



Scottish Information
Commissioner

**Decision 219/2006 Dr Donald Reid and West
Lothian Council**

*Information relating to complaints lodged with the Council's Trading
Standards and Consumer Protection Service*

**Applicant: Dr Donald Reid
Authority: West Lothian Council
Case No: 200502424
Decision Date: 26 June 2008**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 219/2006 Dr Reid and West Lothian Council

Information relating to complaints about a specified company – whether the provisions of Part 9 of the Enterprise Act 2002 constitute a prohibition on disclosure for the purposes of section 26(a) of FOISA – failure to respond to request for review within statutory timescale – section 21 of FOISA

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement), 2(1) and 2(2)(b) (Effect of exemptions), 21(1) (Review by Scottish public authority) and 26(a) (Prohibitions on disclosure)

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision. (References are made to the text of the Enterprise Act 2002 within the decision, and are not set out separately in the Appendix.)

Opinion of the Court of Session in the case of Dumfries and Galloway Council v Scottish Information Commissioner dated 8 February 2008:
<http://www.scotcourts.gov.uk/opinions/2008CSIH12.html>

Facts

Dr Reid wrote to West Lothian Council (the Council) requesting information relating to complaints made to the Consumer and Trading Standards Service about a specified company (the company). The Council refused to supply this information on the grounds that the information was exempt from release under section 26(a) of the Freedom of Information (Scotland) Act 2002 (FOISA), because Part 9 of the Enterprise Act 2002 contained a prohibition on disclosure. Following a review, Dr Reid asked the Commissioner to consider this case.

The Commissioner found that the Council generally acted in accordance with Part 1 of FOISA when responding to Dr Reid's request, and in particular he found that the exemption in section 26(a) of FOISA had been correctly applied in this case.



However, the Commissioner found that the Council failed to respond to Dr Reid's request for review within the timescale set out in section 21(1) of FOISA. The Commissioner did not require any remedial steps to be taken in response to this technical breach.

This decision replaces Decision 219/2006, which was issued on 5 December 2006, and which was quashed by the Court of Session on 28 May 2008.

Background

1. This decision concerns the handling of a request for information concerning complaints made to the Trading Standards Services of West Lothian Council (the Council). However, the same request was submitted by Dr Reid to each of Scotland's 32 local authorities. Ten of these requests were ultimately the subject of an application for a decision by me. Two of these ten cases were resolved informally, while the remaining eight were the subject of full investigation.
2. The key issue in each of these cases is whether or not provisions within Part 9 of the Enterprise Act 2002 (the EA) constitute a prohibition on disclosure that exempts relevant information from release under FOISA. While the general issues raised by these cases were investigated together, separate decisions set out the particular circumstances of each case, and the submissions made by the relevant authority.

Background on section 26(a) of FOSIA and Part 9 of the Enterprise Act 2002

3. At this stage, it is helpful to outline the provisions of FOISA and the EA, interpretation of which is central to this decision.
4. In terms of section 26(a) of FOISA, information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) is prohibited by or under an enactment.
5. The EA enacts various provisions in relation to competition law, the enforcement of consumer legislation and insolvency. Part 9 of the EA introduces rules to govern the disclosure of certain types of information held by public authorities by creating restrictions on the handling of what is termed "specified information".
6. Section 238 of the EA defines the term "specified information". 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) the following Parts of the EA :

- Part 1 (which establishes the Office of Fair Trading (OFT) as a corporate body and provides for arrangements for making “super-complaints”);
- Part 3 (which makes provisions for a new merger control regime);
- Part 4 (which makes provision for market investigation references to be made by the OFT);
- Part 6 (which creates a new criminal offence for individuals to be engaged in cartels, and provides the OFT with investigatory powers);
- Part 7 (which deals with a number of miscellaneous competition provisions);
or
- Part 8 (which outlines new procedures for enforcing certain consumer legislation and related matters)

b) any of the following enactments (specified in Schedule 14 of the EA):

- Parts 1, 2, 3, 4, 5, 6, 7, 8 and 11 of the Fair Trading Act 1973
- Trade Descriptions Act 1968
- Hallmarking Act 1973
- Prices Act 1974
- Consumer Credit Act 1974
- Customs and Excise Management Act 1979
- Estate Agents Act 1979
- Competition Act 1980
- Video Recordings Act 1984
- Consumer Protection Act 1987
- Consumer Protection (Northern Ireland) Order 1987
- Copyright, Designs and Patents Act 1988
- Property Misdescriptions Act 1991
- Timeshare Act 1992
- Clean Air Act 1993
- Value Added Tax Act 1994
- Trade Marks Act 1994
- Competition Act 1998
- Chapter 3 of Part 10 and Chapter 2 of Part 18 of the Financial Services and Markets Act 2000
- An order made under section 95 of that Act; or
- Fireworks Act 2003.

c) any such subordinate legislation as the Secretary of State may by order specify for the purposes of section 238(1) of the EA.



