

Decision Notice

Decision 212/2018: Mr T and the Keeper of the Registers of Scotland

Changes to seed point dataset licence

Reference No: 201800847

Decision Date: 19 December 2018



Scottish Information
Commissioner

Summary

RoS was asked about changes to their seed point dataset licence. RoS disclosed some information, but withheld other information.

The Commissioner found that the majority of the withheld information comprised legal advice which was exempt from disclosure. The Commissioner did not accept that information in one email was commercially sensitive so he ordered its disclosure.

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); 36(1) (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. On 11 March 2018, Mr T made a request for information to the Keeper of the Registers of Scotland (RoS). The information requested was:
 - (1) all internal correspondence, including but not limited to emails, voicemail, letters, and notes, in relation to correspondence between December 2016 and 11 March 2018 with regard to the changes made to the RoS Cadastral seed point dataset licence;
 - (2) all external correspondence re the above between September 2017 and 11 March 2018.
2. RoS contacted Mr T on 6 April 2018, explaining there would be a delay in responding.
3. On 19 April 2018, RoS responded to Mr T's request by disclosing some information, but also withholding some information under a number of exemptions in FOISA: some information was considered to be exempt personal data (section 38(1)(b)), some was considered to be covered by confidentiality in legal proceedings (section 36(1)) and some information was considered likely to prejudice commercial interests if disclosed (section 33(1)(b)).
4. On 26 April 2018, Mr T wrote to RoS requesting a review of its decision. He did not accept that his request captured data impinging on commercial interest, because the data was "free data" which had been available for years. He did not believe licensing advice was legal advice.
5. RoS notified Mr T of the outcome of its review on 18 May 2018, upholding its earlier decision on sections 33(1)(b) and 36(1) with fuller explanations but otherwise without modification.
6. On 18 May 2018, Mr T wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr T stated he was dissatisfied with the outcome of RoS's review because he did not accept that exemptions had been applied

correctly. Neither his requirement for review nor his application questioned the withholding of personal data and this aspect of the information will not be considered further.

7. As Mr T stated in his application, the matter of the external correspondence (part 2 of the request) has already been considered in the Commissioner's previous *Decision 046/2018*¹, to the extent that it was covered by that request. That decision, however, related to an earlier period to the timeframe of the request under consideration here. The Commissioner must now consider whether RoS took adequate steps to identify and any external correspondence covered by Mr T's application.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr T made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
9. On 27 June 2018, RoS was notified in writing that Mr T had made a valid application. RoS was asked to send the Commissioner the information withheld from Mr T. RoS provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. RoS was invited to comment on this application and to answer specific questions, with reference to its application of exemptions and the steps taken to identify and locate any relevant information.

Commissioner's analysis and findings

11. 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 him by both Mr T and RoS. He is satisfied that no matter of relevance has been overlooked.

Information held by RoS

12. RoS provided submissions on how, in consultation with staff most familiar with the subject matter, it had identified keywords and locations for the searches to be carried out. It described the search criteria then applied and provided copy emails confirming the searches carried out and their outcomes.
13. Having considered RoS's submissions, the Commissioner is satisfied that it carried out adequate, proportionate searches for the information requested by Mr T. On the balance of probabilities, he is satisfied that it identified and located all relevant information it held. The information not provided to Mr T was withheld under the exemptions in sections 36(1) and 33(1)(b) of FOISA, which the Commissioner will now consider.

Section 36(1) of FOISA - Confidentiality

14. Section 36(1) of FOISA provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is that to which legal advice privilege, a form of

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2018/201701521.aspx>

legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.

15. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled:
 - (i) the information must relate to communications with a professional legal adviser, such as a solicitor or an advocate;
 - (ii) the legal adviser must be acting in their professional capacity; and
 - (iii) the communications must occur in the context of the legal adviser's professional relationship with their client
16. RoS submitted that the withheld emails comprised communications involving their professional legal adviser, requesting and providing legal advice. RoS contended that the communications satisfied the necessary conditions for legal advice privilege to apply. RoS also confirmed that the information remained confidential (i.e. not in the public domain) at the time of Mr T's request.
17. Having considered the content of the withheld information and the circumstances under which it was created, the Commissioner is satisfied that the information meets the conditions for legal advice privilege to apply. The advice was from a professional legal adviser acting in their professional capacity and the communications were in the context of that legal adviser's professional relationship with their client (RoS)
18. Before information can attract legal advice privilege, the document must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed: the information must possess the quality of confidence at that time, and so cannot have been made public, either in full or in a summary substantially reflecting the whole.
19. In this case, having considered RoS's submissions, the Commissioner accepts that the information remains confidential. In all the circumstances, he is satisfied that legal professional privilege applies.
20. The Commissioner therefore accepts that the information falls within the terms of section 36(1) of FOISA.
21. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA.

The public interest test

22. Mr Alison stated that he believed the public had a right to know why a licence was fundamentally altered by RoS when it relates to "free" data. He could not understand why RoS was being "evasive", given the passage of time since the licence was changed.
23. RoS submitted that the explanation given in both its response and its review outcome to Mr T covered Mr T's concerns regarding transparency. In its review outcome, RoS recognised a public interest in disclosing the information Mr T requested, in the interests of openness and transparency, and to allow scrutiny of the decision-making processes within RoS.
24. RoS also submitted that there is a strong public interest, which the courts have recognised, in maintaining confidentiality of communications between a legal adviser and his or her client.

