



Scottish Information
Commissioner

Ms Cartlidge and the Scottish Executive

Refusal to release information regarding the winning tender for an interactive digital television pilot carried out by the Scottish Executive, West Lothian Council, Dumfries and Galloway Council, Young Scot, NHS Health Scotland and StartHere

Applicant: Ms Cartlidge
Authority: The Scottish Executive
Case No: 200500732
Decision Date: 3 October 2005

Kevin Dunion
Scottish Information Commissioner

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Decision 028/2005 – Ms Cartlidge and the Scottish Executive

Information withheld – Section 36(2) of Freedom of Information (Scotland) Act 2002 – information which, if released would give rise to an actionable breach of confidence

Facts

Ms Cartlidge asked the Scottish Executive for a breakdown of the cost of a digital television pilot involving the Scottish Executive, West Lothian Council, Dumfries and Galloway Council, Young Scot, NHS Health Scotland and StartHere. She also asked for the names of any private sector companies involved in the project and for information about the costs of the contract. In response to her request, the Scottish Executive released the name of the company involved in the project, Thunderchief Pictures Limited (Thunderchief) and some details of the breakdown of the costs of the contract. It did not release details of some costs on the basis that it did not hold the information. In addition, it did not release some costs, on the basis that the information was subject to a confidentiality clause in the contract between it and Thunderchief and was therefore exempt under section 36(2) of the Freedom of Information (Scotland) Act 2002. Ms Cartlidge then asked the Scottish Executive to review its decision to withhold some of the information. The Scottish Executive subsequently upheld its original decision. Ms Cartlidge then applied to the Scottish Information Commissioner for a decision as to whether the Scottish Executive had complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in withholding the information.

Outcome

The Commissioner found that the Scottish Executive (the Executive) had applied section 36(2) of the Freedom of Information (Scotland) Act 2002 (FOISA) correctly in refusing to disclose information to Ms Cartlidge, firstly on the grounds that some of the information in question was not held by the Executive and, secondly, on the basis that the information withheld by it was exempt under FOISA.



Appeal

Should either the Council or Ms Cartlidge 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. On 6 January 2005, Ms Cartlidge wrote to the Scottish Executive, requesting the breakdown of the cost, in as much detail as possible, of the digital television pilot involving the Scottish Executive, West Lothian Council, Dumfries and Galloway Council, Young Scot, NHS Health Scotland and StartHere. She also asked for the names of any private sector companies involved in the project and the costs of the individual pilot ITV components.
2. On 2 February 2005, the Executive responded to Ms Cartlidge, releasing the name of the company involved in the project and some of the details of the breakdown of the cost. It did not release details of the costs of the individual pilot ITV advert /components, on the basis that it did not hold this information. In addition, it withheld some of the details of the breakdown of the costs, on the basis that the information was exempt under section 36(2) of FOISA.
3. On the same day, Ms Cartlidge asked the Executive to review its decision to withhold the information and specifically queried the Executive's application of the exemption contained in section 36(2) of FOISA.
4. On 14 February 2005, the Executive responded to Ms Cartlidge's request for review, fully upholding its original response to her request.
5. On 24 February 2005, Ms Cartlidge applied to me to for a decision as to whether the Executive had breached Part 1 of FOISA in withholding some of the information that she had asked for.
6. The case was allocated to an investigating officer within my Office.



The Investigation

7. On 7 March 2005, my Office asked the Executive to provide me with information to allow me to carry out an investigation into this case, including a copy of the information which the Executive had refused to release to Ms Cartlidge, further information regarding its reliance on the exemption contained in section 36(2) of FOISA and information on the steps it had taken to establish that certain of the information requested by Ms Cartlidge was not held by it.
8. The Executive responded on 21 March 2005, providing all of the information requested in its response. Subsequent information was sought from the Executive over the next month, including a copy of the contract between it and Thunderchief.

The Commissioner's Analysis and Findings

9. The main issue in this investigation is whether the Executive complied with Part 1 of FOISA in applying the exemption contained in section 36(2) of FOISA to some of the information that Ms Cartlidge requested. Accompanying this is the task of ascertaining whether the Scottish Executive was right to claim that it did not hold information about costs of the individual pilot ITV components.

