

**Decision 214/2006 Dr Donald Reid and Falkirk  
Council**

*Information relating to complaints lodged with the Council's Trading  
Standards and Consumer Protection Service*

**Applicant: Dr Donald Reid  
Authority: Falkirk Council  
Case No: 200502417  
Decision Date: 26 June 2008**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
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## Decision 214/2006 Dr Reid and Falkirk Council

***Information relating to complaints about a specified company – whether the provisions of Part 9 of the Enterprise Act 2002 affect the duty to disclose information under FOISA***

### Relevant Statutory Provisions and Other Sources

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Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2(1) and (2)(b) (Effect of exemptions) and 26(a) (Prohibitions on disclosure)

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision. (References are made to the text of the Enterprise Act within the decision and are not set out separately in the Appendix.)

Opinion of the Court of Session in the case of Dumfries and Galloway Council v Scottish Information Commissioner dated 8 February 2008:  
<http://www.scotcourts.gov.uk/opinions/2008CSIH12.html>

### Facts

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Dr Reid wrote to Falkirk Council (the Council) requesting information relating to complaints made to its Trading Standards Service about a specified company (the company). The Council refused to supply this information on the grounds that, under section 244 of the Enterprise Act 2002 (the EA), disclosure would be contrary to the public interest and might significantly harm the business interests of the company. The Council upheld this decision following an internal review. Dr Reid then asked the Commissioner to consider this case.

This decision replaces the version of Decision 214/2006 issued on 27 November 2006, and which was subsequently quashed by the Court of Session on 28 May 2008.



## Background

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1. This decision concerns the handling of a request for information concerning complaints made to the Trading Standards Services of Falkirk Council (the Council). However, the same request was submitted by Dr Reid to each of Scotland's 32 local authorities. Ten of these requests were ultimately the subject of an application for a decision by me. Two of these ten cases were resolved informally, while the remaining eight were the subject of full investigation.
2. The key issue under consideration in each of these cases is whether or not provisions within Part 9 of the EA affect the duty to provide information under Part 1 of FOISA. While the general issues raised by these cases were investigated together, separate decisions set out the particular circumstances of each case, and the submissions made by the relevant authority.
3. This case is different from the other related applications made by Dr Reid in that Falkirk Council did not submit that section 237 of the EA creates a prohibition on disclosure that makes relevant information exempt from release under section 26(a) of FOISA. The Council's position in this case instead at the time of the Commissioner's investigation rested on the interpretation of section 244 of the EA.

### **Background on section 26(a) of FOSIA and Part 9 of the Enterprise Act 2002**

4. At this stage, it is helpful to outline the provisions of FOISA and the EA, interpretation of which is central to this decision.
5. Section 26(a) of FOISA makes information exempt from release under FOISA where disclosure by a public authority is prohibited by or under an enactment.
6. The EA enacts various provisions in relation to competition law, the enforcement of consumer legislation and insolvency. Part 9 of the EA introduces rules to govern the disclosure of certain types of information held by public authorities by creating restrictions on the handling of what is termed 'specified information'.
7. Section 238 of the EA defines the term 'specified information'. Information is specified information if it comes to a public authority in connection with the exercise of any function it has under, or by virtue of

a) the following Parts of the EA :

Part 1 (which establishes the Office of Fair Trading (OFT) as a corporate body and provides for arrangements for making "super-complaints");



- Part 3 (which makes provisions for a new merger control regime);
- Part 4 (which makes provision for market investigation references to be made by the OFT);
- Part 6 (which creates a new criminal offence for individuals to be engaged in cartels, and provides the OFT with investigatory powers);
- Part 7 (which deals with a number of miscellaneous competition provisions);
- or
- Part 8 (which outlines new procedures for enforcing certain consumer legislation and related matters)

b) any of the following enactments (specified in Schedule 14 of the EA):

