

Decision Notice



Decision 075/2008 Anderson Strathern on behalf of Sir Tom Farmer and City of Edinburgh Council

Sale of land at Lochend Butterfly site

Reference No: 200700981
Decision Date: 9 July 2008

www.itspublicknowledge.info

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Summary

Anderson Strathern, Solicitors, on behalf of their client Sir Tom Farmer, asked the Council to provide information relating to the sale of land at a site in Edinburgh. The Council responded by releasing some of the requested information. However, it advised Anderson Strathern that the remainder of the information was considered to be exempt from disclosure in terms of section 36(1) and (2) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, which confirmed the Council's original decision and in addition applied section 33(1)(b) of FOISA, the applicant remained dissatisfied and applied to the Commissioner for a decision

Following an investigation, the Commissioner found that the Council had partially failed to deal with the applicant's request for information, not accepting the Council's arguments in respect of confidentiality or substantial prejudice to commercial interests. He required the Council to release certain information. The Commissioner accepted, however, that the Council had correctly withheld certain legal advice, and correctly identified certain other information as otherwise accessible to the applicant. He also identified breaches of certain technical provisions of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions); 10(1) (Time for compliance); 16(1) and (2) (Refusal of request); 21(1) and (5) (Review by Scottish public authority); 25(1) (Information otherwise accessible); 33(1)(b) (Commercial interests and the economy); 36(1) and (2) (Confidentiality).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 30 March 2007, Messrs Anderson Strathern, Solicitors, on behalf of Sir Tom Farmer, wrote to the Council requesting the following information in relation to the Lochend Butterfly site in Edinburgh:
 - a) Copies of each of the offers for the above site submitted on or before 16 June 2000;



- b) Copies of documentation relating to advice that the Council received from its legal department or external advisors following the submission of these offers;
 - c) Copies of the qualified acceptance by the successful purchaser and copies of the concluded missives;
 - d) Information and evidence relating to the payment of the purchase price or any part thereof by the successful bidder.
2. On 4 May 2007, the Council wrote to Anderson Strathern in response to their request for information. The Council provided Anderson Strathern with information in response to request d) above. In relation to requests a) to c) above, the Council advised Anderson Strathern that it considered the information to be exempt from disclosure under section 36(1) and (2) of FOISA, on the basis that it was “commercially confidential” information.
 3. On 15 May 2007, Anderson Strathern wrote to the Council requesting a review of its decision. Anderson Strathern’s letter stated that they did not consider that the Council to have provided detailed reasons as to why the section 36 exemptions applied.
 4. On 14 June 2007, the Council wrote to notify Anderson Strathern of the outcome of its review. The Council upheld its original decision that the information was exempt in terms of section 36(1) and (2) of FOISA. In addition, the Council advised Anderson Strathern that it was also relying on the exemption in section 33(1)(b) of FOISA, on the basis that disclosure of certain of the information would be likely to prejudice substantially the commercial interests of the parties involved.
 5. The Council advised Anderson Strathern that it was applying the exemptions to the requests noted at paragraph 1 above as follows:
 - Request a) – sections 36(2) and 33(1)(b)
 - Request b) – section 36(1)
 - Request c) – sections 36(2) and 33(1)(b)
 6. The Council also advised Anderson Strathern in relation to request c) that there was no qualified acceptance by the successful purchaser.
 7. On 9 July 2007, Anderson Strathern wrote to the Commissioner’s Office on behalf of Sir Tom Farmer, stating that their client was dissatisfied with the outcome of the Council’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. They argued that the Council had not satisfactorily explained why it was claiming the exemptions under sections 33(1)(b) and 36(2), or how it had applied the public interest test in relation to the section 36(1) exemption.
 8. The application was validated by establishing that Anderson Strathern had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

9. On 11 July 2007, the Council was notified in writing that an application had been received on behalf of Sir Tom Farmer and asked to provide the Commissioner's Office with copies of the information withheld in this case. The Council responded with the information requested and the case was then allocated to an investigating officer.
10. On 29 August 2007, the investigating officer wrote to the Council inviting it to comment on the application in terms of section 49(3)(a) of FOISA, and in particular to respond to specific questions on its application of the exemptions under sections 33(1)(b) and 36(1) and (2) of FOISA, including (where relevant) its application of the public interest test.
11. The Council responded on 26 September 2007. It provided comments on its application of the exemptions and the public interest test (including details of which of the exemptions it considered applied to each document withheld), along with information on the background to the case.
12. During the course of the investigation, the Council provided further comments on the case and reviewed the exemptions applied to certain of the documents withheld. Specifically, the Council applied the exemption contained in section 25(1) of FOISA (information otherwise accessible) to two of the withheld documents. The Council also submitted that on reflection it did not regard one of the withheld documents as falling within the scope of the request and therefore had come to the view that it should be discounted from consideration as part of the investigation.
13. During the course of the investigation, Anderson Strathern also provided additional submissions in support of their client's application, raising a number of alleged breaches of technical provisions of FOISA in addition to comments on the applicability of the exemptions and the public interest.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented to him by both Anderson Strathern and the Council and is satisfied that no matter of relevance has been overlooked.

