



Scottish Information  
Commissioner

**Decision 005/2008 Bradley Dunbar Group Limited  
and the Scottish Ministers**

*European funding and copies of audit investigation reports*

**Applicant: Bradley Dunbar Group Limited**

**Authority: Scottish Ministers**

**Case No: 200700052**

**Decision Date: 16 January 2008**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews  
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## **Decision 005/2008 Bradley Dunbar Group Limited and the Scottish Ministers**

***Request for information regarding European funding and copies of audit investigation reports – information withheld – during the investigation further information was released – after an investigation the Commissioner found that the Scottish Ministers had released all the information it held that fell within the scope of the request***

### **Relevant Statutory Provisions and Other Sources**

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Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 10 (Time for compliance); 16 (Refusal of request) and 74 (Giving of notice etc.)

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

### **Facts**

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Mr Bradley, on behalf of the Bradley Dunbar Group Limited, requested a large number of documents from the Scottish Ministers (the Ministers) regarding European funding and copies of audit investigation reports. The Ministers released some information but withheld the remaining information under exemptions in section 30 of FOISA. The Ministers upheld their decision upon review. Mr Bradley remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Ministers released the remainder of the documents they held which fell within the scope of Mr Bradley's request.



## Background

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1. Mr Bradley made a number of information requests to the Ministers.
2. From July to September 2006, Mr Bradley made a number of requests to the Ministers for specific information regarding European funding and for copies of audit investigation reports. The Ministers responded to these requests by providing Mr Bradley with some information and withholding a small amount of information under section 30(c) of FOISA.
3. On 13 October 2006, Mr Bradley wrote to the Ministers requesting a review of their decision. In particular, Mr Bradley considered that the Ministers had not provided all the information that had been requested in his original request.
4. On 14 November 2006, the Ministers upheld their decision upon review.
5. On 5 September 2006, Mr Bradley emailed the Ministers requesting a copy of a notice regarding the audit investigation reports.
6. On 2 October 2006, the Ministers withheld this information under section 30(b) of FOISA.
7. On 12 October 2006, Mr Bradley wrote to the Ministers requesting a review of their decision.
8. On 9 November 2006, the Ministers upheld their decision upon review and withheld the notice under section 30(b) of FOISA.
9. On 11 January 2007, Mr Bradley wrote to my Office, stating that he was dissatisfied with the outcome of the Ministers' reviews and applying to me for a decision in terms of section 47(1) of FOISA.
10. The application was validated by establishing that Mr Bradley had made his requests for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to these requests.
11. On 15 February 2007, the Ministers were notified in writing that an application had been received from Mr Bradley and were asked to provide my Office with specified items of information required for the purposes of the investigation. The Ministers responded on 19 March 2007 with the information requested and the case was then allocated to an investigating officer.



## The Investigation

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12. On 28 March 2007, the investigating officer emailed Mr Bradley to clarify the scope of his request and application, given the large number of requests made by him.
13. On 17 April 2007, Mr Bradley wrote to the investigating officer confirming the information requests that fell within the scope of his request and application. The requests were for copies of the following:
  - Question 1 The audit investigation report (and associated information) into a named company, conducted in 2005.
  - Question 2 The report and associated information into an investigation into misuse of public funds by a named company conducted by the then Scottish Executive European Structural Funds Division (ESFD) in 2006.
  - Question 3 Internal Scottish Executive advice regarding audit investigation reports.
  - Question 4 An email dated 1 June 2006.
  - Question 5 A letter sent to the Scottish Executive dated 7 July 2006.
  - Question 6 The original attachments to a letter dated 1 June 2005.
14. On 20 April 2007, the investigating officer wrote to the Ministers to clarify the scope of the investigation into Mr Bradley's application and to request additional information regarding the destruction of several documents that were attachments to some of the above letters.
15. On 18 May 2007, the Ministers released to Mr Bradley the two audit reports and two emails referenced in questions 1, 2, 4 and 5.
16. On 30 May 2007, Mr Bradley emailed the investigating officer to confirm that he had received the documents from the Ministers. He also commented that he considered that further documents were being withheld by the Ministers that should be released. Specifically:
  - Question 1 Confirmation that the draft audit report was not amended or adjusted in any way.
  - Question 5 The letter dated 7 July 2006 included references to attachments, which had not been enclosed.
  - Question 6 The letter dated 1 June 2005 made reference to an attached pro forma letter and document, which had not been enclosed.

