

Decision Notice



Decision 008/2014 Mr Alan Laing and Scottish Enterprise

Register of companies in distress

Reference No: 201302588

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www.itspublicknowledge.info

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Summary

On 2 September 2013, Mr Laing asked Scottish Enterprise for information relating to any register listing companies known to be in financial distress or other difficulty. Scottish Enterprise provided information, stating that other information either was not held or was being withheld on the basis that various exemptions of FOISA applied.

Following an investigation, the Commissioner accepted Scottish Enterprise's submission that it did not hold some of the information Mr Laing had asked for. She also accepted that the majority of the information it *did* hold had been correctly withheld on the basis of the harm disclosure would cause to the effective conduct of public affairs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 16(1) (Refusal of request); 17(1) (Notice that information is not held); 30(c) (Prejudice to effective conduct of public affairs).

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

Background

1. On 2 September 2013, Mr Laing wrote to Scottish Enterprise, requesting information which included the following:
 - a) confirmation of the existence of any internal memorandum, note or list of companies known to be in financial distress, or other form of difficulty, which could be referred to as an “at risk register” or similar;
 - b) confirmation of the number of businesses on such a list or register in each financial year since 2007/8;
 - c) copies of the register or list, with all the key identifying information of the company/companies removed to comply with privacy/data protection/commercial confidentiality issues.



2. Scottish Enterprise responded on 3 October 2013. It provided some explanation in response to part a) of the request, but did not confirm the existence of a register. In relation to part b), Scottish Enterprise explained that it did not hold any records going back to 2007/8 as requested. It also stated that it was withholding the information covered by part c) under a number of exemptions in FOISA, including section 30(c).
3. On 3 October 2013, Mr Laing wrote to Scottish Enterprise requesting a review of its decision. He did not believe he had been given a complete response to parts a) and b), and argued that information meeting part c) could be provided with identifying information redacted.
4. Scottish Enterprise notified Mr Laing of the outcome of its review on 1 November 2013. It stated that it had a central process for dealing with companies at risk, but that this had only been in place since May 2013: therefore, it did not hold information falling within the scope of part b) of the request for previous financial years. For the current financial year, Scottish Enterprise responded to part b) by withholding information under section 30(c) of FOISA. It upheld its original response in relation to part c).
5. On 4 November 2013, Mr Laing 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.
6. The application was validated by establishing that Mr Laing 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 5 November 2013, Scottish Enterprise was notified in writing that an application had been received from Mr Laing and was asked to provide the Commissioner with the information withheld from him. Scottish Enterprise provided the information and the case was then allocated to an investigating officer.
8. 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. Scottish Enterprise was asked to explain any steps taken to identify and locate information falling within the scope of the request, and to justify its decision to withhold information from Mr Laing.
9. Scottish Enterprise provided submissions to the investigating officer. It also clarified its position to Mr Laing during the investigation.



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 Laing and Scottish Enterprise. She is satisfied that no matter of relevance has been overlooked.

Information held by Scottish Enterprise

11. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it.
12. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority *should* hold, although the applicant's submissions on this point may be relevant to the investigation. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
13. Where information is held at the time a request is received, section 16(1) of FOISA requires the authority to give the applicant notice in writing to the effect that the information is held, and specify which exemption it considers applies to the information (with reasons).
14. Mr Laing did not believe he had been provided with a clear response to part a) of his request, which sought confirmation of the existence of an "at risk register" or similar. During the investigation, Scottish Enterprise confirmed to the Commissioner (and to Mr Laing) that held a "Priority Companies Monitor", an internal document introduced in May 2013 and used to raise management awareness of issues and challenges presented by companies it was working with. It explained that not all of these were necessarily in distress or difficulty. The Commissioner considers information in this document to fall within the scope of Mr Laing's request, as Scottish Enterprise appears to have acknowledged.
15. The Commissioner accepts that it might have been inferred from Scottish Enterprise's outcome that it held information falling within part a) of the request, but she cannot accept that this amounted to the notice required by section 16(1). Therefore, she must find that Scottish Enterprise failed to comply with section 16(1) of FOISA in dealing with part a) of Mr Laing's request.
16. Scottish Enterprise explained to the Commissioner that it did not hold information on the number of companies in distress or "at risk" for any period before it introduced the Priority Companies Monitor in May 2013. Before then, it explained, such issues were dealt with on an *ad hoc* basis through normal management processes and there was nothing which could be described as the equivalent of an "at risk register". It explained its reasons for introducing this additional central process.



