



Scottish Information
Commissioner

**Decision 027/2007 Mr Michael Foote and Aberdeenshire
Council**

Land/property disposal agreement in Banff

**Applicant: Mr Michael Foote
Authority: Aberdeenshire Council
Case No: 200503105
Decision Date: 12 February 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 027/2007 Mr Michael Foote and Aberdeenshire Council

Request for a copy of the agreement concluded by Aberdeenshire Council and Tesco regarding the proposed sale of land and property at Canal Park, Banff – whether disclosure by the authority so obtaining it to the public (otherwise than under the Freedom of Information (Scotland) Act 2002) would constitute a breach of confidence actionable by that person or any other person – decision to withhold upheld by Commissioner

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002: section 36(2) (Confidentiality).

The full text of this provision is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Foote wrote to Aberdeenshire Council (the Council) and requested a copy of an agreement concluded by the Council and Tesco regarding the proposed sale of land and property at Canal Park, Banff. The Council refused to release the information on the grounds that it was confidential under section 36(2) of the Freedom of Information (Scotland) 2002 (FOISA).

Mr Foote was not satisfied with the Council's decision to withhold the information and asked it to review its decision. Upon review, the Council upheld its original decision.

Mr Foote was dissatisfied with the Council's response and applied to the Commissioner for a decision.

After investigation, the Commissioner found that the Council had dealt with Mr Foote's request in accordance with Part 1 of FOISA. The Commissioner concluded that the information was exempt under section 36(2) of FOISA on the grounds that it had been obtained by a Scottish public authority from another person and that 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.



Background

1. Mr Foote wrote to the Council on 12 September 2005, requesting a copy of an agreement concluded by the Council and the supermarket chain Tesco, with regard to the transfer of ownership of Canal Park in Banff and the adjacent community centre buildings and land.
2. The Council issued a refusal letter which Mr Foote received on 15 September 2005. In its letter, the Council confirmed to Mr Foote that it held the information he had requested but the Council refused to provide the information on the grounds of confidentiality under section 36(2) of FOISA.
3. The Council informed Mr Foote that it was of the opinion that the section 36(2) exemption in FOISA applied to the information requested because the missives for sale, which were concluded prior to 1 January 2005, included “a clear and unequivocal confidentiality clause”. The Council was of the view that disclosure to the public of the information requested would constitute a breach of confidence actionable by the other party to the missives.
4. Mr Foote was not satisfied with the Council’s response and, on 20 October 2005, he wrote to the Council asking it to review its decision to withhold the information he had requested.
5. The Council responded to Mr Foote on 2 November 2005. In its letter, the Council advised Mr Foote of the decision of its Freedom of Information Review Panel, which had considered the matter on 26 October 2005. The Council informed Mr Foote that the Review Panel had found in favour of the Council and the decision notice from the Panel was provided to Mr Foote along with its statement of reasons.
6. The Panel had determined that the information under consideration contained a clause which prevented the release of any information which related to the agreement between the Council and the purchaser to any other person. The Panel concluded that the disclosure of the information would constitute a breach of confidence actionable by the other party to the missives and accordingly the information fell within the exemption contained in section 36(2) of FOISA.
7. Mr Foote was dissatisfied with the outcome of the Council’s review and, on 14 November 2005, applied to me for a decision. In his application, Mr Foote contended that the public had been excluded from meetings held between the Council and Tesco, and that negotiations had not been conducted openly. He also stated that he wished to view the agreement between the Council and Tesco in order to remove any suspicions of impropriety.



8. The case was then allocated to an investigating officer. Mr Foote's appeal was validated by establishing that he had made a valid request to a Scottish public authority and had appealed to me only after asking the Council to review its response to his initial request.

The Investigation

9. The investigating officer wrote to the Council on 6 December 2005, giving notice that an appeal had been received and that an investigation into the matter had begun. The Council was asked to provide its comments in terms of section 49(3)(a) of FOISA, along with supporting documentation for the purposes of the investigation. The Council was also asked to provide information concerning the reasons for the inclusion of a confidentiality clause within its agreement with Tesco.
10. The investigating officer questioned why the Council had accepted such a clause in light of the guidance contained within the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (the Section 60 Code) and the fact that public authorities should have been preparing for the implementation of FOISA since May 2002. The agreement between the Council and Tesco had been concluded on 18 December 2003, whereas the Bill for this Act of the Scottish Parliament (FOISA) was passed by the Parliament on 24th April 2002 and received Royal Assent on 28th May 2002.
11. The Council was also asked to respond to the points raised by Mr Foote in his application to me. These included the assertion that the public had been excluded from meetings held between the Council and Tesco and that negotiations had not been conducted openly. In its response the Council's legal manager stated that he was unaware of any meetings that had been held between the Council and Tesco. He commented that a significant number of Committee meetings had been held which considered reports on the sale of Canal Park and that these reports had been restricted under Schedule 7A of the Local Government (Scotland) Act 1973, which sets out the Committee's rights to exclude the Press and public from meetings during consideration of these items. The Council stated categorically that Tesco was not involved in discussions at these meetings.



