

Decision Notice



Decision 173/2011 Mr Paul Hutcheon and tie Limited

Correspondence generated by FOI requests

Reference No: 201100423
Decision Date: 17 August 2011

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr Hutcheon asked tie Limited (tie) for specified information relating to his own FOI requests on 21 September 2010. tie responded by releasing some of the information requested and withholding the remaining information under various exemptions in FOISA, including section 30(b)(ii). Following a review, Mr Hutcheon remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, tie released further information to Mr Hutcheon, who indicated that it was only the information withheld under section 30(b) on which he required a decision.

Following an investigation, the Commissioner found that tie had partially failed to deal with Mr Hutcheon's request for information in accordance with Part 1 of FOISA, by withholding certain information under the exemption in section 30(b)(ii) of FOISA. He did not accept that disclosure of this information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. He required tie to disclose the withheld information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement) and 30(b)(ii) (Prejudice to effective conduct of public affairs)

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 1 December 2010, Mr Hutcheon wrote to tie requesting all correspondence and files generated by information requests he had made on 21 September 2010. Specifically, he advised that he was seeking the correspondence and files on the subject of how to answer the questions he had raised, whether to release the information, and the process of releasing the information to him.



2. tie responded on 18 January 2011, releasing some of the information within the scope of Mr Hutcheon's request and explaining why it was withholding the remaining information. Certain of that remaining information (Mr Hutcheon's own correspondence) was being withheld under section 25(1) of FOISA, as it was information to which he would already have access. Also, certain information was withheld on the grounds that it constituted personal data which was exempt in terms of section 38(1)(b) of FOISA, while other information was withheld under section 30(b)(ii) and "(iii)" on the grounds that its disclosure would prejudice the effective conduct of public affairs.
3. On 19 January 2011, Mr Hutcheon wrote to tie requesting a review of its decision, arguing that tie had incorrectly applied exemptions to the information being withheld and that disclosure of the information was in the public interest.
4. tie notified Mr Hutcheon of the outcome of its review on 8 February 2011, partially upholding its original response and also explaining that it wished to withhold the information in question under section 30(b)(ii) and not "30(b)(iii)".
5. On 7 March 2011, Mr Hutcheon wrote to the Commissioner, stating that he was dissatisfied with the outcome of tie'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 Hutcheon 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 17 March 2011, tie was notified in writing that an application had been received from Mr Hutcheon and was asked to provide the Commissioner with the information withheld from him. tie responded with the information requested and the case was then allocated to an investigating officer.
8. During the investigation, Mr Hutcheon indicated that he was satisfied with the application of section 25(1) of FOISA to some of the information, this being his own correspondence which he had access to already. He advised that he was only concerned about the information withheld under section 30.
9. The investigating officer contacted tie, 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. In particular, tie was asked to confirm (with details and reasons) whether it wished to continue to rely upon any of the exemptions in section 30 of FOISA.



10. On 12 May 2011 tie responded, indicating that it intended to release further information during the investigation, and clarifying those documents or parts thereof which were still being withheld. By the close of the investigation, only parts of documents 6, 8 and 9 remained withheld under section 30(b)(ii). tie advised that it was withholding other information under sections 36(1) and 38(1)(b) of FOISA, but Mr Hutcheon confirmed that he was not interested in that information.
11. tie provided further arguments in support of its adherence to section 30(b)(ii) in the course of the investigation. All relevant submissions received from both tie and Mr Hutcheon will be considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered the remaining withheld information (i.e. the information redacted from documents 6, 8 and 9) and the submissions made to him by both Mr Hutcheon and tie. He is satisfied that no matter of relevance has been overlooked.

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

13. With regard to Mr Hutcheon's request, tie sought to rely on section 30(b)(ii) of FOISA relative to two phrases in document 6, one sentence in document 8 and one sentence in document 9. In its submissions, tie clarified that it was withholding this redacted information under section 30(b)(ii) of FOISA only.
14. To rely on this exemption, a Scottish public authority must show that the disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
15. tie submitted that the withheld information in documents 6, 8 and 9 related to internal discussion over whether to release information. It explained that it considered the discussions in question to constitute views which were exchanged for the purposes of deliberation, and further argued that disclosure could have the effect that staff were less inclined to discuss the handling of future requests, which in turn might degrade tie's performance.
16. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the test contained in section 30(b)(ii) is high (inhibition must be *substantial*) and the chief consideration is not whether the information constitutes opinion, but whether the disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views.



Would disclosure cause substantial inhibition?

17. Where an authority seeks to exempt information under section 30(b)(ii), it must be able to demonstrate that there is a real risk or likelihood that harm will follow disclosure of the information. The authority will be expected to be specific about the harm that would (or would be likely to) be caused by disclosure and give reasons for expecting these harmful consequences to occur in the near or foreseeable future. If there is only a remote possibility that the conduct of public affairs will be harmed by officials or other parties being inhibited from providing advice or views, then the exemption will not apply. Also, releasing advice or views whilst a decision was being considered, and for which further views were still being sought, would be likely to be more substantially inhibiting than disclosure once the decision had been taken.
18. The word "inhibit" suggests a suppressive effect, so that communication would be less likely, more reticent or less inclusive. The inhibition must be substantial and therefore of real and demonstrable significance.
19. The Commissioner is not satisfied that the text which was redacted from documents 6, 8 or 9, when considered within the context of the surrounding text in these documents, would (or would be likely to) have the effects described by tie if disclosed. While the redacted elements of text might shed some additional light on the detail of the discussions of which they form part, the substantive views being expressed are already clear from the surrounding text and the redacted information adds little, if anything, to any debate or deliberation process. Neither in their content nor in their mode of expression do these particular items of information appear to the Commissioner to be capable of having the effects required for the exemption to apply. Given the nature of the redactions, therefore, the Commissioner does not consider the exemption in section 30(b)(ii) to apply to the information remaining withheld under that exemption.
20. As the Commissioner has concluded that the exemption in section 30(b)(ii) is not engaged, he is not required to go on to consider public interest test in section 2(1)(b) of FOISA.
21. Consequently, the Commissioner requires tie to disclose the redacted information in documents 6, 8 and 9 to Mr Hutcheon.



DECISION

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

The Commissioner finds that by disclosing some information, tie complied with Part 1 of FOISA.

However, in respect of the redactions in documents 6, 8 and 9, the Commissioner finds that the exemption in section 30(b)(ii) was incorrectly applied, with the result that tie failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires tie to disclose the redacted information in documents 6, 8 and 9, by 3 October 2011.

Appeal

Should either Mr Hutcheon or tie Limited 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

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.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or

...