On 11 June 2006, Mr Bradley's comments were passed to the Ministers by the investigating officer.



17. On 5 July 2007, the Ministers responded to the questions above, stating:
- Question 1 There was no amendment or adjustment to the draft audit report.
  - Question 5 The attachments to the 7 July 2006 letter were not held by the Ministers. The Ministers had undertaken extensive searches of its records, both hard copy files and electronically to locate the attachments.
  - Question 6 The pro forma and attachment were not held by the Ministers.
- These comments were passed on to Mr Bradley by the investigating officer.
18. On 11 July 2007, the investigating officer emailed the Ministers to obtain a copy of their records management policy and an explanation as to why they had stated that the various attachments to the letters of 1 June 2005 and 7 July 2006 were not held by them.
19. On 19 July 2007 Mr Bradley emailed the investigating officer providing a summary of the response he had now received regarding his application.
- Question 1 Audit report provided.
  - Question 2 Audit report provided, but not the associated information.
  - Question 3 The Notice had not been provided.
  - Question 4 Copy of an email provided.
  - Question 5 Copy of a letter dated 29 June 2006 provided but not the attachments.
  - Question 6 Copy of attachments to 1 June 2005 had not been provided.
- Mr Bradley also stated in his email that since he could not identify the “associated information” related to questions 1 and 2; he was satisfied that he could not take any action in relation to this matter.
20. On 24 July 2007, the investigating officer emailed the Ministers to ask them to reconsider releasing the notice (Question 3).
21. The Ministers searched again for the various attachments, and on this occasion it found the documents associated with questions 3 and 5. These were subsequently released to Mr Bradley.
22. The investigating officer emailed the Ministers on 15 August 2007 to ask them to search again for the attachments to document 6.
23. On 20 August 2007, the Ministers provided a copy of the current version of the pro forma that it held to the investigating officer and had been released to Mr Bradley on 11 October 2006.



24. On 5 September 2007, the Ministers emailed the investigating officer stating that the missing documents (referenced in the letter of 1 June 2005) had gone through several versions and including extensive discussion with the European Commission and that earlier versions had not been retained.

## **The Commissioner's Analysis and Findings**

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25. In coming to a decision on this matter, I have borne in mind that Mr Bradley is satisfied that the Ministers have released the information associated with his first five questions. However, Mr Bradley would like me to comment on the statement by the Ministers that they do not hold the attachments associated with question 6.

### **Question 6**

26. There are references to two attachments within the letter dated 1 June 2005 (a pro forma and a standard request letter). The Ministers stated that Mr Bradley had been given copies of the current versions of the two attachments on 14 November 2006, but that they did not hold copies of the originals. The Ministers commented that the current versions that were sent to Mr Bradley were very unlikely to be materially different from the originals which Mr Bradley had requested.
27. Considering that the letter (dated 1 June 2005) was written less than a year before Mr Bradley made his initial request, it is perhaps reasonable for Mr Bradley to have expected that the Ministers would still hold copies of the attachments.
28. On 5 July 2007, the Ministers advised me that they had conducted extensive searches of their records, both hard copy files and electronically, and the attachments were not held. This was similar to the situation which had occurred with regards to the attachments relating to question 5, which the Ministers could not originally locate, but which were later found after the investigating officer had asked for a further search to be carried out.
29. The investigating officer asked the Ministers on 15 August 2007 to undertake a further search for the missing attachments to the letter dated 1 June 2005, but the search did not locate the missing attachments. The Ministers commented, as stated above, that earlier versions of the attachments were not kept and updated as required.



