



Scottish Information  
Commissioner

**Decision 097/2007 Mr Gordon Colquhoun and VisitScotland**

*Price paid by [visitscotland.com](http://visitscotland.com) for advertising in VisitScotland publications*

**Applicant: Mr Gordon Colquhoun**

**Authority: VisitScotland**

**Case No: 200600783**

**Decision Date: 2 July 2007**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
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## Decision 097/2007 Mr Gordon Colquhoun and VisitScotland

***Price paid by visitscotland.com for advertising in VisitScotland publications – information withheld – Commissioner held that VisitScotland had failed to comply with the requirements of Part 1 of FOISA in responding to Mr Colquhoun’s information request – disclosure of information required.***

### Relevant Statutory Provisions and Other Sources

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

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

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

### Facts

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Mr Colquhoun requested a range of information from 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). This decision relates only to one part of his request, regarding sums paid by visitscotland.com for advertising in two specific publications. VisitScotland withheld this information on the basis that it was exempt from disclosure under the terms of section 36(2) of FOISA. This decision was upheld following an internal review by VisitScotland. Mr Colquhoun remained dissatisfied with VisitScotland’s responses and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that VisitScotland had failed to deal with Mr Colquhoun’s request for information in accordance with Part 1 of FOISA.. He found that the information withheld had not been provided to VisitScotland by a third party, and so the exemption in section 36(2) did not apply.

In order to comply with Part 1 and section 1(1) of FOISA, the Commissioner required VisitScotland to supply the information withheld from Mr Colquhoun.



## Background

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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 (alongside private sector shareholders) 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 of the unified VisitScotland network).
2. On 1 December 2005, Mr Colquhoun wrote to VisitScotland requesting a range of information relating to a number of websites linked to the visitscotland.com website, and financial information concerning the cost of advertising in certain publications.
3. Most of the information requested by Mr Colquhoun has been provided in full, and is not the subject of Mr Colquhoun's application or this decision. I will not detail these parts of the request or VisitScotland's responses to them.
4. This decision is concerned with the part of Mr Colquhoun's information request that asked
  - a) how much visitscotland.com paid for advertising in two named publications; and
  - b) how much any other commercial letting agency would have been charged for such advertising.The publications in question were the Dumfries and Galloway "Where to Stay 2005" guide and the Dumfries and Galloway "See and Do 2005" guide.
5. On 11 January 2006, VisitScotland emailed Mr Colquhoun in response to his request for information. VisitScotland also provided Mr Colquhoun with the pricing information for commercial letting agencies for advertising in the "Where to Stay" guide. However, it did not provide any response to the part of the request concerning the price paid by visitscotland.com for advertising in the two named publications. Also, no details were provided concerning advertising rates for the "See and Do" guide.
6. On 8 February 2006, Mr Colquhoun contacted VisitScotland by email. In this, he pointed out that VisitScotland had not responded to his request for charging rates for the "See and Do" guide. He also highlighted the fact that VisitScotland had failed to address his request regarding the sum paid by visitscotland.com for advertising in the guides. He requested a review of VisitScotland's decision as contained in its email of 11 January.



7. On 16 February 2006, VisitScotland wrote to notify Mr Colquhoun of the outcome of its review. VisitScotland acknowledged an oversight in the email of 11 January in relation to the advertising rates for the “See and Do” guide and the relevant information was provided to Mr Colquhoun.
8. In relation to the request concerning the amount paid by visitscotland.com for advertising in the relevant publications, VisitScotland advised Mr Colquhoun that the information was considered exempt in terms of section 36 of FOISA and was therefore being withheld.
9. VisitScotland explained that eTourism Ltd (trading as visitscotland.com) had been awarded a concession to manage the national tourism website and national contact centre on behalf of VisitScotland. It went on to explain that, as part of that concession, VisitScotland had made a commitment to promote these booking channels in its marketing activity. VisitScotland stated that details of these commitments were part of contractual arrangements for the joint venture which were subject to a confidentiality agreement with the other parties. VisitScotland stated that it considered that disclosure of the information therein would constitute an actionable breach of confidence, and so the information was exempt.
10. Mr Colquhoun wrote to my Office in a letter dated 12 April 2006, received in this Office on 18 April 2006, stating that he was dissatisfied with the outcome of VisitScotland’s review and applying to me for a decision in terms of section 47(1) of FOISA.
11. In his application, Mr Colquhoun stated that he believed visitscotland.com did not pay anything for advertisements placed in local accommodation and visitor guides. He suggested that, if this was the case, visitscotland.com would be in receipt of an unlawful subsidy under EU law relating to state subsidies.
12. The application was validated by establishing that Mr Colquhoun had made a request for information to a Scottish public authority (VisitScotland) under FOISA and had applied to me for a decision only after asking VisitScotland to review its response to that request. The case was then allocated to an investigating officer.



