

# Decision Notice

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## Decision 174/2018: Mr F and Scottish Enterprise

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### Minutes of meeting

Reference No: 201801178

Decision Date: 31 October 2018



Scottish Information  
Commissioner

## Summary

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Scottish Enterprise was asked about the funding of Pladis (a food company which includes the business formerly carried on by United Biscuits in the UK). Scottish Enterprise withheld information relating to a meeting under section 36(2) of FOISA, as it had been provided in confidence.

Following investigation, the Commissioner accepted Scottish Enterprise had been entitled to withhold the information.

## Relevant statutory provisions

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

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 2 May 2018, Mr F made a request for information to Scottish Enterprise. In relation to the food company known as Pladis (which includes the business formerly carried on by United Biscuits in the UK), Mr F requested information from 21 December 2017 that related to:
  - a) any applications for funding,
  - b) minutes from meetings and
  - c) any funding given or to be given, what any funding was for and any terms and conditions of funding given.
2. Scottish Enterprise responded on 1 June 2018. In relation to parts a) and c) of his request, it advised that it had provided him with the funding information on 21 December 2017, and that there had been no further application since that date.
3. In relation to part b) of the request, Scottish Enterprise submitted that any information held was exempt from disclosure under regulation 36(2) of FOISA. It explained that it had a non-disclosure agreement (NDA) with Pladis, covering minutes from meetings,
4. On 5 June 2018, Mr F wrote to Scottish Enterprise, requesting a review of its decision on the basis that the public interest favoured disclosure.
5. Scottish Enterprise notified Mr F of the outcome of its review on 5 July 2018. It upheld the original decision that the information was exempt under regulation 36(2) of FOISA.
6. On 13 July 2018, Mr F wrote to the Commissioner. Mr F applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He did not accept that the exemption in section 36(2) of FOISA applied.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Mr F made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 31 July 2018, Scottish Enterprise was notified in writing that Mr F had made a valid application. Scottish Enterprise was asked to send the Commissioner the information withheld from Mr F. Scottish Enterprise provided the information, which consisted of handwritten notes taken during a meeting with Pladis, and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Scottish Enterprise was invited to comment on this application and to answer specific questions, focusing on the requirements of section 36(2) of FOISA.
10. Scottish Enterprise responded, confirming that it wished to rely upon section 36(2) of FOISA to withhold the information.

## Commissioner's analysis and findings

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11. 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 him by both Mr F and Scottish Enterprise. He is satisfied that no matter of relevance has been overlooked.

### **Section 36(2) - Confidentiality**

12. 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.

#### *Obtained from another person*

13. 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.
14. Scottish Enterprise explained to the Commissioner that the information within the notes had been supplied to it by another person, namely Pladis. Scottish Enterprise explained who had been in attendance at the meeting and the circumstances in which the information had been provided.

15. 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.

#### *Actionable breach of confidence*

16. 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.
17. 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:
  - (i) the information must have the necessary quality of confidence;
  - (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
  - (iii) unauthorised disclosure must be to the detriment of the person who communicated the information.

#### Necessary quality of confidence

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

#### Obligation to maintain confidentiality

19. Scottish Enterprise submitted that the information had been communicated under an explicit obligation of confidentiality. Scottish Enterprise explained why, in its view, the information provided by Pladis was subject to an NDA.
20. Scottish Enterprise provided the Commissioner with a copy of the NDA.
21. Having considered the circumstances of its provision to Scottish Enterprise and the content of the NDA, the Commissioner is satisfied that the information withheld from Mr F was received in circumstances which imposed upon Scottish Enterprise an obligation to maintain confidentiality. The withheld information falls within the overall definition of “confidential information” contained in the NDA. On the face of it, therefore, there is an explicit obligation of confidence. It might be excluded from that definition if it were “information which is required to be disclosed by law including under [FOISA]...”, but that would not exclude information where an exemption (including, potentially, that under section 36(2)) could be sustained. The exclusion might be relevant if other limbs of section 36(2) could not be said to apply, but the Commissioner is not satisfied that it is sufficient by itself to discharge a plain obligation of confidence contained in the NDA.
22. That obligation to maintain confidentiality might not remain in place for all time, but the Commissioner is satisfied that it did remain in place at the time Scottish Enterprise received Mr F’s request and when it carried out its review in relation to that request.

### Unauthorised disclosure which would cause detriment

23. 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.
24. Scottish Enterprise submitted that disclosure would be detrimental to the interests of Pladis. It explained how it believed such detriment would come about: the Commissioner cannot publish these reasons in detail, without giving an indication of the content of the information being withheld.
25. Scottish Enterprise further submitted that its relationships with private sector partners and customers were crucial to it meeting its overall objectives of furthering the development of Scotland's economy. In order to perform its functions, it submitted that it had to be able to engage those partners and customers at a commercial level and on the basis that information would, where appropriate, be kept private. Scottish Enterprise submitted that disclosing sensitive and current information such as this information would have a negative impact on the outcomes it was trying to achieve.
26. The Commissioner considers these submissions pertinent to the withheld information. Having considered that information, and the submissions put forward by Scottish Enterprise, the Commissioner is satisfied that disclosure of the information withheld would be unauthorised by Pladis and sufficiently detrimental to meet the requirements for an actionable breach of confidence. The Commissioner is therefore satisfied that all the tests for an actionable breach of confidence are met in this case.

### *Public interest*

27. As noted above, 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). However, 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.
28. 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.
29. In coming to a decision on this matter, the Commissioner has taken account of the public interest defence submissions made by Scottish Enterprise (which cannot be set out in detail, without giving an indication of the content of the withheld information) and the submissions made by Mr F on the public interest in his application, which focused on the security of those employed by Pladis. Once again, he has also taken account of the content of the withheld information.
30. 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 public grants and assistance. 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.

31. Having considered all the arguments, therefore, the Commissioner does not consider there to be a reasonable argument in this case for the disclosure of confidential information on public interest grounds and consequently is satisfied that Scottish Enterprise was entitled to withhold the information from Mr F under section 36(2) of FOISA.

## **Decision**

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The Commissioner finds that Scottish Enterprise complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr F.

## **Appeal**

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Should either Mr F or Scottish Enterprise 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**

**31 October 2018**

### 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

...

(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 –

...

(c) section 36(2);

...

#### 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.

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