



Scottish Information  
Commissioner

**Decision 045/2005 – Mr Geoffrey Jarvis, The Clyde Heritage  
Trust and Glasgow City Council**

*Request for correspondence between legal adviser and client*

**Applicant: Mr Geoffrey Jarvis, The Clyde Heritage Trust  
Authority: Glasgow City Council  
Case No: 200501662  
Decision Date: 3 November 2005**

**Kevin Dunion  
Scottish Information Commissioner**

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## **Decision 045/2005 – Mr Geoffrey Jarvis, The Clyde Heritage Trust and Glasgow City Council**

**Request for correspondence between legal adviser and client - Glasgow City Council withheld legal advice from the applicant on the basis of section 36(1) of the Freedom of Information (Scotland) Act 2002 – information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings – decision upheld by Commissioner**

### **Facts**

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Mr Jarvis, Chairman of The Clyde Heritage Trust, submitted an information request to Glasgow City Council (the Council) on 19 January 2005. The request was made in relation to an objection by the Clyde Heritage Trust to a bridge over the River Clyde which had been proposed by the Council to link Tradeston and Broomielaw. Information was provided to Mr Jarvis in response to his request, but a copy of legal advice to the Council from Jonathan Mitchell QC was withheld.

### **Outcome**

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The Commissioner found that the Council had complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding the legal advice from Mr Jarvis. However, the Commissioner also found that the Council had breached Part 1 of FOISA in failing to comply with section 21, in that it did not respond to Mr Jarvis's request for review within 20 working days.

### **Appeal**

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Should either Mr Jarvis 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 of receipt of this notice.



## Background

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1. On 19 January 2005, Mr Jarvis submitted a request for information to the Council. Mr Jarvis asked for three documents:
  - A copy of the Opinion of Jonathan Mitchell QC, Counsel for the Council in respect of devolved powers in relation to the River Clyde (the Opinion)
  - A copy of the original British Waterways Report “River Clyde Waterfront Strategy” which had been modified by the Council and
  - A copy of the latest flooding report based on the LIDAR survey, which shows land on the flood plain and the interim results from the Halcrow et al report due in June 2005.
2. The Council replied to Mr Jarvis on 16 February 2005. The Council provided Mr Jarvis with a copy of the British Waterways Report, but withheld the Opinion on the basis of section 36(1) of FOISA. The Council also withheld the flooding report under regulation 10(4)(d) of the Environmental Information (Scotland) Regulations 2004 (the EIRs).
3. Mr Jarvis was dissatisfied with the response from the Council and, on 8 March 2005, asked the Council to review its original decision.
4. The Council issued its review decision on 14 April 2005. The Council upheld its decision to withhold the Opinion under section 36(1) of FOISA. However, on review, it released the flooding report.
5. On 9 May 2005, I received an application for a decision from Mr Jarvis concerning the Council withholding the Opinion under section 36(1) of FOISA. The case was subsequently allocated to an Investigating Officer within my Office.

## The Investigation

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6. Mr Jarvis’s appeal was validated by establishing that he had made a valid information request to a Scottish public authority (i.e. the Council) under FOISA and had appealed to me only after asking the Council to review the response to his request.



7. A letter was sent by the Investigating Officer to the Council on 11 May 2005, asking for its comments on Mr Jarvis's application in terms of section 49(3)(a) of FOISA. The Council was also asked to provide my Office with a copy of the Opinion, together with any internal correspondence, briefings, memos and minutes relating to the handling of Mr Jarvis's request and the subsequent request for review. The Council was also asked to provide details of the review process carried out and to provide a detailed explanation of the consideration of the public interest as it related to the exemption in section 36(1). The Investigating Officer also asked the Council to provide background on the proposed development of a bridge between Broomielaw and Tradeston, including any studies done to assess the impact on the river and potential for flooding.
8. As the Council did not reply to this letter within the time set down by the letter, I subsequently issued an Information Notice under section 50 of FOISA to the Council on 23 June 2005, requiring it to respond to my letter of 11 May 2005 by 8 July 2005.
9. A full response to this Notice was received from the Council on 6 July 2005.

#### **Submissions from the Council**

10. The submission from the Council stated that the information withheld was considered to be exempt from disclosure under section 36(1) of FOISA as it was covered by legal privilege.
11. The Council cited various court cases to support its argument that the Opinion is covered by the exemption in section 36(1). The Council stated that cases considering the scope of confidentiality of communications all emphasise that particular factors need to be present before the public interest acknowledged to underpin the existence of confidentiality of communications is displaced, i.e. the law agent (here, Counsel) has been party to wrong doing or has made some communication which was in furtherance of wrongdoing; or the actual lawyer/client relationship was the subject of the dispute. The Council stated that none of these factors apply in this case.



