

Decision Notice



Decision 002/2010 Web Rigging Services Limited and Waterfront Edinburgh Limited

Handling of an information request and a request for review

Reference No: 200901987
Decision Date: 14 January 2010

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Kevin Dunion
Scottish Information Commissioner

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Summary

This decision considers whether Waterfront Edinburgh Limited (WEL) complied with the technical requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to an information request made by Web Rigging Services Limited (WRS).

Background

1. On 23 March 2009, WRS wrote to WEL requesting the following information: All information and communications stored by Waterfront Edinburgh on WRS, with particular regard to documents relating to allegations made by [another company] against WRS. WRS requested to see both internal and external communications.
2. Waterfront Edinburgh Limited (WEL) is a joint venture regeneration company wholly-owned by its two partners, the City of Edinburgh Council and Scottish Enterprise Edinburgh and Lothian (which is a company wholly owned by Scottish Enterprise). As such, WEL is a publicly-owned company as defined in section 6(1) of FOISA, and it is a public authority in terms of section 3(1).
3. WEL responded to WRS's information request on 26 March 2009 stating that it was withholding the information because it related to a confidential contractual relationship between the parties concerned.
4. On 26 March 2009, WRS wrote to WEL requesting a review of its decision. In particular, WRS asserted that it did not accept that a claim of confidentiality could be maintained.
5. WEL failed to respond to the review request made by WRS.
6. WRS subsequently employed a solicitor to pursue its information request on its behalf. WRS's lawyer made a renewed request for the same information to WEL on 25 September 2009 and on 30 September 2009 was re-directed to submit this to WEL's Chairman.
7. The request was made to the Chairman on 14 October 2009 and on 15 November 2009 WEL released the information in full to the lawyer.
8. WRS wrote to the Commissioner on 16 November 2009, stating that it was dissatisfied with WEL's handling of its information request of 23 March 2009 and subsequent request for review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.



9. In terms of section 47(4)(a) of FOISA, an application to the Commissioner made under section 47(1)(a) must be made within six months of the applicant receiving the response to their request for review. In this case, the application made by WRS was submitted to the Commissioner outwith the six month period.
10. The Commissioner may, however, (by virtue of section 47(5) of FOISA) consider an application after the expiry of the six month period if he considers it appropriate to do so. In this case, and after having considered representations made by WRS, the Commissioner applied the discretion granted to him under section 47(5) of FOISA and agreed to consider WRS's application on the basis that WEL had failed to advise WRS of their right to make an application to the Commissioner (this is discussed in more detail in the Commissioner's analysis and findings section below).
11. The application was validated by establishing that WRS 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. The case was then allocated to an investigating officer.

Investigation

12. On 3 December 2009, WEL was notified in writing that an application had been received from WRS and was invited to comment on the application.
13. WEL responded on 17 December 2009 with its comments which will be discussed further in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

Court of Session Opinion – requests for documents

14. The Commissioner notes that the information request by WRS included a request for copies of documents. In the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73, the Court of Session emphasised that FOISA provides a right to information, not documents.



15. However, the Court said, in paragraph 45 of its Opinion, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. The Court also said that, if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
16. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between WRS and WEL that WEL questioned the validity of the information request. In addition, there is nothing to suggest from correspondence which WEL has subsequently had with the Commissioner that WEL was unclear as to what the information request sought.
17. The Commissioner is satisfied that the request is reasonably clear and that the information request is therefore valid.

Section 16 – Refusal of request

18. Section 16 of FOISA sets out what information an applicant must be told if a public authority intends to refuse to disclose information in response to an information request. Section 16(1) is set out in full in the Appendix. In terms of section 16(1)(c) and (d), a public authority must specify the exemption it is relying on to withhold the information and, if not otherwise apparent, why the exemption applies.
19. The Commissioner notes that in responding to the request, WEL did not provide WRS with a refusal notice detailing that it was withholding certain information from him, outlining the exemption(s) under FOISA that it was relying on in doing so and its reasons for relying on them.
20. WEL's letter of 26 March 2009 stated that "...in view of the fact that your request relates to a confidential contractual relationship between the parties concerned, we are unable to accede to your request and we will not therefore release to you either the originals or copies of any communication or notes of meetings which have taken place between WEL and [the other company]".
21. Although the Commissioner accepts that this letter may be read as a notice detailing that it was withholding the information requested in terms of section 16 of FOISA, he notes that this response failed to specify the particular exemptions it was relying upon and an explanation of why they applied. The Commissioner therefore finds that WEL failed to comply with the requirements of section 16(1)(c) and (d) of FOISA.