17. Scottish Enterprise also explained the enquiries it carried out to ascertain whether it held information falling within the scope of Mr Laing's requests. It confirmed that these enquiries had failed to disclose any relevant records prior to May 2013. There were individual records for each company it was working with, but there was no mechanism for extracting a report from these to produce anything in the nature of what Mr Laing was seeking.
18. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that Scottish Enterprise interpreted Mr Laing's request reasonably and took adequate, proportionate steps in the circumstances to establish what information it held and which fell within the scope of the request. Given the explanations provided, she is satisfied that Scottish Enterprise did not hold the information specified by Mr Laing in part b) of his request for any period before May 2013.
19. The Commissioner is therefore satisfied that Scottish Enterprise was correct to give Mr Laing notice, in terms of section 17(1) of FOISA, that it held no information falling within the scope of part b) of his request, in addition to that held in the Priority Companies Monitor for the period from May 2013.
20. Scottish Enterprise stated that it wished to rely upon sections 30(c) of FOISA to withhold the information it did hold falling within the scope of part b) of the request (i.e. the number of businesses on the register). For information falling within the scope of part c) of the request (i.e. the information in the register), Scottish Enterprise submitted that it wished to apply the exemptions in sections 30(c), 33(1)(b), 36(2) and 38(1)(b) of FOISA. The Commissioner will first of all consider section 30(c): only if she finds that the information was not properly withheld under that section will she be required to consider the other exemptions applied by Scottish Enterprise.

Section 30(c) – Prejudice to effective conduct of public affairs

21. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
22. As the Commissioner has said in previous decisions, the standard to be met in applying the tests contained in the section 30(c) exemption is high. In particular, the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).



23. Mr Laing did not believe Scottish Enterprise had demonstrated the claimed harm would follow from releasing the information. He believed identifying information could be removed from the records, and could not accept that simply disclosing numbers would be harmful.

Part b)

24. In relation to part b) of the request, Scottish Enterprise submitted that it was critical for it to be able to maintain open, honest and transparent dialogue with its customers with a view to supporting and protecting Scotland's economy. It submitted that it received highly privileged and confidential information from companies it was working with, in absolute confidence, and believed that vital trust and confidence would be undermined by disclosing the relevant numbers.
25. Scottish Enterprise also argued that disclosing the information could potentially damage confidence in Scottish companies and in the Scottish economy generally, which in turn could deter current and potential customers and investors from doing business with Scottish Enterprise. It explained that this would cause substantial prejudice to its ability to engage with private sector partners and customers in future, which would cause real and significant harm to the ongoing exercise of its functions (and therefore to the effective conduct of public affairs).
26. Scottish Enterprise believed releasing the number of companies on the monitor would lead to considerable speculation around the identities of the companies considered to be "at risk", leading to pressure to name them and identify the actions taken to support them. This, the authority submitted, which would have a very disruptive effect on the way in which it conducted its business.
27. As mentioned above, before section 30(c) of FOISA can be relied upon an authority must establish that the prejudice resulting from disclosure would be substantial (and therefore of real and demonstrable significance).
28. The Commissioner has considered Scottish Enterprise's submissions fully. On the basis of the arguments she has been given, she can see no basis for concluding that disclosure of this particular information would have the effects claimed on the relationship of trust and confidence Scottish Enterprise requires to maintain with its customers. Disclosure may lead to speculation, but the Commissioner can see no basis for concluding that it could make any useful contribution to the identification of any individual company or reasons why Scottish Enterprise was engaged with any particular company. In the absence of such a risk, she cannot accept that general, unsubstantiated speculation would present the dangers claimed by Scottish Enterprise.
29. Given these simple assertions as to the consequences of disclosure, the Commissioner cannot accept that disclosure of the numbers requested in part b) would, or would be likely to, prejudice substantially the effective conduct of public affairs.
30. The Commissioner does not accept, therefore, that Scottish Enterprise was correct to withhold the information under the exemption in section 30(c) of FOISA.



31. As the Commissioner is not satisfied that the information covered by part b) of the request was correctly withheld under section 30(c) of FOISA, she is not required to go on to consider the application of the public interest test in section 2(1)(b). As no other exemption has been claimed to justify this information being withheld, she requires Scottish Enterprise to disclose the information to Mr Laing.

Part c)

32. In relation to the information requested at part c) of Mr Laing's request, Scottish Enterprise provided submissions focusing on the content of the information held. Consequently, the Commissioner cannot describe them in full detail in this decision.
33. Having considered the nature and content of the withheld information, together with Scottish Enterprise's submissions, the Commissioner accepts that its disclosure would be likely to cause substantial prejudice to the effective conduct of public affairs, and specifically to the effective discharge of Scottish Enterprise's core functions (particularly in its relationships with companies seeking advice and assistance). She is satisfied that arguments as to the effect of disclosure on relationships of trust and confidence, which may have been of limited relevance to part b) of the request, have far greater force here.
34. The Commissioner notes that Mr Laing suggested that the information could be redacted to remove any identifying characteristics. Having considered the information, the Commissioner accepts that this would not be possible while leaving information with any meaning.
35. In all the circumstances, the Commissioner accepts that Scottish Enterprise was correct to apply the exemption in section 30(c) of FOISA to this information.
36. As mentioned above, the exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

Public Interest test

37. As stated in previous decisions, the "public interest" is not defined in FOISA, but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interests of the public", i.e. disclosure must serve the interests of the public.



