



Scottish Information
Commissioner

**Decision 236/2006 – Company A and East
Ayrshire Council**

*Request for a copy of a letter sent to the Council's Trading
Standards Service*

**Applicant: Company A
Authority: East Ayrshire Council
Case No: 200601092
Decision Date: 18 December 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 236/2006 – Company A and East Ayrshire Council

Request for a copy of a letter sent to the Council's Trading Standards Service

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 34(1)(b) (Investigations by Scottish public authorities and proceedings arising out of such investigations).

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

Facts

Company A submitted an information request to East Ayrshire Council (the Council) for a copy of a letter which had been sent to a named Trading Standards Enforcement Officer. The Council refused to release a copy of this letter to company A and relied on sections 34(1) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 36(2) (Confidentiality) and 38 (Personal information) of the Freedom of Information (Scotland) Act 2002 (FOISA) for doing so. The Council upheld this decision on review.

Following an investigation, the Commissioner found that the letter was exempt and that the Council had complied with Part 1 of FOISA in responding to the information request from Company A.



Background

1. On 1 November 2005, Company A submitted an information request to the Council for a copy of a letter which had been sent to a named Trading Standards Enforcement Officer on a particular date by two named individuals.
2. The Council responded on 11 November 2005, but refused to give the letter to Company A on the basis of the exemptions in sections 34(1), 36(2) and 38 of FOISA.
3. On 25 November 2005, Company A asked the Council to review its decision, refuting the fact that the exemptions applied to the information which had been withheld.
4. The Council carried out a review and notified company A of the outcome of the review on 21 December 2005. The Council upheld its original decision in respect of its reliance on sections 34(1), 36(2) and 38 of FOISA.
5. On 16 June 2006, company A applied to me for a decision as to whether the Council had breached Part 1 of FOISA in withholding the information contained in the letter from it. The application provided me with detailed background information about the matter in question.
6. The case was allocated to an investigating officer and the application was validated by establishing that the company had made an information request to a Scottish public authority and had appealed to me only after asking the Council to review its response to his request.

The Investigation

7. A letter was sent by the investigating officer to the Council on 28 June 2006, notifying it of the application and asking it to comment on the application by company A in terms of section 49(3)(a) of FOISA. The Council was asked to provide, amongst other items, a copy of the information that had been withheld from Company A, an analysis of the exemptions that it was relying on in withholding the information from the company, and an analysis of the application of the public interest test in relation to the exemptions where applicable.
8. A response was received from the Council on 6 July 2006.



9. In carrying out this investigation, I have taken into account the full submissions made by Company A and by the Council.

Submissions from the Council

10. In its submissions to my Office, the Council confirmed that it is relying on the following exemptions for refusing to release a copy of the letter in question to Company A:
- section 34(1)(b) – Investigations carried out by Scottish public authorities and proceedings arising out of such investigations
 - section 36(2) – Confidentiality
 - section 38 – Personal information
11. I will consider the Council's reasoning for relying on these exemptions below.

Submissions from Company A

12. Company A advised me that they are seeking a copy of the letter in question as the letter was provided to the Council as part of an investigation being carried out by the Council's Trading Standards Service in relation to the actions of the individuals who sent the letter. According to Company A, this investigation related to a product for which all trade marks, patents and intellectual property rights are owned by Company A.
13. Company A has also provided me with background information as to what led to the investigation being carried out by the Council's Trading Standards Service, and what the subsequent outcome of this investigation was.
14. Company A is keen to see a copy of the letter in order to establish what information was given by the named individuals to the Trading Standards Service.



The Commissioner's Analysis and Findings

15. As has been explained already, the Council has sought to rely on a number of different exemptions for withholding a copy of the letter from Company A. I have only found it necessary to consider one of the exemptions relied on by the Council (section 34(1)(b) of FOISA) in this decision notice. I trust that the reason for this will become apparent later.

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

16. The exemption in section 34(1)(b) of FOISA exempts information which has at any time been held by a Scottish public authority for the purposes of an investigation which is conducted by the authority and which in the circumstances may lead to a decision by the authority to make a report to the Procurator Fiscal to enable it to be determined whether criminal proceedings should be instituted.

17. The exemption under section 34(1)(b) is a qualified exemption. This means that even if the Council find that the information that it has withheld from Company A would come within the scope of the exemption under section 34(1)(b) of FOISA, it is still required to consider the application of the public interest test in section 2(1)(b) of FOISA. The Council would therefore be required to consider whether in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

18. In order for the Council to be able to rely on this exemption it must show that the letter is, or was at any time, held by it for the purposes of an investigation conducted by it which in the circumstances may lead to a decision by the authority to make a report to the Procurator Fiscal to enable it to be determined whether criminal proceedings should be instituted.

