

Decision Notice



Decision 146/2010 Ms L and Glasgow City Council

Trading Standards' dealings with named businesses

Reference No: 201000441

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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Ms L requested from Glasgow City Council (the Council) information relating to Trading Standards' dealings with two named companies. The Council responded by stating the information was being withheld under section 26(a) of FOISA in that disclosure of the information was prohibited by section 237(2) of the Enterprise Act 2002. Following a review, Ms L remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Council claimed that the information was also exempt in terms of section 34(1)(a) of FOISA (which relates to information held for the purposes of criminal investigations), the Commissioner found that the Council had partially failed to comply with Part 1 of FOISA in dealing with Ms L's information request. He found that the Council was entitled to withhold some of the information under section 26(a) (on the basis that other legislation prohibited the disclosure of the information). He went on to consider whether the exemption in section 34(1)(a) applied to the information which he did not consider to be exempt under section 26(a) and found that this could not be withheld under section 34(1). He therefore required the Council to provide this information to Ms L.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(b) (Effect of exemptions); 26(a) (Prohibitions on disclosure) and 34(1)(a) (Investigations by Scottish public authorities and proceedings arising out of such investigations)

Enterprise Act 2002 sections 237 (General restriction); 238 (Information) and 239 (Consent)

Human Rights Act 1998 section 6(3) and (5) (Public authorities)

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. Ms L, who is the owner of 'Business X', had been in correspondence with the Trading Standards service of the Council regarding the suitability for sale of specific goods.



2. On 3 August 2009, Ms L wrote to the Council requesting the following information:
 - a) *Full disclosure of the circumstances under which the business, 'Business X', came to the attention of Glasgow Trading Standards. I wish to receive paper copies of all information held on this, in whatever format it exists – this may include telephone conversation transcripts, handwritten notes, emails, minutes of meetings, computer files, and any other form of record.*
 - b) *Full disclosure of all records that exist concerning Business X, directly or indirectly, from this point onwards up to and including the date of receipt of this letter. This will include all correspondence, personal records and decisions taken by every person working at, or on behalf of, Trading Standards who has been involved in the case; again in whatever format it exists. It will include full records of the research undertaken and the rationale behind the decision making process on which Standards, Regulations and Tests to apply to Business X Products. It will include all justifications made for applying those Standards, Regulations and Tests.*
 - c) *Full disclosure of all correspondence with the Trading Standards Service dealing with Business Y. Including the date when first contact was made with this Trading Standards Service, the name(s) of the person(s) who subsequently got in touch with Business Y and any information and correspondence you have detailing how they proceeded and what Regulations, Standards, and Tests they applied to Business Y products. This will include all correspondence between Business Y and the Trading Standards Service who made contact with them if you have records of that.*
3. The Council responded on 19 August 2009, providing some information falling within the scope of Ms L's request, but withholding the remainder in terms of section 26(a) of FOISA as it considered disclosure of this information to be prohibited by section 237(2) of the Enterprise Act 2002 (the EA).
4. On 22 August 2009, Ms L wrote to the Council requesting a review of its decision. Specifically, she drew the Council's attention to section 239 of the EA, taking the view that she had given her consent under that section to the disclosure of information on her business (and therefore disclosure was permitted).
5. The Council notified Ms L of the outcome of its review on 18 September 2009, upholding the application of section 26(a) of FOISA. It explained to Ms L that section 239 of the EA also required the permission of the person providing the information.
6. On 3 March 2010, Ms L wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Ms L 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