## The Investigation

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13. The investigating officer contacted VisitScotland by letter on 12 May 2006 informing it that a valid application had been received from Mr Colquhoun. It was asked to provide my Office with specified items of information required for the purposes of the investigation. VisitScotland was also asked to comment on the matters raised by Mr Colquhoun in terms of section 49(3) of FOISA and to respond to specific questions on the application, and its reasoning when applying the exemption under section 36(2) of FOISA to the information withheld.
14. VisitScotland responded with the information requested on 31 May 2006. It reiterated its assertion that the requested information was subject to a confidentiality clause contained within contracts with eTourism Ltd. As such, it maintained that the exemption in section 36(2) applied.
15. VisitScotland also indicated that it had obtained consent to certain information being released that may be relevant to Mr Colquhoun's interests; the Services Agreement between VisitScotland and eTourism Ltd, the Schedule to the Agreement and the Services catalogue. The proposed disclosure would be subject to certain strikeouts relating to price and price-related information for a range of services provided by eTourism Ltd to VisitScotland. VisitScotland maintained its position with respect to the specific information requested by Mr Colquhoun.
16. The investigating officer contacted Mr Colquhoun on 1 June 2006 with this proposal and enquired whether the release of this information would satisfy his request. Mr Colquhoun's response confirmed that he would wish to be provided with the information that VisitScotland was prepared to release, but still wished my Office to continue its investigation and issue a decision on whether the information that he had specifically requested should be released. My decision still therefore addresses the question of whether the relevant information should be supplied to Mr Colquhoun.

## The Commissioner's Analysis and Findings

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17. In coming to a decision in this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Colquhoun and VisitScotland and I am satisfied that no matter of relevance has been overlooked.



18. Given that VisitScotland has provided most of the information requested by Mr Colquhoun on 1 December 2005, the question I must consider here is a narrow one. That is whether the price paid by visitScotland.com for advertising in the publications named by Mr Colquhoun is exempt from disclosure under section 36(2) of FOISA.
19. In terms of section 36(2) of FOISA, information is exempt information if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it would constitute a breach of confidence actionable by that person or any other person.
20. In this case, VisitScotland stated that the contracts that govern the promotion of the visitScotland.com website contain confidentiality agreements, which meant that without the consent of visitScotland.com, disclosure of the information requested by Mr Colquhoun would constitute an actionable breach of confidence.
21. VisitScotland confirmed that it had not sought visitScotland.com's consent to disclosure of the specific information requested by Mr Colquhoun because consent had been refused in response to a related request.
22. The related request is considered in my decision 088/2006 Mr Alan Keith, Chairman of the Association of Dumfries and Galloway Accommodation Providers and VisitScotland.
23. When considering the exemption in section 36(2), the first test I am required to consider is whether the information concerned has been supplied by a third party to VisitScotland.
24. In considering this matter, I have taken into account my decision 088/2007, which considered a related request for access to all agreements between VisitScotland and visitScotland.com. In decision 088/2007, I concluded (in line with a decision of the Information Tribunal in a similar case, reference EA/2006/0014) that, because these contracts were the product of a process of negotiation between two parties, their contents were not provided by a third party for the purposes of section 36(2) of FOISA. Consequently, the first test for the application of the exemption (section 36(2)(a) of FOISA) had not been met. Therefore, there was no requirement for me to consider whether disclosure would constitute a breach of confidence actionable by a third party.
25. The implications of decision 088/2007 are wide reaching. Where information that has been requested is a product of negotiation, and a public authority cannot demonstrate that it has been provided by a third party, the exemption in section 36(2) cannot apply, even where an explicit confidentiality agreement can be shown to relate to it.



26. This case is closely analogous to that considered in 088/2007. VisitScotland has stated that the information requested by Mr Colquhoun would be found within its agreements with visitscotland.com. Because these are covered by overarching confidentiality agreements, it has claimed that the exemption in section 36(2) of FOISA applies.
27. VisitScotland was asked in the investigating officer's letter of 12 May 2006 to confirm whether the information requested by Mr Colquhoun was provided by a third party. VisitScotland's response did not claim that the information concerned had been provided by a third party.
28. VisitScotland was later alerted to the Information Tribunal's decision on appeal EA/2006/0014 (which concerned an agreement between Derry City Council and Ryanair) and its implications for my consideration of Mr Keith's related request in May 2006. In this letter, VisitScotland was asked to confirm whether all or any specific parts of the contracts and agreements between it and visitscotland.com could be identified as having been provided by a third party. VisitScotland's response confirmed that the various agreements between it and visitscotland.com were the product of negotiation, and no specific content was identified as having been provided by a third party.
29. As Mr Colquhoun's request seeks a subset of the information requested by Mr Keith, I have reached the same conclusion in this case. The information requested has not been demonstrated to have been provided to VisitScotland by a third party, and so I cannot accept that the exemption in section 36(2) applies to this information. I am therefore not required to go on to consider whether disclosure of the information would constitute a breach of confidence actionable by a third party.
30. I find that VisitScotland has incorrectly applied the exemption in section 36(2) and has acted in breach of the requirements Part 1, and specifically section 1(1) of FOISA by refusing to disclose the information requested by Mr Colquhoun.
31. I now require VisitScotland to inform Mr Colquhoun of the price paid by visitscotland.com for advertising in the Dumfries and Galloway "Where to stay 2005" and "See and do 2005" guides within 45 days of the receipt of this notice.



## **Decision**

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I find that VisitScotland failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request from Mr Colquhoun.

I find that VisitScotland incorrectly applied the exemption in section 36(2) of FOISA to the information withheld from Mr Colquhoun. In doing so, VisitScotland failed to comply with Section 1(1) of FOISA.

I therefore require VisitScotland to provide the information withheld from Mr Colquhoun (as set out in paragraph 32 above) within 45 days of the receipt of this decision.

## **Appeal**

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Should either Mr Colquhoun or VisitScotland 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 decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**2 July 2007**





## Appendix

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### 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.