

Decision Notice



Decision 065/2010 Mr Peter Stewart-Blacker and Scottish Enterprise

Reports relating to a named company

Reference No: 200901358
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Scottish Information Commissioner

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Summary

Mr Stewart-Blacker requested from Scottish Enterprise information relating to a named company. Scottish Enterprise responded by providing certain relevant information while withholding the remainder under section 36(2) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Stewart-Blacker remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Scottish Enterprise had dealt with Mr Stewart-Blacker's request for information in accordance with Part 1 of FOISA. He found that the information was properly withheld on the basis that it was information supplied by a third party and disclosing it would constitute a breach of confidence actionable in court.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(c) (Effect of exemptions) and 36(2) (Confidentiality)

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

Background

1. On 24 June 2009, Mr Stewart-Blacker wrote to Scottish Enterprise requesting information relating to a named company.
2. Scottish Enterprise responded on 1 July 2009, providing information to Mr Stewart-Blacker which it considered to be in the public domain already. It advised that any other information was being withheld on the basis of a confidentiality agreement.
3. On 1 July 2009, Mr Stewart-Blacker wrote to Scottish Enterprise requesting a review of its decision. Mr Stewart-Blacker then wrote again on 2 July 2009 to clarify that he was specifically looking for access to the information in two separate reports, which he identified to Scottish Enterprise.



4. Scottish Enterprise notified Mr Stewart-Blacker of the outcome of its review on 28 July 2009. It upheld its decision to withhold most of the information contained within the two reports, under section 36(2) of FOISA. However, Scottish Enterprise released the recommendations section from one of the reports, on the basis that its contents were effectively in the public domain.
5. On 28 July 2009, Mr Stewart-Blacker wrote to the Commissioner, stating that he was dissatisfied with the outcome of Scottish Enterprise's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Stewart-Blacker had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 30 July 2009, Scottish Enterprise was notified in writing that an application had been received from Mr Stewart-Blacker and asked to provide the Commissioner with any information withheld from him. Scottish Enterprise responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted Scottish Enterprise, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. Scottish Enterprise was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with particular reference to section 36(2).
9. The submissions received from both Scottish Enterprise and Mr Stewart-Blacker, insofar as relevant, will be considered in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Stewart-Blacker and Scottish Enterprise and is satisfied that no matter of relevance has been overlooked.



Section 36(2) – confidentiality

11. Section 36(2) of FOISA provides that information is exempt information if it was obtained by a Scottish public authority from another person and its disclosure to the public by that authority (otherwise than under FOISA) would constitute a breach of confidence actionable by the person who provided the information or any other person. The exemption is absolute in that it is not subject to the public interest test required by section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is in the public interest.
12. Section 36(2), therefore, contains a two-stage test, both elements of which must be fulfilled before the exemption can be relied upon. Firstly, the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and includes another individual, another Scottish public authority and any other legal entity, such as a company or partnership. As the two reports under consideration here (both of which the Commissioner is satisfied fell within the scope of Mr Stewart-Blacker's original request for information) were provided to it by, respectively, its External Complaints Adjudicator (the Adjudicator – an individual independent of the organisation) and a private consultancy firm (the Consultants – again, clearly a separate legal entity), the Commissioner is satisfied that each of them was obtained by Scottish Enterprise from another person.
13. The second part of the test is to consider whether disclosure of the information by the Scottish Enterprise would constitute a breach of confidence actionable either by the person who gave the information to the authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
14. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to the test. These are:
 - the information must have the necessary quality of confidence;
 - the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - there must be a disclosure which has not been authorised by the person who communicated the information, but which would cause damage to that person.
15. In relation to the Adjudicator's report, Scottish Enterprise submitted that at the time of its writing it would never have been envisaged by the Adjudicator that the report would be made public and therefore it discussed the investigation carried out by the Adjudicator in a way that there were many references to individuals and their business dealings. It had not been intended for publication in the same way as current Ombudsman's reports and those relating to other investigations, which take account of FOISA. It went on to describe the obligations of confidentiality it considered applicable, referring in particular to the confidentiality agreements entered into in relation to the related mediation process.



16. With a view to providing some background, Scottish Enterprise explained that the Agreement to Mediate and the succeeding Mediated Resolution Agreement both had confidentiality clauses binding on Scottish Enterprise. It explained that this was normal in mediation, one of the forms of Alternative Dispute Resolution (ADR) being encouraged to avoid litigation. Scottish Enterprises asserted that confidence in ADR would be “massively damaged” if parties thought that their confidentiality agreements could be subsequently challenged by a Freedom of Information request. Consequently, it considered information on the mediation to be covered by section 36(2) of FOISA. Copies of these agreements were not, however, provided.

