

# Decision Notice



Decision 171/2011 Mr Gary McDougall and Investors in People Scotland

Accreditation information

Reference No: 201100534

Decision Date: 17 August 2011

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**Kevin Dunion**

Scottish Information Commissioner

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Doubledykes Road  
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## Summary

Mr McDougall asked Investors in People Scotland (IIPS) for information as to why a particular organisation was refused accreditation in 2006, and why it was reinstated in 2007. IIPS refused to disclose the information on the basis that it was exempt from disclosure under section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). This exemption applies when disclosure of the information concerned would, or would be likely to, prejudice substantially the commercial interests of any person. Following a review, Mr McDougall remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that IIPS had complied with Part 1 of FOISA in dealing with Mr McDougall's request for information, given that all of the withheld information was exempt under section 33(1)(b).

## Relevant statutory provisions and other sources

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

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1. On 9 February 2011, Mr McDougall wrote to IIPS requesting information on the reasons that a named company ("the company") was refused Investors in People accreditation in 2006 and why it was reinstated in 2007.
2. IIPS responded on 10 February 2011. It refused to supply the requested information to Mr McDougall on the grounds that it was exempt from disclosure under section 33(1)(b) of FOISA. It stated that disclosure of the requested information could potentially harm the commercial interests of the named company, which had supplied information in the belief that it would not be disclosed to any third party. IIPS also indicated that disclosure may also harm its own business, in that its clients may not believe that IIPS could keep such information confidential.



3. On 6 March 2011, Mr McDougall wrote to IIPS requesting a review of its decision. He noted that he was seeking details of the reason(s) why the company was refused accreditation in 2006 and re-instated in 2007, and he did not require details of statements attributed to individuals. He also commented that, as the company is a registered charity, its commercial interests would be minimal.
4. IIPS notified Mr McDougall of the outcome of its review on 11 March 2011. It upheld its original decision that the information requested was exempt from disclosure under section 33(1)(b) of FOISA.
5. On 23 March 2011, Mr McDougall wrote to the Commissioner, stating that he was dissatisfied with the outcome of IIPS's review and applying for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr McDougall 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

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7. On 8 April 2011, IIPS was notified in writing that an application had been received from Mr McDougall and was asked to provide the Commissioner with the information withheld from him. IIPS responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted IIPS on 18 April 2011, 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. IIPS was asked to justify its reliance on the exemption in section 33(1)(b) of FOISA for withholding the requested information.
9. IIPS responded on 9 May 2011 and advised that it considered all of the withheld information to be exempt under section 33(1)(b) of FOISA. IIPS provided an explanation as to why it considered that disclosure of the withheld information would prejudice substantially its own commercial interests and also those of the company.
10. In its response, IIPS also advised that, having considered the withheld information further, it was of the view that the exemption in section 36(2) of FOISA was also applicable to it. IIPS provided an explanation as to why it considered this to be the case.
11. Further submissions were sought and received from IIPS during the investigation to inform the Commissioner's consideration of the matters raised by this case.



12. Mr McDougall was also invited to comment on the matters raised in this case, in particular in relation to the application of the exemption in section 36(2) of FOISA, and also what public interest he considered lay in favour of disclosing the withheld information. Mr McDougall's comments were received on 26 May 2011.
13. All submissions received from IIPS and Mr McDougall, insofar as relevant, are considered in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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14. 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 Mr McDougall and IIPS and is satisfied that no matter of relevance has been overlooked.

### Information withheld

15. The information which has been withheld in this case constitutes certain information in a feedback report which was prepared by IIPS for the company following its assessment in 2006, an action plan falling from this report, and certain information contained in a feedback report which was prepared by IIPS for the company following its assessment in 2007.

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

16. Section 33(1)(b) of FOISA 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). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
17. 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, and must indicate the nature of those commercial interests and how these interests would, or would be likely to, be prejudiced substantially.
18. IIPS has applied the exemption in section 33(1)(b) to all of the withheld information. It maintained that disclosure would, or would be likely to, prejudice substantially the commercial interests of both itself and the company.
19. The Commissioner first considered the application of section 33(1)(b) on the basis that disclosure would harm IIPS's commercial interests.