8. On 25 March 2010, the Council was notified in writing that a valid application had been received from Ms L and was asked to provide the Commissioner with any information withheld from her. The Council responded with the information requested and the case was then allocated to an investigating officer.
9. On supplying the information withheld in this case, the Council broke it down into three categories: reports from other authorities, internal correspondence and files on other suppliers. During the investigation, a schedule of the withheld information was prepared for ease of reference and in order that the Council could provide submissions relative to the information in each document. Documents in the first category were numbered 1/1 to 1/4; those in the second 2/1 to 2/12, and those in the third 3/1 to 3/7.
10. On examining the withheld information, the Commissioner accepted that the information in documents 2/2 and 2/9 (which related to the processing of that request rather than the information requested) did not fall within the scope of Ms L's information request. That information will therefore not be considered further in this decision. He also notes that document 1/4 comprises information taken from the website of Ms L's company: although no exemption has been claimed in respect of this information, it is clearly readily accessible to Ms L (and therefore exempt under section 25(1) of FOISA) and consequently the Commissioner will not require its disclosure. Finally, he notes that all of the information in document 3/2 is also to be found in document 2/11: accordingly, he will not consider document 3/2 further in this decision.
11. The investigating officer subsequently contacted the Council, 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. In particular, the Council was asked (with particular reference to section 26(a)) to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
12. The Council responded, indicating that it considered the withheld information, as a whole, to be "specified information" in terms of section 238(1) of the EA and therefore prohibited from disclosure by section 237(2) of the EA. This was confirmed in subsequent correspondence with the Council.
13. On 6 July 2010, the Council contacted the investigating officer stating that if the Commissioner did not accept the Council's position in relation to the information being exempt under section 26(a) of FOISA, it sought in addition to apply and rely upon section 34(1)(a) of FOISA in that the information was held in relation to an investigation to see whether anyone should be prosecuted for offences arising from consumer protection legislation.
14. The relevant submissions made by the Council and Ms L will be considered fully in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

15. 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 Ms L and the Council and is satisfied that no matter of relevance has been overlooked.

Section 26(a) of FOISA (Prohibitions on disclosure)

16. The Council argued that disclosure of the withheld information was prohibited by section 237(2) of the EA and therefore that the information was exempt in terms of section 26(a) of FOISA. Section 26(a) exempts information if its disclosure, otherwise than under FOISA, is prohibited by or under an enactment. This is an absolute exemption in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA.
17. The question of whether the provisions of Part 9 of the EA (i.e. those in sections 237 and 238, subject to the provisions permitting disclosure in sections 239 onwards) create a prohibition on disclosure for the purposes of section 26(a) of FOISA has been the subject of a judgement of the Court of Session in the case of *Dumfries and Galloway Council against the Scottish Information Commissioner [2008] CSIH 12*. In that case, applied by the Commissioner in the revised *Decision 210/2006 Dr Donald Reid and Dumfries and Galloway Council*, the Court concluded that the provisions contained in Part 9 of the EA did create a prohibition on disclosure for the purposes of section 26(a). The Opinion of the Court can be read online here: <http://www.scotcourts.gov.uk/opinions/2008CSIH12.html>.
18. Section 237 of the EA states that “specified information” which relates to the affairs of an individual or to any business of an undertaking must not be disclosed during the lifetime of the individual or while the undertaking continues in existence, unless the disclosure is permitted under Part 9 of the EA. Section 238 of the EA states that information is specified information if it comes to a public authority in connection with the exercise of certain functions, including functions of the authority under enactments listed in Schedule 14 to the EA. Section 239 of the EA relates to disclosure permitted by virtue of consent: taking account of the Court of Session Opinion referred to in the previous paragraph. The Commissioner does not consider the remaining provisions on permitted disclosure to be relevant to this decision.
19. For the prohibition in section 237 to apply, therefore, the Council must be a public authority for the purposes of the EA, and the withheld information must be “specified information” as defined by section 238 of the EA. In addition, the disclosure must not be permitted.
20. Section 238(3) of the EA specifies that a public authority for the purposes of the EA must be construed in accordance with section 6 of the Human Rights Act 1998, the relevant provisions of which are set out in the Appendix to this decision. As a person certain of whose functions are functions of a public nature, the Commissioner is satisfied that the Council is a public authority for these purposes.



