

Decision Notice

Decision 254/2014: Unison and Edinburgh Leisure

Job evaluation information

Reference No: 201401378

Decision Date: 12 December 2014



Scottish Information
Commissioner

Summary

On 9 April 2014, Unison asked Edinburgh Leisure for job evaluation information.

Edinburgh Leisure provided some information to Unison, but withheld other information on the basis that it was either commercially sensitive or confidential.

Following an investigation, the Commissioner accepted Edinburgh Leisure's decision to withhold information as commercially sensitive, but could not uphold its application of the exemption relating to confidentiality to benchmarking data. The Commissioner also found that part of Unison's request was invalid because it did not adequately describe the information Unison wanted.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 8(1)(c) (Requesting information); 33(1) (Commercial interests and the economy); 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

1. Edinburgh Leisure is in the process of conducting job evaluations for various posts. Unison is acting in the interests of its members who are affected Edinburgh Leisure staff.
2. On 9 April 2014, Unison made a request for information to Edinburgh Leisure. The information requested was:
 - A copy of the scoring matrix as it applies to Edinburgh Leisure's Job Evaluation process
 - A copy of the data used to construct the benchmarking exercise
 - A copy of the rationale used to construct the Pay Structure and the 90%, 100% and 110% points in grades
 - A copy of all evaluations appeals heard to date; including the outcomes and reasoning behind those outcomes
3. A list of how many posts were requested to be appealed and were resisted by the relevant Manager. Edinburgh Leisure responded on 13 May 2014 and provided some information to Unison. It withheld the scoring matrix under sections 36(2) (confidentiality) and 33(1)(a) and (b) (Commercial interests and the economy) of FOISA, and the benchmarking data under section 36(2) of FOISA. Edinburgh Leisure stated that it did not hold any information regarding the rationale used to construct the pay structure.
4. On 27 May 2014, Unison wrote to Edinburgh Leisure requesting a review of its decision, stating its view that Edinburgh Leisure should disclose the scoring matrix, the benchmarking data and the rationale.
5. Edinburgh Leisure notified Unison of the outcome of its review on 19 June 2014. It upheld its original decision without modification.

6. On 19 June 2014, Unison wrote to the Commissioner. It applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Unison stated it was dissatisfied with the outcome of Edinburgh Leisure's review because it believed further information should be disclosed to it.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Unison made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 30 June 2014, Edinburgh Leisure was notified in writing that Unison had made a valid application. Edinburgh Leisure was asked to send the Commissioner the information withheld from Unison. Edinburgh Leisure provided the information 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. Edinburgh Leisure was invited to comment on this application. It was asked to justify its reliance on the provisions of FOISA it considered applicable to the information requested, with particular reference to those referred to in its responses to Unison.
10. Submissions were received from both Edinburgh Leisure and Unison. On being asked by the investigating officer, Unison clarified that by asking for information on Edinburgh Leisure's "rationale", it was asking for the reasoning behind the decision to create the pay and grading structure it had, with a view to providing a reasonable explanation of that process.
11. Edinburgh Leisure also provided submissions from the consultancy company that designed the scoring matrix.

Commissioner's analysis and findings

12. 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 Unison and Edinburgh Leisure. She is satisfied that no matter of relevance has been overlooked.

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

13. Edinburgh Leisure submitted that it was withholding the scoring matrix under sections 33(1)(a) and (b) and 36(2) of FOISA. The Commissioner will firstly consider section 33(1)(b).
14. This exemption 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.
15. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
 - 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.
16. 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.
 17. The withheld information comprises a current document detailing the number and types of factors used, the number of levels in each factor and the weighting used to determine a job's score. Supported by submissions from the consultants, Edinburgh Leisure explained that the matrix was devised, written and is used by a third party consultancy company as part of its consultancy business. It was the business of the consultancy company to sell job evaluation schemes to employers. The matrix, Edinburgh Leisure submitted, was a key part of the consultancy company's unique job evaluation scheme, which it sold to businesses to allow them to carry out job evaluation and to ensure that their salaries comply with the Equal Pay legislation.
 18. Having considered Edinburgh Leisure's submissions, and those of the consultancy company, the Commissioner is satisfied that the interests described above are commercial interests for the purposes of this exemption.
 19. On reaching this conclusion, the Commissioner must now go on to consider whether the commercial interests identified would, or would be 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.
 20. Edinburgh Leisure submitted that if the matrix was made public it would make it difficult for the consultancy company to sell the information, which had been developed, validated, refined and tested over time. It also suggested that inexperienced use of the matrix, without support from the consultants, could produce poor results and impact adversely on the consultants' reputation.
 21. The consultancy company confirmed that the matrix underpinned the entire job evaluation scheme. It confirmed that as a company it had to tender competitively for work and that competitors would be at an advantage if they were to have access to its own unique information. It stated that the matrix was not available to anyone other than its own clients.
 22. The Commissioner has considered all of the arguments put forward by Edinburgh Leisure and (through Edinburgh Leisure) the consultancy company. Having done so, she accepts that disclosure of the contents of the matrix would be likely to cause substantial prejudice to the commercial interests of the consultancy company. Given the detail within the withheld information, which would appear to have been the subject of considerable development, validation, refinement and testing, the Commissioner considers that its wider availability would be likely to have a significant detrimental effect on the consultancy company, thereby inhibiting its ongoing commercial activities.
 23. The Commissioner notes that the matrix information in question is still currently in use by Edinburgh Leisure and outlines the methodology created and employed by the consultancy company. The Commissioner accepts that information is of wider interest, in allowing an insight into the mechanics of the job evaluation scheme constructed by the consultancy company. This would be of significant interest to the consultancy company's competitors.