Section 19 – Content of certain notices

22. Section 19 of FOISA states that a refusal notice under sections 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 17(1) (information not held)) must contain particulars-



(a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and

(b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

23. The Commissioner notes that WEL's response letter of 26 March 2009 failed to provide the information required by section 19 of FOISA with respect to WRS's right to request a review and subsequently apply to the Commissioner. For this reason, the Commissioner has concluded that WEL also failed to comply with the requirements of section 19 (a) and (b) of FOISA

Section 21- Review by Scottish public authority

24. Section 21(1) of FOISA gives a Scottish public authority a maximum of 20 working days following the date of receipt of the requirement to comply with a request for review, subject to certain exceptions which are not relevant in this case.
25. Section 21(4) requires that, in reviewing a decision, the authority 21(4) sets out what an authority might do when it conducts a review - i) confirm a decision with or without modification, ii) substitute a decision, or iii) reach a decision if none had been made before.
26. Section 21(5) then requires the authority to notify the applicant of what was done under section 21(4), and a statement of its reasons for so doing, within the time period required by section 21(1).
27. In its submissions WEL explained that, WRS's request for review was dealt with immediately on its receipt by the Chief Executive in consultation with employees involved. It stated that following these internal deliberations it had concluded that its response of 26 March 2009 was valid.
28. It therefore appears that WEL did take some steps to review its decision to withhold the information sought by WRS, and that this led it to confirm the decision previously made. Thus it seems that steps were taken to comply with the obligations in sections 21(1) and (4) of FOISA. However, WRS has indicated that it never received any response to its request for review, and WEL provided no evidence to the Commissioner to show that it had notified WRS of the outcome of its review. Therefore, the Commissioner finds that WEL failed to comply with section 21(5) of FOISA by failing to notify WRS of the outcome of its review of 26 March 2009.
29. WEL went on to explain that, by the time of the subsequent made request by WRS's solicitor, both parties it was felt that no further matters of a confidential nature remained, and so the information sought was released in response to that request.



30. As WEL has now provided the information requested, the Commissioner does not require WEL to take any action in respect of this breach in response to this decision notice. However, the breaches will be noted and may be taken into account in determining whether any future action should be taken in respect of WEL under the Commissioner's Enforcement Strategy.

DECISION

The Commissioner finds that Waterfront Edinburgh Limited (WEL) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002, in particular sections 16(1), (19) and 21(5) when responding to the information request made by Web Rigging Services Ltd (WRS). As WEL has now provided WRS with the information sought by its request (following the further request made on its behalf by a solicitor), the Commissioner does not require WEL to take any action with regard to these failures in response to this decision notice.

Appeal

Should either Web Rigging Service Limited or Waterfront Edinburgh Limited 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.

Claire Sigsworth
Deputy Head of Enforcement
14 January 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.

...

3 Scottish public authorities

- (1) In this Act, "Scottish public authority" means-
- (a) any body which, any other person who, or the holder of any office which-
 - (i) is listed in schedule 1; or
 - (ii) is designated by order under section 5(1); or
 - (b) a publicly-owned company, as defined by section 6.

...

6 Publicly-owned companies

- (1) A company is a "publicly-owned company" for the purposes of section 3(1)(b) if it is wholly owned-
- (a) by the Scottish Ministers; or
 - (b) by any other Scottish public authority listed in schedule 1, other than an authority so listed only in relation to information of a specified description.

...



16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
 - (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.

...

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

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.

...

- (4) The authority may, as respects the request for information to which the requirement relates-
 - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;



- (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

47 Application for decision by Commissioner

...

- (4) Subject to subsection (5), an application to the Commissioner under subsection (1) must be made-
- (a) where the application concerns a matter mentioned in paragraph (a) of subsection (1), before the expiry of six months after the date of receipt by the applicant of the notice complained of; or
 - (b) where the application concerns a matter mentioned in paragraph (b) of that subsection, before the expiry of six months after the period allowed in section 21(1) for complying with a requirement for review has elapsed.
- (5) The Commissioner may consider an application under subsection (1) made after the expiry of the time allowed by subsection (4) for the making of that application if, in the opinion of the Commissioner, it is appropriate to do so.

...