Necessary quality of confidence

17. The Commissioner must first consider whether the information withheld had the necessary quality of confidence: that is, whether it had the basic attribute of inaccessibility, and was not common knowledge or able to be produced by a member of the public without the investment of skill and labour.
18. Having considered both reports and the arguments put forward by Scottish Enterprise, the Commissioner is satisfied that the reports fulfil the criterion of having the necessary quality of confidence. While noting Scottish Enterprise’s disclosure of the recommendations from the Adjudicator’s report he does not find these to be informative as to the content of the remainder of the report, which he therefore considers is not generally accessible and could not be derived from available sources. None of the Consultants’ report has been made available and the Commissioner finds that the information in it is not common knowledge and could not readily be obtained by members of the general public through any other means.

Obligation to maintain confidentiality

19. In order for information to be confidential, it must at least be clear that the information was imparted in circumstances from which an expectation of confidentiality could reasonably be implied.
20. Although the Adjudicator’s report does not contain an express obligation of confidentiality, the candid manner in which it is written combined with the many references to personal details of the parties involved suggest that the Adjudicator expected the report would be treated as confidential by Scottish Enterprise. The Consultant’s report, on the other hand, was provided to Scottish Enterprise expressly in confidence, as is clear from both the terms of the report and their covering letter. The Commissioner also notes that both reports were written well before the coming into force of FOISA and accepts the relevance of this in considering the expectations of their respective writers.
21. Having considered the circumstances specific to this case, therefore, the Commissioner is satisfied that both reports were provided to Scottish Enterprise in circumstances which imposed an obligation to maintain confidentiality.



Unauthorised disclosure which could cause detriment

22. The third part of the test requires that disclosure of the information must be unauthorised by, and cause damage to, the person who communicated it.
23. Having considered the terms of both reports and the circumstances of their writing, and noting the Consultants' refusal to release Scottish Enterprise from their confidentiality agreement more recently, the Commissioner is satisfied that the disclosure of the withheld information would be unauthorised. Given their content and the manner of their writing, the Commissioner is also satisfied that the disclosure of the information would still be capable of causing damage to the persons who communicated it. Consequently, having considered all the applicable tests, the Commissioner is satisfied in all the circumstances that disclosure of the withheld information would constitute a breach of confidence actionable by the persons who provided the reports.
24. As stated above, if the conditions of section 36(2) are fulfilled an absolute exemption is created. However, it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest.
25. The exemption in section 36(2) is not, however, subject to the public interest test in section 2(1) of FOISA. The law of confidence recognises that there is a strong public interest in ensuring that confidences are respected, and the burden of showing that a failure to maintain confidentiality would be in the public interest is therefore a heavy one. However, in certain circumstances, the public interest in maintaining confidences may be outweighed by the public interest in disclosure of information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure (*Decision 056/2006 MacRoberts and the City of Edinburgh Council*).
26. The courts have considered that there may be a public interest defence to actions of breach of confidentiality where to enforce an obligation of confidence would, for example, cover up wrongdoing, allow the public to be misled or unjustifiably inhibit public scrutiny of matters of genuine public concern. In this case, the Commissioner has considered whether disclosure of the information in question would be necessary to secure effective scrutiny of decision making processes. Having taken into account that the information already disclosed to Mr Stewart-Blacker, however, he sees no reasonable basis for concluding that Scottish Enterprise would have a defence to an action of breach of confidence on public interest grounds should they disclose this information.
27. The Commissioner therefore concludes that Scottish Enterprise was correct in its application of section 36(2) of FOISA to the withheld information contained within both of the withheld reports.



28. In the course of the investigation, Scottish Enterprise also suggested that Mr Stewart-Blacker's request might be considered vexatious. Having found the information requested by Mr Stewart-Blacker to have been properly withheld under section 36(2) of FOISA, the Commissioner does not find it necessary, in this particular case, to give this point further consideration.

DECISION

The Commissioner finds that Scottish Enterprise complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Stewart-Blacker.

Appeal

Should either Mr Stewart-Blacker or Scottish Enterprise 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.

Margaret Keyse
Head of Enforcement
13 May 2010



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.

...

- (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 –

...

- (c) section 36(2);

...



36 Confidentiality

...

- (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.