12. The Council added that the sale of Canal Park was concluded following exposure on the open market, following which three sealed bids were made. At the conclusion of that process, Tesco was awarded “preferred bidder” status. Therefore, it would be wrong to say that there were any direct negotiations between the Council and Tesco and any suggestion of impropriety in the way that the Council conducted its business was unfounded.
13. During the course of the investigation it was noted that the sale of the land and property at Canal Park was still a live issue and that the matter could be the subject of a Public Local Inquiry at some time in the future.

The Commissioner’s Analysis and Findings

14. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Foote and the Council and I am satisfied that no matter of relevance has been overlooked.

Section 36(2) - Confidentiality

15. The Council withheld the information requested by Mr Foote under the exemption in section 36(2) of FOISA (actionable breach of confidence). This exemption allows public authorities to withhold information obtained from another person (including another public authority) if its disclosure to the public would constitute an actionable breach of confidence. The exemption is not subject to the public interest test.
16. In order for information to be withheld under this exemption, an authority must first be able to show that the information was obtained from another person, and then show that disclosure of the information would constitute an actionable breach of confidence. The terms of the relevant agreement were provided to the Council by the legal representatives of Tesco, and therefore the first part of this test was fulfilled.
17. There are three main requirements which must be met before a claim for breach of confidentiality can be established. These are:
 - a) the information must have the necessary quality of confidence;
 - b) the public authority must have received the information in circumstances which imposed an obligation on the authority to maintain confidentiality;and



- c) there must be a disclosure which has not been authorised by the person who communicated the information but which would cause damage to that person.
18. To have the necessary quality of confidence, the information could not be generally accessible. In this case, the information is not currently (and was not at the time of Mr Foote's request) in the public domain and Mr Foote would not be (or have been) able to produce the information himself.
19. In order for the breach of confidence to be actionable, the Council must have received the information in circumstances which imposed an obligation on the authority to maintain confidentiality. The agreement between the Council and Tesco contains a confidentiality clause which states that all information relating to the missives was confidential and that, unless required by law or any regulatory body, no such information was to be divulged to any other person without the consent of the purchaser (in this case Tesco). My understanding is that this remains in force.
20. The third part of the test requires that disclosure of the information must be unauthorised by, and cause damage to, the person who communicated it. The confidentiality agreement in this instance contained words to the effect that information relating to the missives could be disclosed, but only with the explicit consent of the purchaser, i.e. Tesco. Subsequent to Mr Foote requesting the information, the Council approached Tesco's legal representatives in order to determine whether or not such consent could be given. Tesco's legal representatives confirmed to the Council that Tesco was not willing to consent to the missives being released.
21. The Council argued that if it was required to disclose the information in the face of the confidentiality clause and Tesco declining its consent, then the potential claim against the Council would be substantial. The Council also listed a number of instances of harm which, in the opinion of the Council, would be suffered by Tesco should the information be disclosed:
- a) Their aborted legal expenses in concluding missives, joining or supporting the Common Good petition, and related disbursements;
 - b) Other professional fees and disbursements in surveying Canal Park, considering and assessing the replacement facilities, and formulating and pursuing their own planning application;
 - c) Legal expenses of their own Planning Public Local Inquiry; and
 - d) Loss of profit.



22. As for the Council's reasons for accepting a confidentiality clause in the missives, the Council made a distinction between a contract concerning the sale of development land on the open market and the specific terms of a procurement contract. The Council felt that the nature of the contract containing the confidentiality clause was the most important factor to be considered rather than the mere existence of the confidentiality clause itself.
23. The Council noted my investigating officer's comments concerning the consideration of the Section 60 Code, the draft of which came out in April 2003. The Council stated that it had followed the Section 60 Code with interest and had advocated its use by Council officers even before the finalised version was laid before the Scottish Parliament on 6 September 2004.
24. In this instance, however, the Council was of the view that without the existence of the confidentiality clause there would have been no contract and without the contract there would have been no possibility of substantial inward investment in leisure facilities for Banff and Macduff. The Council added that it was extremely concerned that, were the missives to have been made public, Tesco could have resiled (i.e. withdrawn) from the contract.
25. I have stated in my briefing on the section 36 exemption in FOISA (<http://www.itspublicknowledge.info/legislation/briefings/section36.htm>) that public authorities should consider carefully any request to hold information in confidence and should make it clear that they cannot guarantee that information will not be disclosed unless the requirements of section 36(2) (or some other exemption) are met.
26. When entering into contracts, public authorities should refuse to include terms which restrict the disclosure of information held by the authority beyond the restriction permitted in the Act (i.e. if the information is a trade secret or release of the information would or would be likely to substantially prejudice the commercial interests of any person).
27. I would stress that information should only be accepted in confidence if it is necessary for the authority to obtain that information in order to carry out its functions and it would not otherwise be provided or could not otherwise be obtained. Authorities should not agree to hold information in confidence if it is clearly not confidential in nature.
28. In this instance, having examined the information that has been withheld and having considered in full the Council's and Mr Foote's submissions, I am satisfied in the circumstances that the relevant legal tests are all met and therefore that the Council was justified in withholding the requested information under section 36(2) of FOISA.



Decision

I find that Aberdeenshire Council complied fully with Part 1 of FOISA in withholding the information requested by Mr Foote under section 36(2) of the Freedom of Information (Scotland) Act 2002.

Appeal

Should either Mr Foote or Aberdeenshire Council wish to appeal against this decision, there is a right to 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.

Kevin Dunion
Scottish Information Commissioner
12 February 2007



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

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.