Submissions by Mr Laing

38. Mr Laing stated that Scottish Enterprise was a public body carrying out important economic functions. He submitted that that it was in the public interest to know how it operated, and how it supported and reviewed businesses in receipt of public funds. He identified a particular public interest in how it interacted with companies which were in financial distress and which then reduced their workforce.
39. Mr Laing stated that Scottish Enterprise was given a role by the Scottish Ministers, and he believed it to be in the public interest to know whether the authority was properly fulfilling that role, providing adequate support and making appropriate use of public funds.

Submissions by Scottish Enterprise

40. Scottish Enterprise recognised the public interest in openness and transparency in relation to its decision-making processes. There was also a public interest in ensuring that it carried out its role in Scotland's economy, and also its duty of care to
 - appropriately monitor and assess the companies it worked with, and
 - proactively respond to issues or challenges arising within those companies by providing appropriate levels of support.
41. Against this, Scottish Enterprise identified a need to uphold its role as an organisation which sought to assist the commercial interests of Scottish businesses. In fulfilling this role, in relation to matters which were sensitive, confidential and currently ongoing, it submitted that it should be able to engage with private sector partners and customers without those parties having reservations about providing information to it.
42. Scottish Enterprise went on to argue that there was a very strong public interest in ensuring that companies in difficulty, or at a point of transition, were given the assistance Scottish Enterprise made available using the Priority Companies Monitor. The purpose of this support, it submitted, was to ensure that (where possible) those companies will recover, thereby preserving jobs and the strength of the economy in Scotland.
43. Scottish Enterprise noted that in responding to Mr Laing's request it had explained the process followed in monitoring and escalating issues and challenges experienced by companies. It also provided details of the types of information captured in order to carry out this process. In doing this, it believed it had addressed any public interest there might be in the relevant processes.
44. In conclusion, Scottish Enterprise believed its objective of developing relationships with Scottish companies would be substantially prejudiced by the perception that it could not keep highly sensitive information confidential. It submitted that, on balance, there was a higher public interest in the public service it performed for the benefit of the wider economy of Scotland than in knowing the withheld information.



The Commissioner's conclusions

45. The Commissioner acknowledges the general public interest in transparency and accountability, particularly where this involves spending from the public purse and understanding how Scottish public authorities carry out their specific roles. She acknowledges that the withheld information might cast some light on these matters and has taken into account the importance of the role performed by Scottish Enterprise.
46. The Commissioner has also taken account of the submissions made by Scottish Enterprise in favour of maintaining the exemption. She has already acknowledged the risk of substantial prejudice to the effective conduct of public affairs in this case, with particular reference to the effect of disclosure on the relationships of trust and confidence Scottish Enterprise must maintain with companies seeking advice and assistance. She accepts that such harm would not be in the public interest. It is in the public interest for Scottish Enterprise (in appropriate circumstances, as discussed here) to be able to engage with third parties on a confidential basis to ensure it carries out its role effectively and thus secures best value for the public purse. To this end, while the withheld information may be of “interest to the public”, she is not satisfied that it is “in the ‘public interest’” to disclose the information. It is, however, in the public interest that Scottish Enterprise can carry out its role effectively and efficiently.
47. The Commissioner has given weight to the context of this request, and specifically to the situations that individual companies find themselves in. In this regard, she acknowledges that disclosure at this level of detail might cause anxiety (whether warranted or otherwise) to the workforces of these organisations, particularly regarding job security. Taking all of the circumstances into consideration, she is satisfied that the public interest favours maintaining the exemption on this occasion.
48. The Commissioner therefore finds that Scottish Enterprise was entitled to withhold this information under section 30(c) of FOISA, while recognising that the harm associated with disclosure may diminish over time.
49. As the Commissioner has determined that Scottish Enterprise was correct to respond to request c) under section 30(c) of FOISA, she is not required to consider the application of the other exemptions applied by Scottish Enterprise in relation to this part of the request.



DECISION

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

She finds that Scottish Enterprise was entitled to respond to the request, in part, in terms of section 17(1) of FOISA. It was also entitled to withhold the majority of the information it held under section 30(c) of FOISA.

In respect of part b) of Mr Laing's request, the Commissioner finds that Scottish Enterprise was not entitled to withhold information under section 30(c) of FOISA. The Commissioner therefore requires Scottish Enterprise to provide Mr Laing with the number of businesses, as requested in part b), by 10 March 2014.

The Commissioner also finds that Scottish Enterprise failed to give Mr Laing a clear response to part a) of his request, as required by section 16(1) of FOISA. Given the response he was given during the investigation, the Commissioner does not require Scottish Enterprise to take any action on this point.

Appeal

Should either Mr Laing 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
23 January 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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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.
- ...

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.

...

17 Notice that information is not held

- (1) Where-
 - (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.