

Decision Notice



Decision 161/2010 Dr Sandy Spowart and Scottish Enterprise

SMART: SCOTLAND application

Reference No: 201001209

Decision Date: 10 September 2010

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
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Summary

Dr Spowart requested from Scottish Enterprise a Project Application in relation to a SMART: SCOTLAND grant and the External Examiner's assessment on the project. Scottish Enterprise responded by providing some of the information requested, whilst withholding the remainder under the terms of sections 33(1)(b) of FOISA, as they considered its disclosure would be likely to prejudice certain commercial interests. Following a review, Dr Spowart remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which Scottish Enterprise also argued that the information was exempt under section 36(2) FOISA, the Commissioner found that Scottish Enterprise was entitled to withhold the information under the exemption in section 36(2), on the basis that its disclosure would constitute an actionable breach of confidence.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 36(2) (Confidentiality)

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. SMART: SCOTLAND is a Government Initiative which provides financial assistance to individuals and small to medium-sized enterprises to help support development projects which represent a significant technological advance for the relevant UK sector or industry.
2. The Scottish Government administered SMART: SCOTLAND until 1 October 2009, when Scottish Enterprise took over the scheme. Applicants wishing a project grant submit an application to Scottish Enterprise.
3. On 8 April 2010, Dr Spowart wrote to Scottish Enterprise in reference to a grant application submitted by a specific company. Dr Spowart requested that Scottish Enterprise provide him with a copy of the company's Project Application and of the External Examiner's assessment of the project.



4. Scottish Enterprise responded on 5 May 2010. In relation to his request for the Project Application, Dr Spowart was provided with some of the information and informed that the remainder of the Project Application and the External Examiner's assessment was being withheld in terms of section 33(1)(b) of FOISA (on the basis that disclosure would be likely to prejudice substantially a person's commercial interests).
5. On 8 May 2010, Dr Spowart wrote to Scottish Enterprise requesting a review of its decision. Specifically, Dr Spowart wished to be provided with section 26 of the Project Application and the External Examiner's assessment, providing reasons why he believed it to be in the public interest for this information to be released.
6. Scottish Enterprise notified Dr Spowart of the outcome of its review on 10 June 2010, upholding the original response that the remaining information was properly withheld in terms of section 33(1)(b) of FOISA.
7. On 12 June 2010, Dr Spowart wrote to the Commissioner, stating that he was dissatisfied with the outcome of Scottish Enterprise's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Dr Spowart 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

9. On 15 June 2010, Scottish Enterprise was notified in writing that an application had been received from Dr Spowart and asked to provide the Commissioner with any information withheld from him. Scottish Enterprise responded with the information requested and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted Scottish Enterprise, 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, Scottish Enterprise was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
11. Scottish Enterprise responded on 12 August 2010 confirming that it wished to rely upon sections 33(1)(b) and 36(2) of FOISA to withhold the information.
12. The relevant submissions obtained from Scottish Enterprise and Dr Spowart will be considered fully in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

13. 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 Dr Spowart and Scottish Enterprise and is satisfied that no matter of relevance has been overlooked.
14. Dr Spowart provided the Commissioner with various submissions regarding the project to which the SMART: SCOTLAND application related. The Commissioner can take cognisance of these, however, only to the extent to which they are relevant to whether Scottish Enterprise acted in accordance with the requirements of Part 1 of FOISA in dealing with Dr Spowart's requests for information. He would note in particular that, while having taken into account Dr Spowart's own views on the matter for the purposes of considering the public interest, he has proceeded on the basis that it is not his function to assess the merits of the project in question.

Section 36(2) - Confidentiality

15. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is necessary in the public interest.
16. Section 36(2) therefore contains a two stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
17. Scottish Enterprise explained that the information contained in the Project Application had been supplied to Scottish Enterprise by another person, namely the company referred to in Dr Spowart's request. It also advised that the information contained in the External Examiner's assessment of the project commented and reflected upon information contained within the Project Application. The External Examiners assessment had, in any event, been supplied to Scottish Enterprise by another person, namely the External Examiner. In the circumstances, the Commissioner is satisfied that all of the withheld information was obtained by Scottish Enterprise from another person and that the first part of the section 36(2) test has therefore been fulfilled.
18. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.



19. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
- the information must have the necessary quality of confidence;
 - the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

20. Having considered the information requested by Dr Spowart and the arguments put forward by Scottish Enterprise, the Commissioner is satisfied that it fulfils the criteria of having the necessary quality of confidence, in that the information is not common knowledge and could not readily be obtained by Dr Spowart through any other means.

Obligation to maintain confidentiality

21. Scottish Enterprise contended that the information had been communicated under an explicit obligation of confidence, referring to the declaration applicants were asked to sign in conjunction with their SMART: SCOTLAND application. The declaration, in particular, provides that the information in the application will only be used for specific purposes in connection with its processing and appraisal and will not be disclosed to any other organisation except for certain limited purposes in that connection. One of the specified purposes is the provision of the information to outside organisations contracted to provide technical expertise in confidence, which in this case resulted in the External Examiner's assessment (described by Scottish Enterprise as the External Expert Technical and Market Appraisal).
22. The declaration also states that if the application is successful, Scottish Enterprise will publish information from certain sections of the form (3 – 18 and 20 – 22), to make potential applicants, investors, the general public and other interested parties aware of the types of SMART projects, and individuals and businesses receiving SMART grants. Given that this particular application had been successful, the information contained in sections 3 – 18 and 20 – 22 was provided to Dr Spowart in response to his request.
23. Scottish Enterprise also advised that information from applications was provided to the independent experts under separate confidentiality agreements, which provided for the destruction of that information on completion of the assessment.
24. Having considered the circumstances of its provision to Scottish Enterprise, the Commissioner is satisfied that the information remaining withheld from the Project Application was received in circumstances which imposed upon Scottish Enterprise an obligation to maintain confidentiality. Given the circumstances in which it was obtained, and having considered its content, the Commissioner is also satisfied that the information in the External Examiner's assessment was provided under at least an implicit obligation to maintain confidentiality.



Unauthorised disclosure which would cause detriment

25. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence. In that respect, the test of detriment is different from establishing whether, for example, disclosure would prejudice *substantially* the commercial interests of any person when considering the exemption in section 33(1)(b) of FOISA.
26. Scottish Enterprise has submitted that disclosure would be detrimental to the interests of the company which provided the information in its application, in relation the future of the project in question and the company's competitive and trading position. The company's consent to release of the information was sought and declined.
27. It is also apparent that the information in the External Examiner's assessment is intrinsically linked to the information contained in the Project Application.
28. The Commissioner, having considered the submissions put forward by both Scottish Enterprise and Dr Spowart, is satisfied that disclosure of the information remaining withheld under section 36(2) would be unauthorised by, and detrimental to, the company supplying it. The Commissioner is therefore satisfied that the tests for an actionable breach of confidence are met in this case.
29. As noted above, while the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and not subject to the public interest test in section 2(1)(b), the law of confidence recognises that in certain circumstances the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of the information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is generally known as the public interest defence.
30. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.
31. In coming to a decision on this matter, the Commissioner has taken account of the submissions made by Dr Spowart on the public interest in his application and in his request for review. These submissions include Dr Spowart's views on the project in question.
32. There is clearly a general public interest in economy, efficiency and effectiveness in the expenditure of public funds, and more particularly in transparency and effective scrutiny in relation to the awarding of Government funding. In this case, the Commissioner notes that Dr Spowart holds strong views in relation to the project in question and its suitability for public funding. There is, on the other hand, a strong public interest in the maintenance of confidences. On balance, having considered all relevant submissions, the Commissioner is not persuaded that there is a public interest in disclosure sufficiently strong to outweigh that public interest in confidentiality.



33. Having considered all the arguments, therefore, the Commissioner does not consider there to be a reasonable argument in this case for the release of confidential information on public interest grounds and consequently is satisfied that Scottish Enterprise was entitled to withhold the information remaining withheld from the Project Agreement and the External Examiner's assessment under section 36(2) of FOISA.
34. Given that the Commissioner is satisfied that Scottish Enterprise was entitled to withhold the information under section 36(2) of FOISA, he is not required to (and will not) go on to consider the application of section 33(1)(b) of FOISA.

DECISION

The Commissioner finds that Scottish Enterprise was entitled to withhold the information remaining withheld from Dr Spowart under section 36(2) of FOISA.

Appeal

Should either Dr Spowart or Scottish Enterprise 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.

Margaret Keyse
Head of Enforcement
10 September 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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

36 Confidentiality

...

- (2) Information is exempt information if-
- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.