12. The Council commented that the balance of the public interest favours withholding the information and that the underlying rationale for confidentiality of communications is that it allows the best legal advice to be obtained on the basis of the fullest information being provided to the law agent. The Council submitted that a good memorial for Counsel's Opinion will identify all the factors, including perceived weaknesses in a party's position, in order to allow Counsel to take these factors into account in providing the Opinion. Likewise, a good Opinion will not simply give bald advice, but will explore possible areas of weakness and avenues where a position could be attacked with some indication of the likelihood of such attacks succeeding and suggestions how to minimise the risks. According to the Council, all of this is done best when it is done against the background that information to and from the law agent will never be released.
13. The Council also commented that if a perception is allowed to develop that communications with legal advisers are likely to be released, then it is quite possible that those seeking legal advice will present only a partial representation of facts as known to them, or, worse still, simply stop seeking legal advice altogether. The Council submitted that it is clearly in the public interest to have public authorities acting on the basis of legal advice and for that legal advice to be based on full disclosure of all relevant facts and circumstances.
14. Section 36(1) is a qualified exemption in that it is subject to the public interest test. The Council stated that there was an absence of any public interest factors sufficient to outweigh the strong public interest in maintaining legal privilege and that the public interest in openness and transparency can be satisfied without the information being released. The Council also stated that the proposals to build the two bridges have been the subject of public consultations. In consequence of this, a large amount of information is already in the public domain. The public interest in openness and transparency is, the Council submitted, already satisfied in relation to these proposals without the Opinion being released.
15. The information that Mr Jarvis has requested is described by the Council as an opinion and not a document of any particular legal standing. As a result, according to the Council, its publication would not definitively answer the question as to whether it is in law the Scottish Ministers or the Secretary of State for Scotland who has power to confirm the bridge orders submitted by the Council.



## Submissions from Mr Jarvis

16. Mr Jarvis submitted that he believes that there is a compelling public interest in understanding which legislation and authority controls development of bridges over the River Clyde, if only to dispel any doubt in this particular case. He also notes that under the Charter to the City granted by King Charles I, the river was developed in the interests of the people of Glasgow and their representatives. He contends that any alteration to the navigation of the river and its potential to flood with possible loss of life and damage is of compelling public interest.

## The Commissioner's Analysis and Findings

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17. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communications can be maintained in legal proceedings.
18. One type of communication covered by this exemption is communications between legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled.

For example:

- The information being withheld must relate to communications with a legal adviser. This clearly includes communications with Counsel.
  - The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of his/her professional relationship with his/her client.
  - The privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy.
  - The privilege does not extend to communications which relate to fraud or the commission of an offence.
19. The information which the Council has withheld from Mr Jarvis is an Opinion from Jonathan Mitchell QC to the Council regarding devolved powers in relation to the River Clyde. This Opinion comprises legal advice from Jonathan Mitchell QC to the Council. I am satisfied that this correspondence comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result the Opinion would be covered by the exemption contained in section 36(1) of FOISA.



20. However, as mentioned above, the exemption in section 36(1) is subject to the public interest test, and I must now go on to consider whether the public interest would be better served by the information being withheld or the information being released.
21. FOISA has brought about many changes to public life in Scotland, not least that for the first time communications between a legal adviser and a public authority client can be made public if it is in the public interest for those communications to be released.
22. The Courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal advisor and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed towards the end of last year in a House of Lords case, *Three Rivers District Council and Others v Governor and Company of the Bank of England* (2004) UKHL 48. Indeed, this is one of the cases which the Council referred me to.
23. There will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, I am likely only to order the release of such communications in highly compelling cases.
24. Having read the background to this case, the information released to Mr Jarvis by the Council as well as the Opinion which has been withheld from him, I am satisfied that there are no compelling reasons in this case for the Opinion to be released to Mr Jarvis.

## Decision

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I find that Glasgow City Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding from Mr Jarvis a copy of the Opinion from Jonathan Mitchell, QC. The exemption in section 36(1) was relied on correctly by the Council and, as a result, section 1(1) was applied correctly.

I find that the Council failed to comply with Part 1 of FOISA in that it did not comply with the timescale laid down in section 21 in respect of carrying out a review of a response to an application. However, I do not require any remedial action to be taken in relation to this breach.

Kevin Dunion  
Scottish Information Commissioner  
03 November 2005