Did the Executive hold information about costs of the individual pilot ITV components?

10. The Executive stated in its letter sent to the Investigating Officer on 21 March 2005 that the Contract with Thunderchief did not break down the costs of the separate components in the project, instead giving costs for the project as a whole. Having examined the contract, I find this to be the case, and therefore am satisfied that the Scottish Executive does not hold the information that Ms Cartlidge requested in relation to the costs of the individual pilot ITV components.



Did the Executive apply the exemption contained in section 36(2) of FOISA correctly?

11. The Executive partially withheld information about the breakdown of the cost of the interactive digital television pilot carried out by the Scottish Executive, West Lothian Council, Dumfries and Galloway Council, Young Scot, NHS Health Scotland and StartHere over the initial 6 month period, claiming that the information was exempt under section 36(2) of FOISA on the basis of a confidentiality agreement which the Executive had entered into with Thunderchief. The information withheld was the amount of money given to Thunderchief to carry out the services it had been contracted to provide by the Executive.
12. Section 36(2) of FOISA states that information is exempt 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.
13. In guidance I have published on the section 36 exemption, I point out that public authorities relying on this exemption must be satisfied that any breach of confidence in releasing information must be actionable, i.e. that an aggrieved party would have the right to take the authority to court as a result of the disclosure. Therefore, in order to find whether the Executive applied the exemption contained in section 36(2) correctly, I first considered whether if by releasing the information the Executive could be sued for breach of confidence.
14. Section 36(2) can only be relied on if the information in question has been received from another party. In this case, the information was received by the Executive from Thunderchief as part of the tendering process for the services needed by the partner organisations to carry out the project.
15. The information must also have the necessary quality of confidence and have been received in circumstances which imposed an obligation of confidentiality. The agreement between Thunderchief and the Executive (the contract) contains a clause which prohibits the disclosure of “confidential information” to any person. The definition of “confidential information” in the contract is wide and includes information relating to costs of operation, production costs, sales prices and purchase costs.
16. I am satisfied that the information in question has the necessary quality of confidence and was received in circumstances which imposed an obligation of confidentiality on the Executive.
17. In addition, for a breach of confidence to be actionable, a party bringing the action (in this case Thunderchief) would have to prove not only that there has been an unauthorised disclosure of information, but that the disclosure of the information has caused damage.



18. The Executive has provided my Office with copies of correspondence it had with Thunderchief, including an email sent by the company to the Executive on 12 January 2005, which claims that release of the information in question would considerably damage its commercial interests, as it would enable competitors to undercut its bids in any future tendering process it might take part in.
19. Information contained in concluded or terminated contracts decreases in sensitivity with the passage of time. Having considered the contract between the Executive and Thunderchief (which terminated in April 2004, only eight months before Ms Cartlidge made the information request), I consider that not enough time has passed in this case to sufficiently degrade the commercial sensitivity of the information to the extent that no damage would be done to Thunderchief's interests should the information be released to the Ms Cartlidge.
20. As my briefing on the section 36 exemption states, it is important to note that the exemption in section 36(2) is an absolute exemption under FOISA. This means that the exemption is not subject to the public interest test under FOISA. However, the exemption must be considered in line with the common law of confidence, which does contain a public interest defence, and so the public interest does have to be taken into account in deciding whether to disclose the information that has been requested.
21. I find that in this case, the public interest is served in withholding the information and that to release the information would constitute a breach of confidence actionable by a third party.

Decision

I find that the Scottish Executive did apply section 36(2) of the Freedom of Information (Scotland) Act 2002 (FOISA) correctly in withholding the information requested by Ms Cartlidge. In addition, I find that the Executive did not hold information about the costs of individual pilot ITV components. As a result, I find that the Executive did not breach Part 1 of FOISA in dealing with the information request by Ms Cartlidge.

I do not require the Executive to take any action as a result of this decision.

Kevin Dunion
Scottish Information Commissioner