21. The Commissioner is also satisfied that the withheld information was held by the Council in connection with the exercise of its functions under the Consumer Protection Act 1987 (the CPA), which is one of the enactments listed in schedule 14 of the EA. This is not, however, sufficient for the information to qualify as “specified information” for the purposes of this part of the EA: it must have “come to” the Council in connection with the exercise of these functions.
22. The Council contended that whilst each document, on its own, might not appear to be covered by the exemption in section 26(a), the information as a whole should be considered as “specified information” in terms of section 238(1) of the EA. It stated that the information had come to the Council, as a public authority, in connection with the exercise of a function under the CPA. It explained that its Trading Standards service investigated complaints in terms of the CPA and that it considered any such record of the investigation, arising in connection with the exercise of that function, to be “specified information”.
23. The Council submitted that the phrase “comes to” should not be interpreted in a narrow manner as to do so would deprive the Council, and all other public authorities, of the protection afforded by section 238(1) in relation to all of its internal communications whilst carrying out the functions protected by the EA. It went on to argue that the information it sought to withhold had flowed from its investigations, directly following reports from other trading standards authorities and in exercise of a relevant function, and consequently was “specified information”.
24. Having considered the Council’s submissions, the Commissioner cannot accept that the EA protects the functions of the Council. What is protected is “specified information”, and for information to fall within that definition it must “come to” the Council. There is no specific definition of the words “comes to” for the purposes of the EA, so the Commissioner must arrive at a reasonable interpretation of the ordinary language of these words, taking into consideration any other relevant provisions of Part 9 of the EA.
25. In the Commissioner’s view, therefore, “comes to” for these purposes denotes material supplied to or obtained by the public authority in question: in other words, for information to be “specified information” for the purposes of section 238 of the EA, it must have been received from another person. It might be said that this was the situation envisaged by section 239(2) of the EA (which relates to disclosure with consent and is set out in full in the Appendix below), but in any event it appears to the Commissioner to be the only reasonable meaning which could be attached to the words in question in the absence of further specific guidance. That said, the Commissioner acknowledges that it is the source of the information which is relevant for these purposes, rather than the communication within which it is contained: therefore, information which has “come to” an authority will retain that character (and therefore remain “specified information”, assuming it meets the other requirements for such information) whenever it is reproduced by the authority elsewhere, for example in internal communications.



26. (The Commissioner notes that section 238 of the EA was considered by the UK Information Commissioner (the ICO) in Decision Notice FS50232320¹, regarding a request made to Cornwall Council. In that case, the ICO adopted basically the same approach to information which had “come to” the authority as that set out in paragraph 25 above.)
27. The Commissioner, having considered the content and context of the withheld information, is satisfied that the information in documents 1/1, 1/3, 2/11, 3/1, 3/3, 3/4, 3/5, 3/6 and 3/7 comprise information which could be described as having come to the Council and thus (being held for the purposes described in paragraph 21 above) falls within the meaning of “specified information” for the purposes of section 238 of the EA. Consequently, he also satisfied that this information is prohibited from disclosure in terms of section 237 of the EA. In the absence of the required consents in terms of section 239 of the EA, he can identify nothing which would permit the disclosure of this information: the Commissioner notes that the required consents have not been sought, but this is not something he can require the Council to pursue.
28. In all the circumstances, therefore, the Commissioner finds that the disclosure of the information in documents 1/1, 1/3, 2/11, 3/1, 3/3, 3/4, 3/5, 3/6 and 3/7 is prohibited by section 237 of the EA and, accordingly, the Council was entitled to withhold this information in terms of section 26(a) of FOISA.
29. Given the definition of the words “comes to” he has set out at paragraph 25 above, however, the Commissioner is not persuaded by the Council’s arguments in respect of the information in the remaining documents under consideration here (1/2, 2/1, 2/3 to 2/8 inclusive, 2/10 and 2/12). To the extent that this information came to the Council, it came from Ms L. As indicated at paragraph 4 above, she has consented to its disclosure (and it must be presumed in the circumstances that she did so both as the source of the information and as the person carrying on the business in question), with the result that disclosure is permitted by section 239 of the EA and the prohibition in section 237 does not apply. The remaining information in these documents was created by the Council itself in the course of dealing with Ms L or its concerns in respect of her products, and makes no reference to information obtained from any source other than Ms L. Consequently, the Commissioner cannot accept that this information came to the Council, and therefore must conclude that it is not “specified information” for the purposes of section 238 of the EA.
30. As indicated above, towards the end of the investigation, the Council provided the Commissioner with a submission to the effect that section 34(1)(a) applied to the withheld information. The Commissioner will therefore consider whether this exemption applies to the information he found the Council was not entitled to withhold under section 26(a) of FOISA.

¹ http://www.ico.gov.uk/upload/documents/decisionnotices/2010/fs_50232320.pdf



Section 34(1)(a) of FOISA (Investigations by public authorities and proceedings arising out of such investigations)