24. For these reasons, the Commissioner accepts that disclosure of the withheld information in the matrix would be likely to prejudice the commercial interests of the consultancy company substantially, and she accepts that the exemption in section 33(1)(b) was correctly applied on that basis.

The public interest test

25. As the Commissioner has found that the exemption in section 33(1)(b) is engaged, 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).

Submissions from Unison

26. Unison submitted that the scoring matrix was the only way the employee could determine if the evaluation applied to their role was accurate. If an employee could not clearly identify and understand the “value” applied to their role, then how could they and their representatives (Unison submitted) accept or appeal their evaluation?
27. Disclosing the scoring matrix, Unison submitted, would allow the employer to demonstrate that their evaluation exercise was open and transparent.
28. Unison went on to submit that it intended to conduct an equal value assessment on the employer’s evaluation exercise, to determine if it was “equalities-proofed”, and that this could lead to an “order for productions” to release the full design specifications of the model. Unison argued that this could well be avoidable if Edinburgh Leisure released the scoring matrix.

Submissions from Edinburgh Leisure

29. Edinburgh Leisure submitted that it did not believe there to be a public interest in disclosure of the information. Edinburgh Leisure acknowledged that the information might be of interest to individuals (possibly those individuals in the posts being evaluated, or other job evaluation consultancies), but this did not mean disclosure would be in the interests of the wider public.
30. Edinburgh Leisure stated that it had introduced its job evaluation process to have as robust a process as possible to measure the size of all of its jobs. It believed it had done this so that it could then ensure that it was paying equal pay for work of equal value: it would carry out regular impact assessments to measure this.
31. Achieving equal pay is in the interest of the public, Edinburgh Leisure submitted, and to publish the architecture of the scheme would allow individuals to manipulate the scheme for their own ends, which would defeat that public interest.

The Commissioner’s findings on the public interest

32. The Commissioner has noted all of the comments made by Unison and Edinburgh Leisure regarding the public interest.
33. In considering the public interest in favour of disclosure, the Commissioner has recognised the general public interest in access to information held by Scottish public authorities. She acknowledges that disclosure of the matrix would contribute to transparency and accountability in relation to, and public scrutiny of, Edinburgh Leisure’s job evaluation

process. Edinburgh Leisure is at least partly publicly funded, and public interest in following those public funds cannot be discounted.

34. The Commissioner also believes that organisations which engage in commercial activities with public authorities should be aware information relating to these activities may require to be disclosed as a result of a request under FOISA.
35. The Commissioner has already acknowledged the risk of substantial commercial prejudice to the consultancy company in this case. The withheld information derived from the matrix would reveal a core part of the methodology employed by the consultancy company in relation to its trading activities. In the Commissioner's opinion, making this information available would be likely to put the company at a competitive disadvantage in future competitive tendering exercises. The Commissioner considers there is a public interest in ensuring that companies are able to compete fairly for public contracts.
36. The Commissioner is also of the view that information already disclosed to Unison (including some not in the public domain) goes some way towards addressing the point raised by Unison that the information would be of interest to the people in posts under evaluation, and their representatives. She acknowledges Edinburgh Leisure's point that these interests are not necessarily to be equated with the public interest.
37. The Commissioner also notes Unison's intent to conduct an equal value assessment on the job evaluation exercise to determine, which could lead to an "order for productions" to release the full design specifications of the model. This suggests that there are potential alternative routes for Unison accessing the information, without public disclosure under FOISA and therefore with a reduced risk of harm of the kind under consideration here.
38. While there will be circumstances in which the public interest requires the disclosure of information, even if substantial prejudice is likely, the Commissioner does not believe those circumstances to be present here. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of this case, that 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 Edinburgh Leisure was entitled to withhold the scoring matrix.
39. In the light of the above findings the Commissioner will not go on to consider the application of sections 33(1)(a) and 36(2) of FOISA, also applied by Edinburgh Leisure to this information.

Section 36(2) of FOISA - Confidentiality

40. Edinburgh Leisure withheld three benchmarking data documents from Unison under section 36(2) of FOISA.
41. Section 36(2) 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 (although there may still be circumstances in which disclosure of confidential information is justified in the public interest).
42. 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.

43. The second stage is that the disclosure of the information by the public authority must constitute a breach of confidence, actionable either by the person or persons from whom the authority obtained the information or by any other person. The Commissioner takes the view that "actionable" means the basic requirements for a successful action must appear to be fulfilled.
44. 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:
 - the information must have the necessary quality of confidence;
 - the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - unauthorised disclosure must be to the detriment of the person who communicated the information.
45. The Commissioner notes that the "summary of benchmarking" document and the "excel record of manual searches" document were apparently created by Edinburgh Leisure itself and so were not supplied from any third party. It is not enough that the information in these documents may have been derived from information obtained from third parties, so the first part of the section 36(2) test cannot apply to these documents
46. The "summary of SPORTA information" document was also apparently created by Edinburgh Leisure itself. To the extent that it contains information from other sources, many of these are clearly public (such as websites). There is some information Edinburgh Leisure states was obtained from networking contacts in other organisations.
47. During the investigation, Edinburgh Leisure acknowledged that it had created these documents itself and that some of the data in them was available publicly. However, it believed this information would take time, effort and experience to collate, and that that the completed product (derived from considerable investment of its own resources and expertise) had commercial value. It did not choose to apply any other exemption to this information, in addition to section 36(2), or provide any arguments to justify its assertion that disclosure would constitute an actionable breach of confidence.
48. As indicated above, the Commissioner does not accept that the information in the first two documents can meet the first part of the two-part test created by section 36(2). In relation to the third, it is not immediately apparent why disclosure of any of the information should involve an actionable breach of confidence, and Edinburgh Leisure has provided no arguments as to why this should be the case. In this connection, the investment of its own time, resources and expertise is of no relevance.
49. Based on the information available to her, therefore, the Commissioner is not satisfied that the requirements of section 36(2) of FOISA can be met in relation to any of the information in the benchmarking data documents. Consequently, the Commissioner can only conclude that Edinburgh Leisure was not entitled to rely upon section 36(2) of FOISA in withholding the benchmarking information and she requires this information (insofar as not in Unison's possession already) to be disclosed to Unison. It is not for the Commissioner to comment on what Unison may wish to do with the information.

The rationale

50. Unison asked Edinburgh Leisure for “a copy of the rationale used to construct the Pay Structure and the 90%, 100% and 110% points in grades.” Unison later clarified this by stating that it was looking for the reasoning behind the decision to create the pay and grading structure it had, with a view to providing a reasonable explanation of that process.
51. Edinburgh Leisure advised Unison that it did not hold any information falling within the scope of this part of the request, stating that this was because it had commissioned another organisation (the consultancy company) to create the pay structure.
52. The Commissioner considers it would have been appropriate for Edinburgh Leisure to have sought clarification of what Unison was actually asking for in this part of the request. From Unison’s application and subsequent correspondence, its primary concern would appear to be the 90-100% salary range for individual posts, but the request could still be read as seeking the “rationale” underlying the entire pay and grading structure. Certainly, it would have been possible to read the original request in that way, and the Commissioner acknowledges (having read Edinburgh Leisure’s submissions) that the creation of this structure was a multi-stage process, with (potentially) a number of underlying rationales.
53. The term “rationale” is intelligible enough, as defined by Unison. The question which is less amenable to a straightforward answer, in relation to this request, is “rationale for what?” This is something Edinburgh Leisure should have sought to clarify, in line with its duty to provide advice and assistance, in line with section 15 of FOISA. In the absence of that clarification, however, having considered this question carefully, the Commissioner is not satisfied that it is sufficiently clear from the terms of this request what information Unison is seeking. Therefore, she does not consider it to have been a valid request for information in terms of section 8(1)(c) of FOISA – it fails to describe the information requested.
54. Unison may, of course, make a new information request to Edinburgh Leisure in relation to information of this kind. The Commissioner understands that it intends to make a new request in relation to the rationale. In any further request, she would urge Unison to be clear and precise about those parts of the process and/or resulting structures for which it is seeking a “rationale”. It should engage with Edinburgh Leisure with a view to formulating a request which is capable of being answered, and Edinburgh Leisure should facilitate this process by providing appropriate advice and assistance in terms of section 15 of FOISA.

Decision

The Commissioner finds that Edinburgh Leisure partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Unison.

She finds that by withholding the scoring matrix under section 33(1)(b) of FOISA, Edinburgh Leisure complied with Part 1. However, she also finds that the remainder of the withheld information was not exempt in terms of section 36(2) of FOISA and in this respect Edinburgh Leisure failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires Edinburgh Leisure to disclose the benchmarking data to Unison by 30 January 2015.

Appeal

Should either Unison or Edinburgh Leisure 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.

Enforcement

If Edinburgh Leisure fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Edinburgh Leisure has failed to comply. The Court has the right to inquire into the matter and may deal with Edinburgh Leisure as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

12 December 2014

Appendix 1: 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.

...

8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which-

...

...

- (c) describes the information requested.

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

- (a) it constitutes a trade secret; or

- (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).

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

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