*Does IIPS have commercial interests?*

20. 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. That said, there is no requirement that these activities be profit making before this exemption can be engaged, although it is often the case.
21. IIPS informed the Commissioner that it is an organisation limited by guarantee, which exists to promote the Investors in People Standard (IIP) within Scotland and has a licence to do so from the UK Commission for Education and Skills (UKCES). IIPS explained that it generates income directly from its clients by providing services, such as assessment, advisory, workshops and other types of consultancy work. IIPS does not, it explained, receive any public funding towards its day to day operational costs and competes within a commercial market.
22. IIPS advised that, in the case of the information requested by Mr McDougall, IIPS's client, the company, paid it to provide a service and produce a report.
23. Having considered the submissions from IIPS, the Commissioner recognises IIPS's position that it engages in commercial activity with respect to the provision of its services, and that IIPS has commercial interests in this respect. Should IIPS be able to demonstrate that disclosure of the withheld information would, or would be likely to, substantially prejudice these commercial interests, then the exemption in section 33(1)(b) applies.

*Would disclosure prejudice substantially IIPS's commercial interests?*

24. IIPS's submissions highlighted the terms and conditions of its assessments. These indicate that a feedback report will highlight how the organisation being assessed maps against the principles of the IIP framework, and details identified strengths and areas of potential development. These terms and conditions indicate that the report is "commercial in confidence", and the property of the organisation subject to assessment.
25. Taking this into consideration, IIPS considered that disclosure of the withheld information would breach its terms and conditions with the company, and it would also set a precedent that any client report could be disclosed under FOISA.
26. IIPS submitted that this would harm its commercial interests for the following reasons:
  - Clients chose to work with IIPS on the basis that IIPS's assessment work and related reports will remain confidential and will not be disclosed to any unauthorised third party.
  - The client pays IIPS to provide a commercial service, and IIPS makes it clear that the report it produces belongs to the client and not IIPS. IIPS holds a copy of this on its database for both its own information and to allow the client to access it.
  - IIPS will disclose whether an organisation is IIP recognised or not as this information is in the public domain and can be disclosed. However, the contents of a report are not in the public domain.



- IIPS carries out IIP assessments on a daily basis and has over 1,400 recognised organisations. Establishing a precedent of disclosure of this information will affect each and every one of its clients in that the same rule of disclosure will apply.
  - IIPS had consulted the company, which had indicated that information it had supplied should not be disclosed, and it believed the report was confidential and it would not authorise its release.
  - IIPS considered that clients and potential clients could be deterred from coming forward for IIP assessment or otherwise using IIPS's services if there is a perception that their private details might be placed in the public domain without their consent, notwithstanding a contractual obligation of confidentiality.
27. IIPS considered that, if the withheld information were to be disclosed in this case, its clients would choose a quality standard other than IIP to be assessed against, or request that a body not covered by freedom of information legislation conduct an assessment just to ensure that their information is not exposed to the public domain without their authorisation. IIPS submitted that it believes that its business would suffer detrimentally as a result of disclosing this information with immediate effect from the point of the decision to order disclosure being made. IIPS considered that this detriment would be in the form of existing bookings being cancelled, and clients seeking alternative sources of support for IIP.
28. IIPS submitted that its competitors could use disclosure of the type under consideration to obtain business from it, and others (such as the Press) could use this as a way of criticising its member organisations (Scottish Enterprise and Highlands and Islands Enterprise) by suggesting that they are unable to keep information confidential.
29. IIPS explained that the licence granted to IIPS from UKCES is provided on the basis that it can meet client needs. It commented that if it were unable to keep such information confidential, there would be a further risk that IIPS could lose its licence.
30. The Commissioner has considered the arguments put forward by IIPS, and he accepts that if this information were to be disclosed, then it is likely that substantial prejudice would be caused to IIPS's commercial interests.
31. He recognises that the assessment service provided by IIPS is undertaken with an express commitment that IIPS will keep confidential information provided to it during the assessment, and contained within reports following the assessment. He considers that release of information to which this commitment clearly applies would be likely to undermine the relationship between IIP and its clients, reducing their confidence in its ability to adhere to the terms upon which this service is offered.
32. The Commissioner also considers that disclosure of the information withheld in this case would create an expectation of similar disclosures in future, and encourage both current and future potential clients of IIPS to look to alternative types of accreditation or approach other accreditation bodies (not bound by FOISA) for similar services.





33. Furthermore, the Commissioner recognises that disclosure could suggest that IIPS was no longer unable to conduct its services in the confidential manner expected within the IIP framework. This could also create circumstances which could lead to the UKCES revoking IIPS's licence.
34. The Commissioner considers that these conclusions are sufficient to persuade him that disclosure in this case would have a substantial and significant effect on IIPS's ability to attract and retain custom for its services and generate income.
35. For the reasons given above, the Commissioner has concluded that disclosure of the information under consideration would, or would be likely to, prejudice substantially IIPS's commercial interests, and so the exemption in section 33(1)(b) was properly applied in this case.