7. Sections 237(1) and (2) of the EA provide that specified information relating to the affairs of an individual or any business of an undertaking must not be disclosed during the lifetime of the individual or while the undertaking continues in existence, *unless* disclosure is permitted under Part 9 of the EA.
8. Section 245(1) of the EA creates a criminal offence where a person discloses information to which section 237 applies in contravention of section 237(2). This criminal offence is punishable by imprisonment for a term up to two years, or a fine, or both.
9. There are a number of circumstances where the disclosure of specified information is permitted through “gateways” under Part 9. These can be summarised as follows:
 - if the individual or undertaking has given consent to the disclosure (section 239);
 - if disclosure is required for the purpose of a Community obligation (section 240);
 - if disclosure by the authority is for the purpose of facilitating the exercise of a statutory function of that authority (section 241(1));
 - if disclosure is in connection with investigating a criminal offence or for the purposes of criminal proceedings (section 242);
 - if disclosure is to an overseas public authority for the purposes of investigating an offence of pursuing criminal or civil proceedings (section 243).
10. Furthermore, it should be noted that section 237(6) states that “This Part [i.e. Part 9] (except section 244) does not affect any power or duty to disclose information which exists apart from this Part.”
11. Before disclosing any specified information, section 244 of the EA requires an authority to have regard to a number of considerations, i.e.:
 - the need to exclude from disclosure information which the authority thinks is contrary to the public interest;
 - the need to exclude from disclosure commercial information the disclosure of which the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or information relating to the private affairs of an individual the disclosure of which the authority thinks might significantly harm the individual’s interests; and
 - the extent to which disclosure of information relating to a business interest or the private affairs of an individual is necessary for the purpose for which the authority is permitted to make the disclosure.



Dr Reid's request and the Council's response

12. Dr Reid wrote to the Council's Trading Standards Services on 9 February 2005, requesting details of any complaints lodged in the last 10 years against any or all of the following:
- a) a named company (which will be referred to as "the company" throughout this decision),
 - b) any named directors of the company (whether the complaint related to the director in connection with the company or otherwise), and
 - c) any named employee of the company.

Dr Reid's request specified further that the details of the complaints that he was requesting were to include:

- i. the date on which the complaint was lodged,
 - ii. against whom the complaint was lodged (in relation to a – c above),
 - iii. a brief summary of the nature of the complaint, and
 - iv. the outcome of any investigation undertaken.
13. The Council issued a refusal notice, dated 8 March 2005, in response to this request. This stated that the information requested was subject to the absolute exemption in section 26(a) of FOISA because its disclosure was prohibited under Part 9 of the EA.
14. Dr Reid then wrote to the Council seeking a review of the decision to withhold the information he had requested. The request for review, in a letter dated 14 March 2005, suggested that the Council had failed to have regard to provisions within section 244 of EA when considering the request.
15. Dr Reid did not receive any response to his request for a review. Dr Reid then made an application to my Office about this case, along with 9 others. His application was received on 15 August 2005.
16. The case was allocated to an investigating officer, who contacted the Council to establish why no response had been provided following Dr Reid's request for review. The Council indicated that it had no record of receiving Dr Reid's request for review, and so no review had been undertaken. However, the Council indicated that it would be willing to undertake a review should a further request be made.
17. After receiving advice from my Office, Dr Reid submitted a second request for review by email dated 21 September 2005.



18. Despite repeated contact from my Office to check on the progress of this matter, no response to Dr Reid's further request for review was issued until 1 March 2006. The Council's response advised Dr Reid that it had upheld the initial judgement that Part 9 of the EA created a prohibition on disclosure for the purposes of section 26(a) of FOISA.
19. Following the receipt of this response, Dr Reid submitted a further application for a decision by me. This was received by my Office on 2 March 2006.
20. Dr Reid's appeal concerning West Lothian Council was then validated by establishing that Dr Reid had made an information request to a Scottish public authority under FOISA (i.e. the Council) and had appealed to me only after asking the Council to review the response to his request.