On balance, RoS held the view that that the public interest in maintaining the exemption outweighed the public interest in disclosure here.

Conclusions on public interest

25. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where:
 - (i) the privileged material discloses wrongdoing by/within an authority;
 - (ii) the material discloses a misrepresentation to the public of advice received;
 - (iii) the material discloses an apparently irresponsible and wilful disregard of advice;
 - (iv) a large number of people are affected by the advice, or
 - (v) the passage of time is so great that disclosure cannot cause harm.
26. The Commissioner notes Mr T's concerns as to why a retrospective change in the licence was implemented by RoS. It is not for the Commissioner to come to a view on the legality or otherwise of doing so; this is not within his remit under FOISA. He has also considered carefully all the submissions, including the withheld information itself. After careful consideration, the Commissioner is satisfied that none of the considerations set out above (or any others of comparable weight) apply here, in relation to the information withheld under section 36(1).
27. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, on administration of justice grounds. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB). Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
28. The Commissioner acknowledges that there is a public interest in the disclosure of the information about the licensing of data for use by the public and that Mr T is correct that some time has elapsed since the licence was changed. However, the Commissioner is not satisfied that these factors are of sufficient substance to outweigh the public interest in maintaining confidentiality, outlined above.
29. On balance, therefore, the Commissioner accepts that greater weight should be attached to the arguments which favour withholding the information in the public interest. In all the circumstances of this case, the Commissioner concludes that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 36(1). Consequently, he finds that the RoS was entitled to withhold this information.
30. The Commissioner need not consider the application of any other exemptions claimed by RoS in relation to this information.

Section 33(1) of FOISA - Commercial interests and the economy

31. RoS withheld the remaining information, in email 3, solely under section 33(1)(b) of FOISA.
32. Section 33(1)(b) 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 exemption is subject to the public interest test in section 2(1)(b) of FOISA.
33. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
 - (i) whose commercial interests would (or would be likely to) be harmed by disclosure,
 - (ii) the nature of those commercial interests and
 - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
34. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers 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.

Commercial interests

35. In his requirement for review, Mr T contended that there was no commercial interest in jeopardy as this data had been available for years. He noted this was not a “new” licence and so there should be no difficulty in disclosing what he wished to know. In his application, he re-iterated this line of argument, emphasising the importance of knowing why a licence should be fundamentally altered by RoS. He noted that the withheld correspondence was a very long time after commercial terms had been agreed. He suggested that much of RoS’ refusal is based on the views of a third party (Ordnance Survey (OS)) which were, in his view, wholly irrelevant in relation to internal RoS correspondence.
36. RoS submitted that it did not wish to expand or comment further on the points made in its review outcome relating to withholding information under this exemption. In its review decision, RoS referred to the explanations in its initial response, and also gave consideration to Mr T’s view that no commercial interests were in jeopardy here, as set out above.
37. RoS referred to the Commissioner’s *Decision 046/2018*, which covers the way in which RoS applied the same exemption to different information on the same subject matter. RoS acknowledged that the commercial interests it considered relevant were those of OS.
38. RoS stated that it reached this view after consulting OS and on the basis that, amongst other matters, email 3 was clearly of relevance to OS’s current commercial licensing model, in general, and also raised questions of intellectual property ownership and licensing which were core to OS’s current business model.
39. RoS therefore concluded that there was a risk that this information, if released “may be used to undermine and challenge OS’s licensing model which may have the effect of substantially prejudicing the commercial activities that RoS undertakes as part of that model”. RoS stated that it was satisfied the information under consideration in this case was “very different in

character to the 'relatively innocuous' information that the Commissioner ordered RoS to release in Decision Notice 046/2018".

Commissioner's views

40. The Commissioner has carefully considered all the arguments put forward, along with the withheld information itself. The arguments above appear somewhat hypothetical, with RoS contending that the impact of disclosing this particular information "may" rather than "would" or "would be likely to" cause harm. More significantly, there is nothing in the withheld information which is particularly revealing as to OS's methodologies or "know-how". It is quite general in nature and, while there may be a degree of frankness in the expression of views about OS's proposals, RoS has not suggested that the way in which the communication is expressed would carry with it any risk of harm to its own commercial interests in the event of disclosure.
41. For these reasons, the Commissioner is not satisfied that disclosing the requested information would, or would be likely to, damage OS's commercial interests – or, for that matter, those of RoS – in the event of disclosure.
42. As the Commissioner has found that the exemption in section 33(1)(b) was wrongly applied to the withheld information, he is not required to go on to consider the public interest in disclosing the information or maintaining the exemption. The Commissioner finds, therefore, that the withheld information (email 3) was incorrectly withheld under section 33(1)(b) of FOISA.
43. He requires that the information (email 3) be disclosed, subject to the redaction of any personal data.

Decision

The Commissioner finds that, in respect of the matters specified in the application, the Keeper of the Registers of Scotland (RoS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr T.

The Commissioner finds that by disclosing some information, RoS complied with Part 1. He is also satisfied that RoS correctly applied section 36(1) of FOISA to some information.

However, the Commissioner finds that RoS was not entitled to withhold the information in email 3, under section 33(1)(b) of FOISA and that, in so doing, RoS failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires RoS to disclose the information in email 3 to Mr T by 5 February 2018.

Appeal

Should either Mr T or RoS 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 RoS fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that RoS has failed to comply. The Court has the right to inquire into the matter and may deal with RoS as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

19 December 2018

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).

...

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

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