### Consideration of the public interest

36. As the Commissioner has found that the exemption in section 33(1)(b) applies, he 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).
37. In its submissions, IIPS noted that "public interest" is not defined in FOISA, but its understanding was that this was likely to mean something of serious concern or benefit to the public. It noted also that something is not in the public interest just because it is of interest to the public; it must be in the interest of the public to have the information disclosed.
38. IIPS commented that it believed that maintaining the exemption in section 33(1)(b) of FOISA outweighed the public interest in disclosure, as the request under consideration was from one individual who has requested information about one of IIPS's clients and who, it understood, wishes to use for his own (legitimate) purposes, rather than those of the general public.
39. IIPS stated that given that it currently has 1,400 recognised organisations, as well as 4,000+ which have previously been recognised; a requirement to disclose will, IIPS submitted, impact on all of these organisations, which expect their information to remain confidential. IIPS stated that it appears to it that the general public, which it serves, are in the majority in this case.
40. IIPS also highlighted the following comments made by the Commissioner in paragraph 42 of his recent *Decision 073/2011 Mr Tom Gordon of The Herald and City Building (Glasgow) LLP*:

*"With respect to the public interest in maintaining the exemption, the Commissioner has concluded that, having accepted that disclosure of the information would be harmful to CBG's commercial interests, disclosure would be contrary to the public interest. He considers that it is in the public interest that CBG is able to compete effectively within the commercial markets within which it operates. He recognises that disclosure in this case would place it at a disadvantageous position with respect to its competitors with respect to its ability to build and maintain relationships business contacts".*



IIPS submitted that its competitors within Scotland who offer similar services and quality standards are not all bound by FOISA and would benefit from disclosure in this case.

41. IIPS explained that the work it has done in Scotland with its stakeholders is aimed at improving workforce development within Scotland and increasing the contribution IIPS makes to the Scottish economy by improving business performance. IIPS submitted that providing the information requested in this case could significantly damage what it is trying to do for the good of its clients, the Scottish Government and the country as a whole.
42. IIPS also commented that, as an organisation that operates to support and improve the Scottish economy and public services, it is not in the public interest that its operations are compromised as a result of disclosure of confidential information.
43. For the reasons set out above, IIPS submitted that it did not consider that disclosing this information would be in the public interest. IIPS stated that it could not think of any way of disclosing the information without harming both its own interests and those of its client.
44. The Commissioner has noted all of the comments made by IIPS when considering the balancing exercise with regard to the public interest in this case.
45. Mr McDougall was invited to provide a submission as to why he considered the public interest lay in disclosure of the withheld information, but no submission on this point was received. In considering the public interest for disclosure, however, the Commissioner has recognised the general public interest in disclosing information held by Scottish public authorities. He recognises that disclosure in this case would contribute to understanding of the work of IIPS and the assessment which was undertaken in relation to the company in question.
46. The Commissioner also recognises that Mr McDougall has an interest in why the particular company to which his request relates was refused accreditation in 2006, but subsequently achieved this in 2007. However, in the absence of further comments from Mr McDougall, he has not been made aware of any specific reasons as to why disclosure of this particular information would contribute to the public interest more widely.
47. The Commissioner has noted all of the above when weighing the public interest for and against disclosure. Having already concluded that disclosure in this case would harm IIPS's commercial interests, he also recognises that it would be contrary to the public interest to place IIPS in a disadvantageous position with respect to its competitors, to the detriment to its ability to contribute to the Scottish economy.
48. The Commissioner recognises that there is some public interest in disclosure in this case, but he considers that this is limited. In this case, the Commissioner finds that this public interest is outweighed by that in avoiding undermining IIPS's ability to conduct its operations on the terms agreed with its clients, and the negative consequences for its client relationships and commercial interests that would follow from such disclosure.





49. 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.
50. The Commissioner therefore finds that IIPS was entitled to withhold the information under consideration in this decision. Having reached this conclusion, he has not gone on to consider whether disclosure would, or would be likely to, harm the commercial interests of the company, or whether the exemption in section 36(2) also applies to any of the withheld information.

## DECISION

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

## Appeal

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Should either Mr McDougall or Investors in People Scotland 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**  
**17 August 2011**



## Appendix

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### 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.

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- (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.

...

##### 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).