Investigation

21. The investigating officer wrote to the Council on 3 March 2006 to confirm that a valid application for decision had now been received and that a full investigation would now commence. The Council was invited to comment on the case in terms of section 49(3)(a) of FOISA. The Council was asked to provide details of its reasoning when reaching the view that provisions within Part 9 of the EA created a prohibition on disclosure for the purposes of section 26(a) of FOISA.
22. During the investigation, I sought the Opinion of Senior Counsel on the interpretation of the provisions of Part 9 of the EA. This Opinion suggested that these provisions did not create a prohibition for the purposes of section 26(a) of FOISA. I invited comments from the Council on this Opinion and also invited submissions on any other exemption that the Council believed applied to the information withheld. The Council disagreed with the Opinion, and it did not seek to apply any further exemptions to the information requested by Dr Reid.
23. I also provided copies of the Opinion, and sought comments on this from a range of bodies that had an interest in the matters raised by this case, including the UK Government (the Department for Trade and Industry), the Office of Fair Trading, LACORS, (the Local Authorities Coordinating Office on Regulatory Services), the Scottish Consumer Council and the Information Commissioner (my counterpart responsible for enforcing the Freedom of Information Act 2000).



The Commissioner's analysis and findings

Does the EA create a prohibition on disclosure?

24. Section 237(1) of the EA states that the provisions of section 237 apply only to information that is "specified information" as defined in section 238, and which relates to either the affairs of an individual or any business of an undertaking.. In order to determine whether the exemption in section 26(a) of FOISA has been correctly applied by the Council in this particular case, three separate questions must be addressed:
- a) is the information requested by Dr Reid "specified information" for the purposes of the EA?
 - b) does the information relate to the affairs of an individual or any business of an undertaking?
 - c) if the answers to both (a) and (b) are "yes", does part 9 of the EA then prohibit its release?
25. In response to the first and second questions, I am satisfied that the requested information is specified information for the purposes of the EA, and that it relates to the business of an undertaking, namely that of the company. Dr Reid has requested information about a named company that has been gathered by the Council in the pursuit of its statutory functions under consumer legislation referred to in section 238 of the EA. This concurs with the view taken by the Council that the information is specified information, given that it is held by it with regard to its wide consumer protection function, the function of identifying problem traders and of taking possible enforcement action.
26. The question of whether the provisions of Part 9 of the EA 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, which was prompted by Dr Reid's related information request to Dumfries and Galloway Council. This can be read online here: <http://www.scotcourts.gov.uk/opinions/2008CSIH12.html>.
27. The Court concluded that in this case the provisions contained in Part 9 of the EA do create a prohibition on disclosure for the purposes of section 26(a) of FOISA.
28. In line with the Court's judgement (and for the reasons set out in the judgement), I find that the exemption in section 26(a) was correctly applied by the Council in this case.



Technical breach – timescale for review

29. I want to finally comment on one technical aspect of this case. When Dr Reid first asked the Council to review its response to this information request, it would appear that his letter was either not received by the Council or mislaid following its receipt.
30. In the absence of proof of postage, Dr Reid was advised to submit a further request for a review. This advice was given by my Office after it had been advised that the Council would be willing to conduct a review outwith the period in which Dr Reid was entitled to request it.
31. However, following the receipt of Dr Reid's second request for review in September 2005, the Council failed to respond until 1 March 2006. In taking so long to conduct a review, the Council failed to comply with the requirements of section 21(1) of FOISA, which states that on receipt of a request for review, an authority should comply promptly, and in any event by not later than the twentieth working day after its receipt.

Decision

I find that West Lothian Council (the Council) generally acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) when responding to Dr Reid's request for information.

In particular, I have concluded that the information requested by Dr Reid was appropriately withheld by the Council on the basis that it was exempt from disclosure under the terms of section 26(a) of FOISA.

However, I found that the Council failed to comply with the requirements of Part 1 and section 21(1) of FOISA by failing to respond to Dr Reid's request for review within 20 working days of its receipt. I do not require any remedial steps to be taken in response to this technical breach.



Appeal

Should either Dr Reid 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 after the date of intimation of this notice.

Signed on behalf of Kevin Dunion, Scottish Information Commissioner, under delegated authority granted on 14 November 2007.

Margaret Keyse
Head of Investigations
26 June 2008



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.

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

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

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