- Parts 1, 2, 3, 4, 5, 6, 7, 8 and 11 of the Fair Trading Act 1973
- Trade Descriptions Act 1968
- Hallmarking Act 1973
- Prices Act 1974
- Consumer Credit Act 1974
- Customs and Excise Management Act 1979
- Estate Agents Act 1979
- Competition Act 1980
- Video Recordings Act 1984
- Consumer Protection Act 1987
- Consumer Protection (Northern Ireland) Order 1987
- Copyright, Designs and Patents Act 1988
- Property Misdescriptions Act 1991
- Timeshare Act 1992
- Clean Air Act 1993
- Value Added Tax Act 1994
- Trade Marks Act 1994
- Competition Act 1998
- Chapter 3 of Part 10 and Chapter 2 of Part 18 of the Financial Services and Markets Act 2000
- An order made under section 95 of that Act; or
- Fireworks Act 2003.

c) any such subordinate legislation as the Secretary of State may by order specify for the purposes of section 238(1) of the EA.

8. Sections 237(1) and (2) of the EA provide that specified information relating to the affairs of an individual or any business of an undertaking must not be disclosed during the lifetime of the individual or while the undertaking continues in existence, unless disclosure is permitted under Part 9 of the EA.



9. Section 245(1) of the EA creates a criminal offence where a person discloses information to which section 237 applies in contravention of section 237(2). This criminal offence is punishable by imprisonment for a term up to two years, or a fine, or both.
10. There are a number of circumstances where the disclosure of specified information is permitted through “gateways” under Part 9. These can be summarised as follows:
  - if the individual or undertaking has given consent to the disclosure (section 239);
  - if disclosure is required for the purpose of a Community obligation (section 240);
  - if disclosure by the authority is for the purpose of facilitating the exercise of a statutory function of that authority (section 241(1));
  - if disclosure is in connection with investigating a criminal offence or for the purposes of criminal proceedings (section 242);
  - if disclosure is to an overseas public authority for the purposes of investigating an offence of pursuing criminal or civil proceedings (section 243).
11. Furthermore, it should be noted that section 237(6) states that “This Part [i.e. Part 9] (except section 244) does not affect any power or duty to disclose information which exists apart from this Part.”
12. Before disclosing any specified information, section 244 of the EA requires an authority to have regard to a number of considerations, i.e.:
  - the need to exclude from disclosure information which the authority thinks is contrary to the public interest;
  - the need to exclude from disclosure commercial information the disclosure of which the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or information relating to the private affairs of an individual the disclosure of which the authority thinks might significantly harm the individual’s interests; and
  - the extent to which disclosure of information relating to a business interest or the private affairs of an individual is necessary for the purpose for which the authority is permitted to make the disclosure.

### **Dr Reid’s request and the Council’s response**

13. Dr Reid wrote to the Council’s Trading Standards Services on 9 February 2005, requesting details of any complaints lodged in the last 10 years against any or all of the following:



- a) a named company (which will be referred to as “the company” throughout this decision),
- b) any named directors of the company (whether the complaint related to the director in connection with the company or otherwise), and
- c) any named employee of the company.

Dr Reid’s request specified further that the details of the complaints that he was requesting were to include:

- i. the date on which the complaint was lodged,
- ii. against whom the complaint was lodged (in relation to a – c above),
- iii. a brief summary of the nature of the complaint, and
- iv. the outcome of any investigation undertaken.

14. The Council responded to this request in a letter dated 9 March 2005. This stated that alongside considering the terms of FOISA, the Council had a duty to consider any other provision relevant to requests for information. The Council explained that under section 237 of the EA, information should only be disclosed if it is permitted under Part 9 of the EA.
15. The Council went on to note the provisions of section 244 of the EA (see above). The Council explained that it believed that disclosure would be contrary to the public interest, and might significantly harm the business interests of the company and individuals named in the request. It stated that it therefore could not provide the information requested.
16. In refusing the request for information, the Council made no reference to any exemption contained within Part 2 of FOISA as a reason for its decision.
17. On 14 March 2005, Dr Reid wrote to the Council seeking a review of the decision to withhold the information he had requested. His request for review suggested that the Council had failed to have regard to provisions within section 244 of the EA when considering the request, in that the release of information to him would not be contrary to the public interest and would not significantly harm business interests.
18. The Council responded to Dr Reid’s request for review in a letter dated 18 April 2005. This confirmed that the Council had upheld its original decision that, under section 244 of the EA, disclosure of the information requested would be contrary to the public interest and could significantly harm the business interests of the company and individuals named in the request. Again, no exemption contained in Part 2 of FOISA was cited when refusing the request.
19. Dr Reid then made an application for a decision by me in relation to this matter.



