

Decision Notice



Decision 223/2013 Mr Derek Reid and Highlands and Islands Enterprise

Correspondence from a named individual

Reference No: 201301552
Decision Date: 8 October 2013

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Rosemary Agnew
Scottish Information Commissioner

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Summary

On 8 May 2013, Mr Reid asked Highlands and Islands Enterprise (HIE) for any correspondence from a named individual to HIE concerning Mr Reid or his company. HIE withheld the information under several exemptions in FOISA.

Following an investigation, the Commissioner found that HIE was entitled to withhold the information under section 33(1)(b) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy)

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 8 May 2013, Mr Reid emailed HIE asking if there had been any recent correspondence from a named individual to HIE concerning Mr Reid's company. Mr Reid stated that he wished to see any such correspondence. Mr Reid's company is involved in the Harris Tweed industry.
2. HIE responded on 4 June 2013. HIE informed Mr Reid that it had received correspondence from the named individual. HIE withheld the information on the basis that it was exempt from disclosure in terms of sections 33(1)(b), 33(2)(a) and 36(2) of FOISA.
3. On 5 June 2013, Mr Reid emailed HIE requesting a review of its decision. Mr Reid did not accept that it was not in the public interest to disclose the content of the correspondence.
4. HIE notified Mr Reid of the outcome of its review on 2 July 2013. HIE upheld its previous decision without modification.
5. On 3 July 2013, Mr Reid wrote to the Commissioner, stating that he was dissatisfied with the outcome of HIE'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 Reid 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 9 July 2013, HIE was notified in writing that an application had been received from Mr Reid and was asked to provide the Commissioner with any information withheld from him. HIE responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted HIE, 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. HIE was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. HIE responded on 6 September 2013, providing submissions on why it considered the requested information was exempt from disclosure in terms of sections 33(1)(b), 33(2)(a) and 36(2) 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 Reid and HIE. She is satisfied that no matter of relevance has been overlooked.

Section 33(1)(b) – Commercial interests and the economy

11. HIE submitted that the information sought by Mr Reid was exempt from disclosure in terms of section 33(1)(b) of FOISA. This provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). In this case, HIE submitted that disclosure would damage the commercial interests of the Harris Tweed industry, particularly Harris Tweed manufacturers, including home weavers.
12. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.



13. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to indicate whose commercial interests would (or would be likely to) be harmed by disclosure, the nature of those commercial interests and how those interests would (or would be likely to) be prejudiced substantially by disclosure. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear: generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
14. It is the Commissioner's view that commercial interests in their clearest sense will relate to any commercial trading activity an organisation undertakes, such as the sale of products or services, commonly for the purpose of revenue generation. Such activity will commonly take place within a competitive environment. There is no requirement that these activities are profit-making before this exemption can be engaged, although it would be normal.
15. Having considered HIE's submissions, the Commissioner is satisfied that those interests that have been identified are commercial interests for the purposes of this exemption.
16. Having reached this conclusion, the Commissioner must now go on to consider whether the commercial interests identified would, or would likely to, be prejudiced substantially by the disclosure of the information withheld. As described above, such prejudice must be at least likely before the exemption can apply.
17. In its submissions, HIE argued that the sensitive issues raised in the withheld correspondence were still live and of immediate relevance within the industry. The Commissioner is unable to include or discuss these submissions within this decision as to do so would essentially disclose the content of the withheld information.
18. HIE also provided copies of correspondence between it and the author of the withheld correspondence, concerning the potential disclosure of the information under consideration. The individual in question did not consent to disclosure of the information and had explained to HIE why they considered disclosure of the information was not appropriate.
19. The Commissioner has considered all of the arguments put forward by HIE. She accepts that, if the correspondence were to be disclosed, then it is likely that substantial prejudice would be caused to the commercial interests of the Harris Tweed industry. Given the nature of, and detail within, the withheld information, the Commissioner considers that its disclosure would be likely to have a significant detrimental effect on the industry generally, thereby inhibiting the ongoing commercial activities of its participants. In reaching this view, the Commissioner is mindful that disclosure of the information under FOISA would be disclosure to the world at large, not just to Mr Robb.
20. For these reasons, the Commissioner accepts that disclosure of the withheld information would be likely to prejudice the commercial interests of the Harris Tweed industry and she accepts that the exemption in section 33(1)(b) was correctly applied on that basis.



Public interest test

21. As the Commissioner has found that the exemption in section 33(1)(b) applies, she has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).
22. In his review request to HIE, Mr Reid explained why he considered there was a public interest in disclosure of the information. Mr Reid considered that the public interest favoured the content of the correspondence being made known.
23. In its submissions, HIE pointed out that the information was still relatively recent and that its author believed the issues raised were still of immediate concern to the industry. HIE considered the public interest favoured withholding the information in order to help achieve the objectives of the industry forum in working purposefully together in implementing a strategy for the sector. HIE submitted that this would assist the continued development and sustainable growth of the industry and ultimately, the local economy of the Outer Hebrides.
24. The Commissioner has noted all of the comments made by Mr Reid and HIE regarding the public interest test.
25. In considering the public interest in favour of disclosure, the Commissioner has recognised the general public interest in disclosing information held by Scottish public authorities. She recognises that disclosure in this case would contribute to the public's understanding of issues faced by the Harris Tweed industry and assist in promoting discussion on the subject.
26. However, the Commissioner also considers that this was not the purpose of the withheld correspondence, which was intended as part of a confidential discussion with HIE. Whilst disclosure of the information would show one side of the discussion and highlight some matters considered of importance to the author, it would not in itself allow the public to draw any conclusions about the matters raised.
27. In the Commissioner's view, there are relevant and valid arguments in this case which suggest that the public interest in disclosing the information is outweighed by that in maintaining the exemption. This includes the likelihood of commercial damage being caused to the Harris Tweed industry through the disclosure of sensitive information. Having already concluded that disclosure in this case would harm the Harris Tweed industry's commercial interests, she also recognises that it would be contrary to the public interest to place it in a disadvantageous position, to the detriment of the ongoing development and sustainability of the industry.
28. Therefore, having balanced the public interest for and against disclosure in this case, the Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure of the information under consideration. The Commissioner therefore finds that HIE was entitled to withhold all of the information under consideration in this decision.



29. Having reached this conclusion, the Commissioner has not gone on to consider the remaining exemptions which HIE applied to the withheld information.

DECISION

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

Appeal

Should either Mr Reid or Highlands and Islands 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
8 October 2013



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.

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...