

Decision Notice

Decision 173/2014 Mr BJ Fielding-Browne and Renfrewshire Council

Information on a specified company

Reference No: 201401095

Decision Date: 6 August 2014



Scottish Information
Commissioner

Summary

On 11 March 2014, Mr Fielding-Browne asked Renfrewshire Council (the Council) for any information that it held regarding a named company. The Council withheld the information under the exemption in section 26(a) of FOISA on the basis that there was a prohibition on disclosure created by the Enterprise Act 2002 (the EA).

Following an investigation, the Commissioner found that the Council was entitled to withhold the information on the basis that it was exempt from disclosure under section 26(a) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections sections 1(1) and (6) (General entitlement); 2(1) and (2)(b) (Effect of exemptions); 26(a) (Prohibitions on disclosure)

Enterprise Act 2002 (the EA) sections 211 (Domestic infringements); 237 (General restriction); 238 (Information)

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. On 11 March 2014, Mr Fielding Browne wrote to the Council requesting any information that it held regarding a named company.
2. The Council responded on 20 March 2014. The Council informed Mr Fielding-Browne that the information was exempt from disclosure in terms of section 26(a) of FOISA. This was on the basis that there was a prohibition on disclosure of the information contained in the EA.
3. On 11 April 2014, Mr Fielding-Browne wrote to the Council requesting a review of its decision. Mr Fielding-Browne stated that the information should be disclosed to him.
4. The Council notified Mr Fielding-Browne of the outcome of its review on 6 May 2014. The Council upheld its decision that the information was exempt from disclosure under section 26(a) of FOISA.
5. On 20 May 2014, Mr Fielding-Browne wrote to the Commissioner, stating that he 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.
6. The application was validated by establishing that Mr Fielding-Browne made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 9 June 2014, the Council was notified in writing that an application had been received from Mr Fielding-Browne and was asked to provide the Commissioner with the information withheld from him. The Council provided the information and the case was then allocated to an investigating officer.
8. 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. The Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. The Council responded on 16 July 2014, providing submissions on its application of the exemption in section 26(a) of FOISA.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Fielding-Browne and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 26 of FOISA – prohibitions on disclosure

11. Section 26(a) of FOISA exempts information from disclosure under FOISA where disclosure 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. In this case, the Council argued that such a prohibition was created by sections 237 and 238 of the EA.
12. The Council submitted that the requested information related to the business of an undertaking and that the information comprised specified information for the purposes of section 238 of the EA. The Council stated that the information had been gathered by it in pursuit of its statutory functions under consumer legislation referred to in section 238 of the EA.
13. The Council stated that the information held by the Council came to it in exercise of its duties as a General Enforcer under Part 8 of the EA, specifically "Domestic Infringements". The Council stated that this was in line with its obligations under the Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2003, including (but not limited to) its duties under the Sale of Goods Act 1979 and the Unfair Contract Terms Act 1977.
14. The Council stated that it did not consider that disclosure of the information was permitted under any of the provisions contained in Part 9 of the EA.
15. 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*¹. In that case, the Court concluded that the provisions contained in Part 9 of the EA created a prohibition on disclosure for the purposes of section 26(a) of FOISA.

¹ <http://www.scotcourts.gov.uk/opinions/2008CSIH12.html>

16. 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.
17. 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.
18. 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 Commissioner is satisfied that the Council, as a person, certain of whose functions are functions of a public nature, is a public authority for these purposes.
19. The Commissioner is also satisfied that the withheld information was held by the Council in connection with its enforcement duties under Part 8 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.
20. 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.
21. In the Commissioner’s view, “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. In this case, the Commissioner is satisfied that the source of the information under consideration is information which could be described as having come to the Council and thus (being held for the purposes described in paragraph 19 above) falls within the meaning of “specified information”. Consequently, she is also satisfied that this information is prohibited from disclosure in terms of section 237 of the EA.
22. In all the circumstances, therefore, the Commissioner finds that the disclosure of the information 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.

Decision

The Commissioner finds that Renfrewshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Fielding-Browne.

Appeal

Should either Mr Fielding-Browne or Renfrewshire Council wish to appeal against this decision, they have the right to 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.

Margaret Keyse
Head of Enforcement
6 August 2014

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;

...

Enterprise Act 2002

211 Domestic infringements

- (1) In this Part a domestic infringement is an act or omission which—

- (a) is done or made by a person in the course of a business,
- (b) falls within subsection (2), and
- (c) harms the collective interests of consumers in the United Kingdom.

- (2) An act or omission falls within this subsection if it is of a description specified by the Secretary of State by order and consists of any of the following—
- (a) a contravention of an enactment which imposes a duty, prohibition or restriction enforceable by criminal proceedings;
 - (b) an act done or omission made in breach of contract;
 - (c) an act done or omission made in breach of a non-contractual duty owed to a person by virtue of an enactment or rule of law and enforceable by civil proceedings;
 - (d) an act or omission in respect of which an enactment provides for a remedy or sanction enforceable by civil proceedings;
 - (e) an act done or omission made by a person supplying or seeking to supply goods or services as a result of which an agreement or security relating to the supply is void or unenforceable to any extent;
 - (f) an act or omission by which a person supplying or seeking to supply goods or services purports or attempts to exercise a right or remedy relating to the supply in circumstances where the exercise of the right or remedy is restricted or excluded under or by virtue of an enactment;
 - (g) an act or omission by which a person supplying or seeking to supply goods or services purports or attempts to avoid (to any extent) liability relating to the supply in circumstances where such avoidance is restricted or prevented under an enactment.
- (3) But an order under this section may provide that any description of act or omission falling within subsection (2) is not a domestic infringement.
- (4) For the purposes of subsection (2) it is immaterial—
- (a) whether or not any duty, prohibition or restriction exists in relation to consumers as such;
 - (b) whether or not any remedy or sanction is provided for the benefit of consumers as such;
 - (c) whether or not any proceedings have been brought in relation to the act or omission;
 - (d) whether or not any person has been convicted of an offence in respect of the contravention mentioned in subsection (2)(a);
 - (e) whether or not there is a waiver in respect of the breach of contract mentioned in subsection (2)(b).
- (5) References to an enactment include references to subordinate legislation (within the meaning of the Interpretation Act 1978 (c. 30)).
- (6) The power to make an order under this section must be exercised by statutory instrument.
- (7) But no such order may be made unless a draft of it has been laid before Parliament and approved by a resolution of each House.

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.

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