## Investigation

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20. Dr Reid's application for decision was received by my Office on 15 August 2005. This application contained complaints about responses provided by ten of the 32 local authorities which were sent the request for information detailed in paragraph 13 above. These cases were allocated to an investigating officer.
21. The application concerning Falkirk Council was then validated by establishing that Dr Reid had made an information request to a Scottish public authority under FOISA (i.e. the Council) and had appealed to me only after asking the Council to review the response to his request.
22. The investigating officer wrote to the Council on 15 September 2005 to confirm that a valid application for decision had been received and that a full investigation would now commence. The Council was invited to comment on the case in terms of section 49(3)(a) of FOISA. The Council was asked to provide details of its reasoning concerning the relationship between the provisions of Part 9 of the EA and FOISA. The Council was also asked to confirm whether it believed any exemption in Part 2 of FOISA applied to the information requested by Dr Reid.
23. The Council's response to this request was received on 10 October 2005. This explained that the Council had not judged that any exemption contained within Part 2 of FOISA applied to the information requested by Dr Reid. In particular (and in contrast with the position expressed by the other Councils to which Dr Reid's applications relate), the Council did not believe that section 237 of the EA created a prohibition on disclosure for the purposes of section 26(a) of FOISA.
24. The Council submitted that the EA permitted disclosure where (under section 237(6)) a power or duty to disclose existed outside of Part 9 of EA, and that FOISA created such a power or duty. However, the Council stated that any potential disclosure of specified information must be considered in the light of the provisions of section 244 of the EA, and not (solely) those within Part 2 of FOISA. As such, the Council confirmed that no exemption in FOISA had been judged to apply, but the request had been refused on the grounds that having had regard to the considerations set out in section 244 of the EA, it had judged that disclosure would be against the public interest and might lead to significant harm to the business interests of the named company and individuals.



## The Commissioner's analysis and findings

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### Section 237 of the EA

25. The question of whether the provisions of Part 9 of the EA create a prohibition on disclosure for the purposes of section 26(a) of FOISA has been the subject of a judgement of the Court of Session, which was prompted by Dr Reid's related information request to Dumfries and Galloway Council (see link in Statutory Provisions and Other Sources, above).
26. The Court concluded that in this case section 237(1) of the EA creates a prohibition on disclosure for the purposes of section 26(a) of FOISA. I will therefore concentrate on this point, rather than on whether section 244 is applicable.
27. Section 237(1) of the EA states that the provisions of section 237 apply only to information that is "specified information" as defined in section 238, and which relates to either the affairs of an individual or any business of an undertaking. In order to consider whether the information withheld by the Council is exempt from disclosure as a result of section 237(1), I must address three separate questions:
  - a) is the information requested by Dr Reid "specified information" for the purposes of the EA?
  - b) does the information relate to the affairs of an individual or any business of an undertaking?
  - c) if the answer to both (a) and (b) is "yes", does Part 9 of the EA then prohibit its release?
28. In response to questions (a) and (b), I am satisfied that the requested information is specified information for the purposes of the EA and that it relates to the business of an undertaking, namely that of the company. Dr Reid has requested information about a named company which has been gathered by the Council in the pursuit of its statutory functions under consumer legislation referred to in section 238 of the EA.
29. In line with the Court's judgement, and for the reasons set out in the judgement, I find that the information in question is exempt in terms of section 26(a) of FOISA. This is an absolute exemption and I am therefore not required to go on to consider where the public interest lies in relation to the information.





## **Decision**

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I find that Falkirk Council was entitled to refuse to disclose the information requested by Dr Reid as a result of the exemption in section 26(a) of Freedom of Information (Scotland) Act 2002.

## **Appeal**

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Should either Dr Reid or the Council 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 notice.

Signed on behalf of Kevin Dunion, Scottish Information Commissioner, under delegated authority granted on 14 November 2007.

**Margaret Keyse**  
**Head of Investigations**  
**28 June 2008**



## **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.

##### **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.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
  - ...
  - (b) section 26

##### **26 Prohibitions on disclosure**

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment