

Our Ref: 200501566

Mr David Flint
MacRoberts Solicitors

23 June 2006

Dear Mr Flint

**DECISION NOTICE – SECTION 49 OF THE FREEDOM OF INFORMATION
(SCOTLAND) ACT 2002
DECISION NUMBER 125/2006
PUBLIC AUTHORITY: ORKNEY ISLANDS COUNCIL (THE COUNCIL)**

I refer to the applications you made to me on 22 and 25 April 2005, for a decision as to whether the Council dealt with the information requests you made in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). In this case, the information requested consisted of copies of the lists of properties in respect of which the Council collects waste water charges and household water charges on behalf of Scottish Water.

Please note that this is a formal decision notice under section 49 of FOISA.

I have now completed my investigation. In doing so, any points raised in your applications and any comments submitted to me by the Council have been taken into account.

Background

The Council refused your requests on the basis of the following sections in FOISA: section 25 (information otherwise accessible), section 33(1)(b) (disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person, including, without prejudice to that generality, a Scottish public authority) and section 36(2) (the information was obtained by the Council from another person, including another such authority, and its disclosure by the Council so obtaining it to the public otherwise than under FOISA would constitute a breach of confidence actionable by that person or any other person).

Decision

After carrying out an investigation, I am satisfied that the Council was correct not to provide you with the information you requested as the information withheld from you is exempt from disclosure under section 33(1)(b) on the grounds that disclosure of the information under FOISA would, or would be likely to, prejudice substantially the commercial interests of Scottish Water. I also found that that it would not be in the public interest to release such information on the grounds that the loss of income

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which is currently obtained by Scottish Water in providing property search certificates under the provisions of its publication scheme and in entering into licensed arrangements with commercial organisations in respect of property searches would, or would be likely to, have the unintended consequence of increasing overall water and sewerage charges which would not be in the interest of the public.

I am satisfied that the Council was correct not to provide you with the information you requested as the information withheld from you is exempt from disclosure under section 36(2) of FOISA on the basis that the information was obtained by the Council from another person (in this case, Scottish Water) and disclosure by the Council of the information to the public would constitute a breach of confidence actionable by Scottish Water. The exemption in section 36(2) of FOISA is not subject to the public interest test contained in section 2(1)(b) of FOISA and I am therefore not required to consider the public interest in the disclosure or withholding of the information.

I have however found that the Council was wrong to rely upon the exemption under section 25 of FOISA, since lists of properties in respect of which the Council collects/does not collect waste water charges and household water charges on behalf of Scottish Water are not contained within Scottish Water's publication scheme. The information requested is therefore not otherwise accessible in terms of being reasonably obtainable under Scottish Water's publication scheme.

I also found that the Council partially failed to comply with Part 1 of FOISA by failing to respond to your requests for information within 20 working days as required by section 10(1). The Council also breached Part 1 of FOISA by failing to carry out corresponding reviews within the time limits set out in section 21(1) of FOISA. I do not require the Council to take any remedial steps in relation to these breaches.

As you are aware, this particular application is very similar to another application by MacRoberts which I considered in detail in decision 056/2006, MacRoberts and the City of Edinburgh Council. That decision was sent to you by recorded delivery on 28 March 2006 and I understand that you have confirmed that you have received that decision. Whilst I am not specifically required by FOISA to provide reasons for my decisions, I wish to make it clear that the reasons for coming to this particular decision are set out in some detail in decision 056/2006, therefore I refer you to that decision for an explanation of my reasoning in this particular case.

Appeal

Should either MacRoberts or the Council wish to appeal against this decision, there is a right of appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

I have sent a copy of this decision to the Council. This decision notice will be made available on my website in due course.

Yours sincerely

Kevin Dunion
Scottish Information Commissioner