31. The Council explained that it held the information following its receipt of certain reports and that it had subsequently carried out an investigation to see if there should be a prosecution under consumer protection legislation. On this basis, it argued that it was entitled to withhold the information under section 34(1)(a) of FOISA, providing submissions on the public interest in support of this assertion.
32. The exemptions in sections 34 are described as "class-based" exemptions. This means that if information falls within the description set out in the exemption, the Commissioner is obliged to accept it as exempt. There is no harm test: the Commissioner is not required or permitted to consider whether disclosure would, or would be likely to, prejudice substantially an interest or activity, or otherwise to consider the effect of disclosure in determining whether the exemption applies. The exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
33. Section 34(1)(a) provides that information is exempt if it has at any time been held by a Scottish public authority for the purposes of an investigation which the authority has a duty to conduct to ascertain whether a person (i) should be prosecuted for an offence or (ii) prosecuted for an offence is guilty of it. In order for an exemption under section 34(1)(a) to apply, therefore, the Commissioner must be satisfied that the withheld information has been held by the Council for the purposes of an investigation of the type specified in either section 34(1)(a)(i) or section 34(1)(a)(ii), and that the Council had a duty to conduct that investigation.
34. Essentially, the Council's submissions on the application of the section 34(1)(a) are as set out in paragraph 30 above. No further detail was provided, except in relation to the public interest. The Commissioner acknowledges, however, that the Council has a duty to enforce the consumer safety provisions in the CPA and related secondary legislation and, consequently, has a duty to carry out investigations for these purposes. Such an investigation may, if a relevant offence is discovered, result in a report to the procurator fiscal, which may in turn lead to a criminal prosecution.
35. Whether such an investigation was ever in contemplation in this case is, however, another matter. In this connection, the Commissioner notes that in referring Ms L's products to the public analyst the Council describes the status of the reference as "informal" (as opposed to "formal" or "complaint"). It also describes Ms L as the "client", which tends to suggest that the analysis was in pursuit of an informal enquiry rather than a more formal investigation contemplating enforcement action which might lead to criminal prosecution. On the other hand, subsequent communications with Ms L appear to suggest that the possibility of such action has been considered and, for various reasons, discounted. In the circumstances, therefore, the Commissioner accepts that the withheld information has been held by the Council for the purposes of an investigation which it had a duty to conduct to consider whether a person should be prosecuted for an offence (and therefore that the information is exempt under section 34(1)(a)(i) of FOISA).



36. Having reached this conclusion, the Commissioner is required to consider the public interest test contained in section 2(1)(b) of FOISA. The Council provided public interest arguments in relation to both information received from other authorities and its own internal communications. Given that he has accepted the information received from other authorities as having been correctly withheld under section 26(a) of FOISA, the Commissioner will only consider the arguments put forward in respect of the internal communications.
37. In this connection, the Council argued that whilst it was carrying out investigations the internal communications amongst the officers concerned required to be as full and open as possible. The free sharing of information was, it submitted, beneficial to the effective functioning of the Trading Standards service and the overall protection of consumers. Ms L, on the other hand, has identified a public interest in knowing that Trading Standards services throughout the UK are interpreting and applying relevant legislation uniformly.
38. The Commissioner accepts both sets of public interest arguments as relevant, in appropriate circumstances. Considering the content of the internal communications under consideration here, however, it is difficult to see how the disclosure of that information could reasonably be expected to have any effect (detrimental or otherwise) on the free sharing of information for the purposes of Trading Standards investigations, or in turn on the effective functioning of that service or the protection of consumers. Much of the communication is routine in nature, and where it is not its content and tone are measured. The information relates to a matter the Council was no longer pursuing actively at the time it dealt with Ms L's information request and request for review. Supporting disclosure, clearly there is a public interest in being satisfied that public authorities with regulatory functions are discharging those functions fairly and consistently in accordance with the relevant legislation, provided this can be achieved without undue prejudice to the effective discharge of the function itself. In this case, on balance, the Commissioner is satisfied that the public interest in disclosing the information is not outweighed by that in maintaining the exemption in section 34(1)(a) of FOISA and thereby withholding it.
39. The Commissioner therefore concludes that the Council was not entitled to withhold the information in documents 1/2, 2/1, 2/3 to 2/8 inclusive, 2/10 and 2/12 under either section 26(a) or section 34(1)(a) of FOISA.



DECISION

The Commissioner finds that Glasgow City Council partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). He found that in responding to the information request made by Ms L the Council was entitled to withhold certain information under section 26(a), on the basis that other legislation prohibited disclosure.

The Commissioner also finds, however, that the Council failed to comply with Part 1, and in particular section 1(1), of FOISA by incorrectly withholding certain information under section 26(a). He also finds that the Council was not entitled to withhold that information under section 34(1)(a) FOISA.

The Commissioner therefore requires the Council to provide Ms L with the information in documents 1/2, 2/1, 2/3 to 2/8 inclusive, 2/10 and 2/12, by 9 October 2010.

