

Decision Notice

Decision 117/2014 Ms G and Argyll and Bute Council

Complaints regarding a named trader

Reference No: 201400623

Decision Date: 02 June 2014



Scottish Information
Commissioner

Summary

On 12 December 2013, Ms G asked Argyll and Bute Council (the Council) for information concerning complaints made against a named trader. 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

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.

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 237 (General restriction) and 238 (Information) and Schedule 14 (Specified functions)

Background

1. On 12 December 2013, Ms G emailed the Council requesting the following information:
“Within the last five years, has the Trading Standards Dept. of the Council ever received a complaint(s) regarding (named trader) in Oban. If so, can you please provide details, to include the date of the complaint(s), the nature of the complaint and the outcome of the complaint(s).”
2. The Council responded on 8 January 2014. The Council informed Ms G 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 sections 237 and 238 of the EA.
3. On 17 January 2014, Ms G emailed the Council requesting a review of its decision. Ms G stated that she was aware of what the complaint was about and partly how it was dealt with, but required a record for research purposes.
4. The Council notified Ms G of the outcome of its review on 14 February 2014. The Council upheld its decision that the information was exempt from disclosure under section 26(a) of FOISA. Additionally, the Council informed Ms G that it also considered the information to be exempt in terms of section 25 of FOISA on the basis that she was aware of the nature of the complaint and the information was therefore reasonably obtainable by her.
5. On 17 March 2014, Ms G wrote to the Commissioner, stating that she 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 Ms G 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

7. On 3 April 2014, the Council was notified in writing that an application had been received from Ms G and was asked to provide the Commissioner with any information withheld from her. The Council responded with the information requested 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 19 May 2014, providing submissions on its application of the exemptions in sections 25 and 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 Ms G 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 under FOISA where disclosure of the information 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 relates to the affairs of a business. It stated that the information had come to the Council as a result of an investigation undertaken by Trading Standards using powers under the Consumer Protection from Unfair Trading Regulations 2008 (the 2008 regulations). The Council explained that the information was therefore provided to the Council in connection with its functions under Part 8 of the EA and the 2008 regulations. The Council noted that the 2008 regulations were enacted under the Consumer Protection Act 1987 (the CPA) which is listed in schedule 14 of the EA.
13. 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.
14. 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.

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

15. 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.
16. 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.
17. The Commissioner is also satisfied that the withheld information was held by the Council in connection with the exercise of its functions under the CPA, which is one of the enactments listed in schedule 14 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.
18. 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.
19. 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 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 17 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.
20. 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.
21. As the Commissioner is satisfied that the information is exempt from disclosure in terms of section 26(a), she has not gone on to consider whether the Council was entitled to withhold the information under section 25 of FOISA.

Decision

The Commissioner finds that Argyll and Bute Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Ms G.

Appeal

Should either Ms G or Argyll and Bute 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.

Alison Davies
Deputy Head of Enforcement
02 June 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

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.

Schedule 14

Specified functions

Parts 1, 3, 4, 5, 6, 7, 8 and 11 of the Fair Trading Act 1973 (c. 41).

Trade Descriptions Act 1968 (c. 29).

Prices Act 1974 (c. 24).

Consumer Credit Act 1974 (c. 39).

Estate Agents Act 1979 (c. 38).

Competition Act 1980 (c. 21).

Video Recordings Act 1984 (c.39).

Consumer Protection Act 1987 (c. 43).

Consumer Protection (Northern Ireland) Order 1987 (S.I. 1987/2049 (N.I. 20)).

Copyright, Designs and Patents Act 1988 (c.48).

Property Misdescriptions Act 1991 (c. 29).

Timeshare Act 1992 (c. 35).

Clean Air Act 1993 (c.11).

Value Added Tax Act 1994 (c.23).

Trade Marks Act 1994 (c.26).

Competition Act 1998 (c. 41).

Chapter 3 of Part 10 and Chapter 2 of Part 18 of the Financial Services and Markets Act 2000 (c. 8).

An order made under section 95 of that Act.

Fireworks Act 2003.

Compensation Act 2006 (c.29).

Consumers, Estate Agents and Redress Act 2007.

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