30. Taking into account the number and extent of searches which have been carried out by the Ministers I am satisfied, on balance of probabilities, that the information in question is not held by the Ministers.

## Technical Breaches

### Section 16 – Refusal of request

31. Mr Bradley expressed dissatisfaction with the lack of reasoning in the Ministers' refusal notices in response to his requests for information/requests for review.
32. Section 16 of FOISA sets out what information an applicant must be told if a public authority intends to refuse to disclose information in response to an information request. Section 16(1) is set out in full in the Appendix. In terms of section 16(1)(c) and (d), a public authority must specify the exemption it is relying on to withhold the information and, if not otherwise apparent, why the exemption applies.
33. The Ministers complied with their duties under section 16(1)(c) by advising Mr Bradley of the exemptions they were relying on and in paraphrasing them in their refusal notice. However, the Ministers did not explain to Mr Bradley why an exemption applied. As noted above, section 16(1)(d) requires a public authority to explain why an exemption applies if it is not otherwise apparent. I do not consider that it is apparent why the exemptions in sections 30(b)(i), (ii) and 30(c) of FOISA should apply and why disclosure of the information would, or would be likely to, prejudice substantially the Ministers' relevant functions. I therefore find that the Ministers failed to comply with section 16(1)(d) of FOISA.
34. In terms of section 16(2) of FOISA, where, as in this case, a public authority is relying on an exemption which is subject to the public interest test, the refusal notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
35. Instead of providing Mr Bradley with reasons as to why the Ministers considered that the public interest in maintaining the exemption outweighed that in disclosing the information, the Ministers merely advised Mr Bradley that they took the view that the public interest in disclosing the information is outweighed by that in maintaining the exemption. No reasons were given and so Mr Bradley was left none the wiser as to why the Ministers had chosen to maintain the exemptions.
36. I therefore also find that the Ministers failed to comply with section 16(2) of FOISA.



## **Section 10 – Time for compliance**

37. Section 10(1) of FOISA requires a Scottish public authority to comply with a request for information not later than the twentieth working day after receipt by it of that request.
38. It should also be noted that section 74(2) of FOISA states that a letter should be presumed to be received three days after posting and an email is presumed to be received on the day of transmission. However, the twenty working day response time period commences the day after the receipt of the request.
39. Noting the above, the Ministers responded to all of Mr Bradley's requests except his letter dated 7 September 2006 within the twenty working day response time period. The Ministers responded to this letter on 11 October 2006. Therefore the Ministers breached Part 1 of FOISA as a consequence.

## **Decision**

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I find that, in failing to provide a detailed explanation of why information was being withheld and why the exemptions were being maintained, and in failing to respond to one of Mr Bradley's information requests for within 20 working days, the Scottish Ministers failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002, in particular sections 16(1), (2) and 10(1).

However, I note the Ministers have provided Mr Bradley with all of the information they hold in relation to his requests and therefore I do not require the Ministers to take any action with regard to these failures.





## **Appeal**

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Should either the Bradley Dunbar Group Limited or the Scottish Ministers 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 decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**16 January 2008**



## 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.

##### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
  - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
  - (b) in a case where section 1(3) applies, the receipt by it of the further information.

##### 16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
    - (a) discloses that it holds the information;
    - (b) states that it so claims;
    - (c) specifies the exemption in question; and
    - (d) states (if not otherwise apparent) why the exemption applies.
  - (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
- (....)

##### 74 Giving of notice etc.

- (....)
- (2) For the purposes of any provision of this Act, a thing-
    - (a) posted is presumed not to be received until the third day after the day of posting; and
    - (b) transmitted by electronic means is presumed to be received on the day of transmission.