

Enforcement Notice

Failure to adopt a publication scheme approved by the Scottish Information Commissioner

ENF005/2016 Highland Birchwoods

Reference no: 201602001

Notice date: 9 December 2016



Scottish Information
Commissioner

Summary

Highland Birchwoods Ltd. is a publicly owned company and, as such, is subject to the Freedom of Information (Scotland) Act 2002 (FOISA).

It has a duty, in line with section 23 of FOISA, to adopt and maintain a publication scheme which is approved by the Scottish Information Commissioner (the Commissioner), and to publish information in accordance with that scheme.

Highland Birchwoods has failed to adopt and maintain a publication scheme and to publish information in accordance with the scheme. It has accordingly failed to comply with Part 1 of FOISA.

The Commissioner requires Highland Birchwoods to submit a publication scheme to her for approval by 31 January 2017.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 3(1)(b) (Scottish public authorities); 6(1)(b), (2)(b) and (3) (Publicly-owned companies); 23(1) to (5)(a) (Publication schemes); 24(1) and (2) (Model publication schemes); 51(1) to (3) (Enforcement notices)

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.

Introduction

1. Where the Commissioner is satisfied that a public authority has failed to comply with any of the requirements of Part 1 of FOISA, she may, under section 51(1) of FOISA, give the authority a notice requiring it to take steps to comply with Part 1, within a specified period.
2. This notice sets out:
 - (i) the provision of Part 1 of FOISA with which the Commissioner is satisfied that Highland Birchwoods has failed to comply, and
 - (ii) the respect in which it has failed to comply.
3. This notice also specifies the steps Highland Birchwoods must take in order to comply with Part 1 of FOISA.

Background

Section 23(1) – Publication Schemes

4. Section 23(1) of FOISA requires all Scottish public authorities to adopt a publication scheme, which has been approved by the Commissioner.
5. Section 3(1) of FOISA sets out the definition of “Scottish public authority.” In terms of section 3(1)(b), publicly-owned companies, as defined by section 6 of FOISA, are Scottish public authorities.

6. Under section 6(1)(b) of FOISA, a company is a “publicly-owned company” if it is wholly owned by a Scottish public authority listed in Schedule 1 to FOISA, other than an authority so listed only in relation to information of a specified description.
7. Highland Birchwoods is wholly owned by Highland Council, a Scottish public authority by virtue of paragraph 21 of Schedule 1 to FOISA (“A council constituted by section 2 of the Local Government etc. (Scotland) Act 1994”). Highland Council is not listed in Schedule 1 only in relation to information of a specified description. Therefore, Highland Birchwoods is a Scottish public authority for the purposes of section 3(1)(b) of FOISA.
8. On 29 August 2011, the Commissioner approved the publication scheme adopted by Highland Birchwoods under section 23(1) of FOISA. The Commissioner provided, in line with section 23(5)(a) of FOISA, that the approval for the publication scheme would expire on 31 May 2015.
9. On 6 March 2015, the Commissioner wrote to Highland Birchwoods to remind it:
 - (i) that approval for its publication scheme would expire on 31 May 2015, and
 - (ii) of the requirement to adopt and maintain a publication scheme which has been approved by the Commissioner.
10. The letter from the Commissioner set out in some detail the options available to Highland Birchwoods and gave guidance as to what steps were required of Highland Birchwoods, together with a link to guidance available on the Commissioner’s website¹. The Commissioner recommended that Highland Birchwoods adopted the Model Publication Scheme 2015 (MPS).
11. Highland Birchwoods failed to respond to this letter.
12. On 1 September 2015, the Commissioner wrote to Highland Birchwoods, noting that it had failed to adopt an approved publication scheme and requesting it to submit a completed notification form within seven days. In this letter, Highland Birchwoods was also advised that non-compliance (i.e. a failure to adopt a publication scheme) could result in enforcement action being taken by the Commissioner.
13. Highland Birchwoods failed to respond to this letter.
14. The Commissioner wrote to Highland Birchwoods on 7 November 2016, advising that if it did not comply with the requirements of section 23 of FOISA by 23 November 2016, the Commissioner would issue an Enforcement Notice under section 51 of FOISA. Highland Birchwood was also advised that failure to comply with an Enforcement Notice can be referred to the Court of Session and may be treated as contempt of court.
15. Highland Birchwoods failed to respond to this letter.
16. Given its ongoing refusal to correspond with the Commissioner, and its continued failure to adopt a publication scheme, the Commissioner is satisfied that Highland Birchwoods has failed to take the steps required to adopt and maintain a publication scheme. The Commissioner finds that Highland Birchwoods is in breach of section 23(1) of FOISA and has been since 1 June 2015.