19. In its submissions to my Office, the Council advised that, following a complaint, it carried out an investigation into a possible infringement of the Trade Marks Act 1994 and that the letter was received as part of this investigation. The Council submit that this investigation was carried out to ascertain whether any legal proceedings should be instigated.

20. The Council has advised that its Trading Standards Service, which carried out this investigation, have a duty to carry out such investigations under the Trade Marks Act 1994 where a complaint is received regarding a possible trade mark infringement. The duty to carry out such an investigation, and the powers afforded to Trading Standards Services in undertaking such an investigation are found in sections 92 and 93 of the Trade Marks Act 1994, and in sections 27 and 28 of the Trade Descriptions Act 1968.



21. The Council concluded that the information contained in the letter enabled it to conclude its investigation into a possible trade mark infringement.
22. From considering the information which has been withheld, together with the submissions from the Council, I am satisfied that the letter in question was held by the Council as part of an investigation. I am also satisfied that the investigation that was carried out was one which the Council's Trading Standards Service has a duty to carry out under the terms of the Trade Marks Act 1994. I am also satisfied that this investigation conducted by the Council was one which in the circumstances may lead the Council to decide to make a report to the Procurator Fiscal to determine whether criminal proceedings should be instituted.
23. As I am satisfied that the letter which has been withheld from company A would come within the scope of the exemption in section 34(1)(b) of FOISA, I am now required to consider the application of the public interest test laid down in section 2(1)(b) of FOISA.

Public Interest Test

24. The public interest is not defined in FOISA, but it has been variously described as being something which is of serious concern and benefit to the public, not merely something of individual interest. It has also been held that the public interest does not mean of interest to the public, but in the interest of the public; that is, that it serves the interest of the public.
25. In considering the application of the public interest test the Council has advanced the following arguments to justify its view that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 34(1)(b).
 - That the public interest is best served by information which comes its way as part of an investigation being kept confidential.
 - That it would not be in the wider public interest for the Council to take actions which would result in the public being less willing to assist the Council in conducting investigations, as would be the case if those potential participants believed that any information they supplied to the Council would be placed into the public domain.

The Council has also submitted that, in looking at the nature of the information contained in the letter, the information is not of a quality which would make it of genuine interest to the wider public and is only of interest to Company A. The Council states that it considers that the information is only of interest to Company A.

26. In considering the application of the public interest test, I have taken into account the submissions made by the Council and by Company A.



27. The Council has argued that the effectiveness of investigations would be affected adversely if information provided in the course of the investigation was not kept confidential. This is a compelling argument where an investigation is ongoing. In this particular case the investigation which the authority had been conducting had been concluded at the time of request. So the harm envisaged by the authority is not to this investigation but to the potential impact on similar investigations in the future. It is more difficult to judge what would be the future impact, not least because it would be inappropriate to suggest to those supplying information that such information would always be kept confidential, given the requirements of the Act.
28. However, looking at the specific information in this case, I do think it is fair to conclude that the full, frank and cooperative nature of the information supplied might be replaced by a more guarded or reticent response in future investigations if this information was released.
29. Even so it may be in the public interest to do so, if the public benefits in release outweigh the negative consequences of release. I have considered the nature and the contents of the letter in question and the context in which it was supplied. In my view the contents may be of interest to the applicant, but are not of general public interest. Even so it may be appropriate to satisfy the interest of an individual if this will meet wider public interest values such as ensuring fairness or establishing whether a public authority with regulatory responsibilities is adequately discharging its functions.
30. On that basis I have considered the balance of public interests. Whilst release may assist the applicant, the wider public interest benefits in release are not strong and do not outweigh the benefits of maintaining the exemption.
31. I would like to make it clear here that although I am satisfied that the information that has been withheld from Company A does come within the scope of the exemption in section 34(1)(b) of FOISA, and that the public interest lies in maintaining the exemption I am not seeking to indicate that all information of this kind would be treated in the same way. I will consider any other appeals to my Office for similar information on a case by case basis in terms of the information that has been withheld.
32. I am however satisfied that the Council has relied on the exemption in section 34(1)(b) of FOISA correctly in withholding the letter from Company A.
33. As I am satisfied that the Council has relied on the exemption in section 34(1)(b) of FOISA correctly, and that this applies to the whole of the document that has been withheld from Company A, I have not found it necessary to consider the other exemptions relied on by the Council.



Decision

I find that East Ayrshire Council dealt with Company A's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and that the letter is exempt from release in terms of section 34(1)(b) of FOISA.

Appeal

Should either Company A or the 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 of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
18 December 2006



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.

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) ...
 - (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted
 - (c) ...