Consideration of section 33(1)(b)

15. Section 33(1)(b) of FOISA 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, without prejudice to that generality, a Scottish public authority).



16. In this case, the Council has applied the exemption in section 33(1)(b) to the written offers received for the site (documents 1,2 and 3) and the missives between the Council and the successful purchaser (document 8).
17. There are certain elements to section 33(1)(b) of FOISA which an authority needs to demonstrate when relying on this exemption. In particular, it needs to indicate whose commercial interests might be harmed by disclosure, the nature of those commercial interests and how those interests would, or would be likely to, be prejudiced substantially by disclosure. Where an authority is arguing that the commercial interests of a third party will be harmed, the authority must make this clear and must indicate the nature of those commercial interests and how these interests would, or would be likely to, be substantially prejudiced.
18. Where an authority considers that section 33(1)(b) of FOISA applies to information which is the subject of the request, it must still go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
19. In its submissions to the Commissioner's Office, the Council stated that the parties whose commercial interests would be substantially prejudiced by disclosure in this case were itself and the offerers (including the successful purchaser). It pointed out that all of the offers had been submitted by property developers, and submitted that property development involved substantial risks and rewards and was by its nature highly competitive. A competitive tendering exercise was being undertaken and release of the information could, the Council argued, disclose business practices and information to competitors and seriously damage business confidence.
20. In their submissions to the Commissioner's Office on behalf of the applicant, Anderson Strathern stated that the Council had provided them with no evidence to support its application of this exemption. They considered that the Council had not provided a proper explanation of the substantial prejudice that would result from disclosure of the information covered by their client's requests a) and c), or any relevant arguments in relation to the public interest. They emphasised that the onus lay with the Council to establish that the exemption applied.
21. Anderson Strathern also considered the passage of time to be an important factor in this case and, in particular, that the age of the information should be a relevant consideration when deciding where the public interest lay.
22. There is no definition of substantial prejudice in FOISA, but the Commissioner's view is that in order to claim this exemption the damage caused (or likely to be caused) by disclosing the information must be both real and significant, as opposed to hypothetical or marginal. Damage would also have to occur in the near future, and not at some distant time. The Commissioner therefore takes the view that there must be a significant probability that the required degree of harm would occur in order for the exemption to be appropriately applied. If a public authority is applying this exemption, the Commissioner would expect it to be able to show what kind of harm would result and why this would be the expected outcome if the information in question were released.



23. In this case, the Commissioner is not persuaded by the Council's arguments that disclosure would be likely to have such a detrimental effect both on its own and the offerers' commercial interests that this exemption would be engaged. The Council's arguments concerning the impact of disclosure have been essentially hypothetical in nature and have merely suggested that some sort of effect could flow from disclosure. The Council has essentially submitted no evidence of substance to show how disclosure of the information in this case would have a substantially prejudicial effect on the commercial interests of the parties involved.
24. The Commissioner is also mindful of the effect of the passage of time in assessing whether the release of the information will cause the required degree of harm. As he has stated in his guidance on this exemption which can be viewed here: <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.asp>, the potential that certain information may have to cause harm will frequently diminish over time. The guidance takes the example of information relating to a tendering process, which may well cause harm to the commercial interests of those submitting tenders during or immediately following that process, but where the likelihood of this harm will diminish with the passage of time, as prices, service delivery methods and market conditions change.
25. In this case, the offers for the site in question were submitted in 2000. The missives between the Council and the successful purchaser were concluded in 2004. The Commissioner considers that the commercial sensitivity of the information in question would have significantly diminished in the intervening years. The prices would have been indicative of the local property market as it existed at the time the offers were submitted. Even at that time, the offers would have had nothing of significance to say about the businesses of those submitting, beyond the fact that each of them was prepared to offer a certain sum of money for the land and, in some cases, had certain broad plans for it. Having examined the concluded missives, the Commissioner can identify nothing in addition that would be particularly revealing of the respective commercial positions of either the purchaser or the Council. In addition, the Commissioner notes that where any sale of land is completed, the price paid for that land will be entered in a publicly available register.
26. In all the circumstances, therefore, the Commissioner is satisfied that by the time the Council carried out its review of the applicant's request in June 2007, no substantial prejudice would, or would have been likely to, follow from release of the information in documents 1, 2, 3 or 8. He has therefore concluded that the Council has not demonstrated that it was justified in applying the exemption in section 33(1)(b) of FOISA to this information. As the Commissioner has not accepted that this exemption applies, there is no need for him to go on to consider the public interest test in section 2(1)(b) of FOISA and he would conclude that the Council was not entitled to withhold the information in question under section 33(1)(b) of FOISA.