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<http://www.itspublicknowledge.info/ScottishPublicAuthorities/PublicationSchemes/PublicationSchemesHome.aspx>

Findings

The Commissioner finds that Highland Birchwoods has failed to adopt and maintain a publication scheme approved by her, and to publish information in accordance with that scheme. Highland Birchwoods has therefore failed to comply with Part 1 (and, in particular, with section 23(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA).

The Commissioner requires Highland Birchwoods to take steps to comply with section 23(1)(a) and (b) of FOISA, and submit a publication scheme to her for approval in line with guidance previously provided, by 31 January 2017.

Appeal

Should Highland Birchwoods wish to appeal against this enforcement notice, it has 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 Highland Birchwoods fails to comply with this notice, the Commissioner has the right to certify to the Court of Session that Highland Birchwoods has failed to comply. The Court has the right to inquire into the matter and may deal with Highland Birchwoods as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

9 December 2016

Freedom of Information (Scotland) Act 2002

3 Scottish public authorities

- (1) In this Act, "Scottish public authority" means-
- ...
 - (b) a publicly-owned company, as defined by section 6.
- ...

6 Publicly-owned companies

- (1) A company is a "publicly-owned company" for the purposes of section 3(1)(b) if it is wholly owned-
- ...
 - (b) by any other Scottish public authority listed in schedule 1, other than an authority so listed only in relation to information of a specified description.
- (2) For the purposes of subsection (1), a company is wholly owned-
- ...
 - (b) by any other Scottish public authority if it has no members except-
 - (i) the authority or companies wholly owned by the authority; or
 - (ii) persons acting on behalf of the authority or of such companies.
- (3) In subsections (1) and (2), "company" includes any body corporate.

23 Publication schemes

- (1) A Scottish public authority must—
- (a) adopt and maintain a scheme (in this Act referred to as a "publication scheme") which relates to the publication of information by the authority and is approved by the Commissioner;
 - (b) publish information in accordance with that scheme; and
 - (c) from time to time review that scheme.
- (2) A publication scheme must specify—
- (a) classes of information which the authority publishes or intends to publish;
 - (b) the manner in which information of each class is, or is intended to be, published; and
 - (c) whether the published information is, or is intended to be, available to the public free of charge or on payment.

- (3) In adopting or reviewing its publication scheme the authority must have regard to the public interest in—
 - (a) allowing public access to information held by it and in particular to information which—
 - (i) relates to the provision of services by it, the cost to it of providing them or the standards attained by services so provided; or
 - (ii) consists of facts, or analyses, on the basis of which decisions of importance to the public have been made by it;
 - (b) the publication of reasons for decisions made by it.
- (4) The authority must publish its publication scheme but may do so in such manner as it thinks fit.
- (5) The Commissioner may—
 - (a) when approving a publication scheme, provide that the approval expires at the end of a specified period; ...

...

24 Model publication schemes

- (1) The Commissioner may, in relation to Scottish public authorities falling within particular classes –
 - (a) prepare and approve model publication schemes; or
 - (b) approve such schemes prepared by other persons.
- (2) If an authority which falls within the class to which an approved model publication scheme relates adopts that scheme without modification, no further approval of the Commissioner is required so long as that model scheme remains approved; but the approval of the Commissioner is required in relation to any modification of the scheme by the authority.

...

51 Enforcement notices

- (1) If the Commissioner is satisfied that a Scottish public authority has failed to comply with a provision of Part 1 of this Act, the Commissioner may give the authority a notice (referred to in this Act as “an enforcement notice”) requiring the authority to take, within such time as is specified in the notice, such steps as are so specified for so complying.
- (2) An enforcement notice must contain—
 - (a) a statement of the provision with which the Commissioner is satisfied that the authority has failed to comply and the respect in which it has not done so; and
 - (b) particulars of the right of appeal conferred by section 56.
- (3) The time specified under subsection (1) must not expire before the end of the period within which an appeal may be brought under section 56 against the notice and, if such an appeal is brought, the notice need not be complied with before the cause is finally determined.

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