Appeal

Should either Ms L or Glasgow City Council 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
24 August 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
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (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 –

...

- (b) section 26;

...

26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;

...



34 Investigations by Scottish public authorities and proceedings arising out of such investigations

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-
 - (a) an investigation which the authority has a duty to conduct to ascertain whether a person-
 - (i) should be prosecuted for an offence; or
 - (ii) prosecuted for an offence is guilty of it;

...

Enterprise Act 2002

237 General restriction

- (1) This section applies to specified information which relates to—
 - (a) the affairs of an individual;
 - (b) any business of an undertaking.
- (2) Such information must not be disclosed—
 - (a) during the lifetime of the individual, or
 - (b) while the undertaking continues in existence,unless the disclosure is permitted under this Part.
- (3) But subsection (2) does not prevent the disclosure of any information if the information has on an earlier occasion been disclosed to the public in circumstances which do not contravene—
 - (a) that subsection;
 - (b) any other enactment or rule of law prohibiting or restricting the disclosure of the information.
- (4) Nothing in this Part authorises a disclosure of information which contravenes the Data Protection Act 1998 (c. 29).
- (5) Nothing in this Part affects the Competition Appeal Tribunal.



- (6) This Part (except section 244) does not affect any power or duty to disclose information which exists apart from this Part.

238 Information

- (1) Information is specified information if it comes to a public authority in connection with the exercise of any function it has under or by virtue of—
- (a) Part 1, 3, 4, 6, 7 or 8;
 - (b) an enactment specified in Schedule 14;
 - (c) such subordinate legislation as the Secretary of State may by order specify for the purposes of this subsection.
- (2) It is immaterial whether information comes to a public authority before or after the passing of this Act.
- (3) Public authority (except in the expression “overseas public authority”) must be construed in accordance with section 6 of the Human Rights Act 1998 (c. 42).
- (4) In subsection (1) the reference to an enactment includes a reference to an enactment contained in—
- (a) an Act of the Scottish Parliament;
 - (b) Northern Ireland legislation;
 - (c) subordinate legislation.
- (5) The Secretary of State may by order amend Schedule 14.
- (6) The power to make an order under subsection (5) includes power to add, vary or remove a reference to any provision of—
- (a) an Act of the Scottish Parliament;
 - (b) Northern Ireland legislation.
- (7) An order under this section must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.
- (8) This section applies for the purposes of this Part.



239 Consent

- (1) This Part does not prohibit the disclosure by a public authority of information held by it to any other person if it obtains each required consent.
- (2) If the information was obtained by the authority from a person who had the information lawfully and the authority knows the identity of that person the consent of that person is required.
- (3) If the information relates to the affairs of an individual the consent of the individual is required.
- (4) If the information relates to the business of an undertaking the consent of the person for the time being carrying on the business is required.
- (5) For the purposes of subsection (4) consent may be given—
 - (a) in the case of a company by a director, secretary or other officer of the company;
 - (b) in the case of a partnership by a partner;
 - (c) in the case of an unincorporated body or association by a person concerned in the management or control of the body or association.

Schedule 14

Specified functions

Parts 1, 3, 4, 5, 6, 7, 8 and 11 of the Fair Trading Act 1973 (c. 41).

Trade Descriptions Act 1968 (c. 29).

Prices Act 1974 (c. 24).

Consumer Credit Act 1974 (c. 39).

Estate Agents Act 1979 (c. 38).

Competition Act 1980 (c. 21).

Video Recordings Act 1984 (c.39).

Consumer Protection Act 1987 (c. 43).

Consumer Protection (Northern Ireland) Order 1987 (S.I. 1987/2049 (N.I. 20)).

Copyright, Designs and Patents Act 1988 (c.48).

Property Misdescriptions Act 1991 (c. 29).

Timeshare Act 1992 (c. 35).



Clean Air Act 1993 (c.11).
Value Added Tax Act 1994 (c.23).
Trade Marks Act 1994 (c.26).
Competition Act 1998 (c. 41).
Chapter 3 of Part 10 and Chapter 2 of Part 18 of the Financial Services and Markets Act 2000 (c. 8).
An order made under section 95 of that Act.
Fireworks Act 2003.
Compensation Act 2006 (c.29).
Consumers, Estate Agents and Redress Act 2007.

Human Rights Act 1998

6 Acts of public authorities

...

(3) In this section “public authority” includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

...

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

...