Consideration of section 36(1)

27. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings.



28. Communications which are subject to legal professional privilege are among those which may be the subject of a claim of confidentiality of communications. Legal professional privilege can itself be split into two categories – legal advice privilege and litigation privilege. It is the first of these categories, legal advice privilege, which has been claimed by the Council in this particular case. This covers communications between lawyers and their clients, where legal advice is sought or given.
29. In its submissions, the Council asserted that document 4 in this case consisted of legal advice from the Council Solicitor to the Director of City Development in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The Council did not consider that the public interest in disclosure was outweighed by that in maintaining the exemption.
30. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. For example, there must be a legal context to the advice given and it must be given by a professional legal adviser acting in that capacity. That may include an in-house legal adviser providing professional advice to another part of the organisation in which he or she is employed.
31. In this case, legal advice has been provided by the Council Solicitor to another officer within the Council. Having considered the information which has been withheld under section 36(1) and the relevant submissions made by the Council, the Commissioner accepts that the document withheld by the Council constitutes legal advice given in circumstances which would attract legal professional privilege. Consequently, the Commissioner is satisfied that the document identified by the Council comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, the Commissioner accepts that this information is exempt in terms of section 36(1) of FOISA.
32. The exemption under section 36(1) is subject to the public interest test contained within section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider the application of the public interest test and in particular whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption.

Public interest test

33. In consideration of the public interest test in respect of this information, the Council referred to previous decisions and specifically *Decision 023/2005 Mr David Emslie and Communities Scotland*. The Council noted this decision had stated that the public interest argument for disclosure of legal advice would only apply in highly compelling cases. The Council did not consider this (i.e. Anderson Strathern's request on behalf of Sir Tom Farmer) to be a highly compelling case. The Council considered that any public interest argument that may favour disclosure was outweighed by the public interest in authorities being able to obtain and consider legal advice in private.



34. As the Commissioner has stated in previous decisions, 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 and there are many judicial comments on the fundamental nature of this confidentiality in our legal system. Many of the arguments in favour of maintaining confidentiality of communications were discussed in *Three Rivers District Council and Others v Governor and Company of the Bank of England [2004] UKHL 48*: <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>.
35. In *Decision 023/2005*, the Commissioner concluded that there would always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client and therefore, while he would consider each case on an individual basis, he was likely to order the release of such communications in highly compelling cases only. The Commissioner has reiterated this in a number of subsequent decisions.
36. In their submissions to the Commissioner's Office, Anderson Strathern argued that the public interest in favour of disclosure (in relation to this and the other exemptions applied by the Council) was particularly strong, given the large amounts of public money involved, issues of best value and the duties of local authorities to act in accordance with the best interests of those whom they represent, and the need for transparency of process in order that local authorities could be properly held to account for their decisions. It pointed to the passage of time in this particular case.
37. The Commissioner acknowledges that the passage of time is important in the consideration of the public interest test and that the age of the information in question is likely to be a relevant consideration in deciding where the public interest lies.
38. The Commissioner accepts that there is a public interest in enhancing scrutiny of the legality of the actions of a public body and, by extension, the effective oversight of expenditure of public funds and obtaining value for money. In this instance there is a potential public interest argument in favour of disclosure based on enhanced scrutiny, in that disclosure of the legal advice in relation to this issue would allow the public to consider the Council's decisions in the light of the legal advice given.
39. However, having considered the competing public interest arguments in relation to the information in document 4, the Commissioner concludes that the public interest in allowing legal advice to be requested, received and evaluated in confidence outweighs that in disclosing the information. While he recognises that there are reasons which might justify disclosing legal advice of this kind in certain circumstances, in this instance he does not consider that the public interest in disclosure is compelling, in the context of the particular advice under consideration, and is outweighed by the strong public interest in the confidentiality of legal communications.
40. On balance, therefore, the Commissioner finds that the Council was correct to maintain the exemption in section 36(1) of FOISA as a basis for withholding the information in document 4.



