(3)(a) of FOISA. VisitScotland was also asked to provide copies of all contracts that had been withheld from Mr Keith, and details of its reasoning when applying the exemption in section 36(2) of FOISA. VisitScotland's response to this letter was received on 24 January 2006.
15. On 29 March 2006, the investigating officer made a request for further information and comments, particularly in the light of Mr Keith's comments on the case. VisitScotland's response to this further request was received on 1 June 2006.
16. In its second letter to my Office, VisitScotland indicated that in recognition of the public interest in this information, and having sought the consent of eTourism, it would be willing to release the Services Agreement between eTourism and the Scottish Tourist Board, the Schedule to this agreement and the Services Catalogue (which in turn forms part 5 of that Schedule), subject the striking out of certain financial details.
17. The investigating officer conveyed this offer to Mr Keith and asked him whether the disclosure of this information would be sufficient to satisfy his request. Mr Keith indicated that he would not be satisfied with this limited disclosure, and that he would still want my decision to consider whether the relevant information should be disclosed to him in full. My decision will therefore still address the question of whether the relevant agreements should be supplied to Mr Keith in full.
18. Further correspondence between the investigating officer and VisitScotland in relation to the application of section 36(2) ensued in May and June 2007.

The Commissioner's analysis and findings

19. In this case, VisitScotland initially claimed that all information it withheld in response to Mr Keith's request was exempt from disclosure under FOISA because its unauthorised disclosure would constitute an actionable breach of confidence. Having consulted with eTourism before responding to Mr Keith, consent to disclosure was not provided.



20. However, in the course of the investigation by my Office, VisitScotland did seek and gain the consent from visitScotland.com to the disclosure of some of the relevant information subject to the striking out of certain financial information. Having been granted authorisation for disclosure, disclosure of this information by VisitScotland would not constitute an actionable breach of confidence and VisitScotland is no longer seeking to apply the exemption in section 36(2) to this information. This information should therefore now be disclosed.
21. However, I must now consider whether the remaining information requested by Mr Keith (i.e. those contracts and parts thereof for which consent to disclosure has not been granted) should also be disclosed to him.
22. In terms of section 36(2) of FOISA, information is exempt information if it was obtained by a Scottish public authority from another person and its disclosure by the authority so obtaining it would constitute a breach of confidence actionable by that person or any other person.
23. The first test I must consider is whether the information concerned has been supplied by a third party to VisitScotland. In considering this matter, I have had regard to the recent decision by the Information Tribunal under the terms of the Freedom of Information Act 2000 (FOIA) in appeal number EA/2006/0014 between Derry City Council and the Information Commissioner.
24. Appeal number EA/2006/0014 concerned information contained in an agreement between Derry City Council and Ryanair, which was withheld under the terms of the exemption in section 41(1) of FOIA, which is framed in almost identical terms to that contained in section 36(2) of FOISA.
25. In paragraph 32(c) of its decision, the Information Tribunal considered whether information within a contract between two parties (where one is a public authority) might be considered to have been provided by a third party for the purposes of section 41(1) of FOIA. It concluded:

“It might be said that the effect of any contract is that each contracting party informs the other of the obligations which it will undertake and of its agreement to accept the counterparty's obligations in return. Such a two-way flow might be characterised as a process by which the public authority obtained information from the other party. However, we think that this imposes too great a strain on the language of the Act and that the correct position is that a concluded contract between a public authority and a third party does not fall within section 41(1)(a) of the Act.”



26. Having considered the Tribunal's decision, I agree with the view of the Information Tribunal and so would similarly not accept that terms of a contract that had been negotiated between a Scottish public authority and a third party had been provided to the Scottish public authority for the purposes of the exemption in section 36(2) of FOISA.
27. In May 2007, my office alerted VisitScotland to the Information Tribunal's decision and its relevance for my consideration of this case. VisitScotland was asked to provide details of the process by which the various contracts between VisitScotland and visitscotland.com were formed. In particular, VisitScotland was asked whether these contracts were the products of a process of negotiation or whether part or all of these should be considered to have been provided by a third party.
28. VisitScotland confirmed that the contracts were created by negotiation on the basis of a formal Invitation to Negotiate that was issued to tenderers by VisitScotland following a notice in the Official Journal of the European Communities. Draft documents were prepared by solicitors acting for VisitScotland and then adjusted through negotiation with the other parties to the agreements.
29. Visit Scotland confirmed that all information in the contracts had been supplied by the parties to the contracts. However, it did not indicate that any part of the contracts should be considered by me to have been provided by a third party in the light of my observations on the Information Tribunal's decision.
30. Having considered the Information Tribunal's decision in the light of the circumstances of this case, and having considered the further comments provided by VisitScotland on the preparation of the various agreements between itself and visitscotland.com, I am unable to conclude that these or the contents that VisitScotland is still seeking to withhold were provided by a third party for the purposes of section 36(2) of FOISA.
31. In these circumstances, the first test for the application of this exemption has not been met, and it is not necessary for me to go on to consider whether disclosure would entail a breach of confidence actionable by a third party.
32. I find that VisitScotland has incorrectly applied the exemption in section 36(2), and so has acted in breach of the requirements of section 1(1) of FOISA by withholding the remaining documents requested by Mr Keith.
33. I now require the remaining agreements to be supplied to Mr Keith in full



Decision

I find that the VisitScotland failed to in accordance with the requirements of Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr Keith's request for information.

I find that VisitScotland incorrectly applied the exemption in section 36(2) of FOSIA to the information withheld from Mr Keith. Therefore, VisitScotland breached section 1(1) of FOISA by refusing to disclose this information to Mr Keith.

I now require VisitScotland to provide the information withheld from Mr Keith in response to his information request within 45 days of the date of receipt of this decision.

Appeal

Should either VisitScotland or Mr Keith wish to appeal against my 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.

Kevin Dunion
Scottish Information Commissioner
20 June 2007



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.

36 Confidentiality

(1) [...]

(2) Information is exempt information if-

(a) it was obtained by a Scottish public authority from another person (including another such authority); and

(b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.