Consideration of section 36(2)

41. In terms of section 36(2) of FOISA, information is exempt information if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it would constitute a breach of confidence actionable by that person or any other person.
42. In this case, the Council has applied the exemption in section 36(2) to the written offers which the Council received for the site (documents 1,2 and 3) and the missives between the Council and the successful purchaser of the site (document 8).
43. The exemption in section 36(2) is absolute in that it is not subject to the public interest test laid down by section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is justified in the public interest (this is commonly known as "the public interest defence").
44. In order to rely on section 36(2), an authority needs to demonstrate that certain elements apply. Firstly, the information must have been obtained by the Council from another person.
45. In this case, the Council contended that the information in documents 1, 2, 3 and 8 was obtained from the parties who made offers to purchase the site and, in relation to the missives, from the successful purchaser.
46. In relation to the offers the Council received for the site, the Commissioner is satisfied that these constitute information provided to the Council by third parties.
47. In considering whether the information contained in the missives was supplied by a third party to the Council, the Commissioner has taken into account his *Decision 088/2007 Mr Alan Keith and VisitScotland*, which considered a request for full details of certain contracts. In that decision, he concluded (in line with a decision of the Information Tribunal in a similar case, reference EA/2006/0014, involving Derry City Council and the Information Commissioner) that because these contracts were the product of a process of negotiation between two parties, their contents could not have been provided by a third party for the purposes of section 36(2) of FOISA. Consequently, the first test for the application of the exemption had not been met. Therefore, there was no requirement for the Commissioner to consider whether disclosure would constitute a breach of confidence actionable by a third party.
48. The implications of decision 088/2007 are wide reaching. Where information that has been requested is a product of negotiation, and a public authority cannot demonstrate that it has been provided by a third party, the exemption in section 36(2) cannot apply, even where a clear obligation of confidentiality can be shown to relate to it.



49. The missives take the form of an exchange of letters with various attachments. Having considered this information, the Commissioner has reached the conclusion in this particular case that only those letters originating from the purchaser's solicitor (letters of 17 March 2003, 30 May 2003, 15 October 2003, 31 December 2003, 1 December 2004 and 10 December 2004 (2 letters and state for settlement)) can reasonably be regarded as having been obtained from another person, the remainder either having been created within the Council or being the product of negotiation between it and the successful purchaser. He is therefore not required to go on to consider whether disclosure of the remaining parts of the missives would constitute a breach of confidence actionable by a third party.
50. The second test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person or persons from whom the authority obtained the information or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled. The Commissioner is required to consider the application of this second test in relation to the offers received for the site and those letters listed in paragraph 49 above.
51. There are three main requirements, all of which must be met before a claim for breach of confidence can be established. These are:
- i. the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already.
 - ii. the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties; and
 - iii. there must have been unauthorised use or disclosure of the information to the detriment of the party communicating it. Detriment may be potential rather than actual and need not be financial.

Necessary quality of confidence

52. To have the necessary quality of confidence, the information should not be generally accessible. That is clearly the case here. The information will only have been viewed by a limited number of individuals. It was clearly received under circumstances from it should reasonably have been inferred that it was confidential (see below). The Commissioner is not satisfied, however, that the information would have retained the necessary quality of confidence by the time the Council dealt with the applicant's request. As indicated above, a considerable period had passed by then from the submission of the offers, and indeed the conclusion of the missives. In the Commissioner's view, while the information may have been properly regarded as confidential when received by the Council, it could not have been so regarded by the time the Council dealt with the applicant's request for review (or for that matter his request for information).



53. By 2007, the transaction had been completed for some time. As the Commissioner understands, the primary reason for confidentiality in the process of submitting offers for property is to ensure that bidders are not aware of the prices and other conditions in competing offers, thus ensuring fair competition. While there may also be sound reasons for confidentiality in the process of negotiation between the successful offerer and the seller leading to concluded missives and ultimately a sale, the Commissioner can identify no reason for confidentiality remaining in any of the information under consideration at so considerable a remove from the time at which it was immediately relevant. In reaching this conclusion, he has considered the content of the information and taken into account his consideration of its commercial sensitivity, set out more fully above in relation to section 33(1)(b).

Obligation to maintain confidentiality

54. The Council must also have received the information in circumstances which imposed an obligation on it to maintain confidentiality. The Council submitted that offers received for property (and missives following on from them) should be treated as confidential between the seller and the offerer. The Council referred to John Halliday's "Conveyancing Law and Practice" which states (at section 30-13): "Any offer received should be treated as confidential between the seller and offerer. It should not be disclosed, nor should indications of price level based upon it be given to other offerers". This being well recognised legal practice, the Council argued that an obligation of confidentiality could be inferred in the circumstances.
55. The Commissioner accepts in all the circumstances that the information in question would have been received under an implicit obligation to maintain confidentiality. Such an expectation would indeed have been normal legal practice in a transaction of this kind. As indicated above, however, the Commissioner does not agree that the obligation would have remained in effect at the time the Council dealt with the applicant's request or his request for review.

Unauthorised disclosure which would cause detriment

56. The third requirement is that that disclosure of the information must be unauthorised by, and cause detriment to, the person who communicated it.
57. The Commissioner is satisfied that when the offerers in this case submitted their offers (and in the case of the successful purchaser, subsequent correspondence making up the missives) to the Council, they did so in the expectation that the information in them would not be disclosed into the public domain, at least not at that time. During the investigation, the Council consulted with the offerers to ascertain their views on disclosure. Of these, two stated that they did not wish the information to be disclosed, while the other did not object. In relation to information emanating from two parties at least, therefore, disclosure would be unauthorised.
58. However, in its submissions to the Commissioner the Council completely failed to address the issue of whether and what detriment would be caused to the parties who had communicated the information. The Council has provided no arguments or evidence to show that any detriment would occur.



59. In all the circumstances, and in the absence of any arguments from the Council on this matter, the Commissioner is unable to conclude that disclosure in this instance would cause detriment to the parties concerned. While the threshold of detriment is not particularly high for this purpose, the Commissioner can identify nothing in the information which would, at the time the Council dealt with the applicant's request, have been capable of causing any identifiable harm to the business or other interests of those who submitted offers for the property.

Conclusion on section 36(2)

60. For the reasons set out above, the Commissioner finds that the information in documents 1, 2, 3 and 8 were not properly withheld by the Council under section 36(2) of FOISA.

Consideration of section 25(1)

61. Section 25(1) of FOISA provides that information which the applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information.
62. During the course of the investigation, the Council applied the exemption in section 25(1) to documents 5 and 6. These comprise extracts from minutes of the Executive of the Council dated 15 August 2000 and the Resource Management and Audit Scrutiny Panel dated 14 September 2000 respectively.
63. The Commissioner accepts that these documents fall within the scope of the applicant's request b), in that they relate to legal advice obtained by the Council, although they do not contain or summarise that advice.
64. The Council provided links to its website to facilitate accessing this information. These links are:
http://www.edinburgh.gov.uk/internet/Council/Council_Business/Decision_making/Archive/Committee_Minutes/Executive_15_08_2000/Ex991508_doc.html (document 5) and
http://www.edinburgh.gov.uk/internet/Council/Council_Business/Decision_making/Archive/Committee_Minutes/Scrutiny_Panel/Resource_Management_and_Audit_14_09_2000/RMA1409_0_doc.html (document 6).
65. Having tested these links and examined the information to be found there, the Commissioner is satisfied that the Council has correctly applied the exemption in section 25(1) to the information contained in these minutes.

Documents outwith the scope of the investigation

66. During the course of the investigation, the Council, which had initially considered that a report to the Executive of the Council (document 7) contained legal advice and so came within the scope of the request (and was exempt from disclosure in terms of section 36(1)), came to the view that the report did not in fact contain any reference to legal advice or advice from external advisers. In consequence, the Council submitted that the report should be excluded from consideration as part of this investigation.



67. Having reviewed this document, the Commissioner is satisfied that there is indeed no reference to legal advice or advice from external advisers contained therein, and therefore does not fall within the scope of the applicant's request b). He is also satisfied that it does not fall within the scope of the applicant's requests, a), c) or d). As the Commissioner considers document 7 to fall outwith the scope of the applicant's requests, he shall not consider it further in this decision.

Technical provisions of FOISA

Timescales

68. In their submissions to the Commissioner's Office on behalf of the applicant, Anderson Strathern expressed concern that the Council appeared to have breached the timescales laid down in FOISA in responding to both their client's initial request and his request for review.
69. The applicant's initial request was made by way of a letter dated 30 March 2007. The Council's response was issued on 4 May 2007.
70. Section 10(1) of FOISA gives a Scottish public authority a maximum of 20 working days following receipt of an information request to respond to that request, subject to exceptions which do not apply here. In this case, the Council failed to respond to the request within that period and consequently breached the requirements of section 10(1) of FOISA.
71. Anderson Strathern's requirement for a review of the initial decision was sent by letter on 15 May 2007. The response was issued by the Council on 14 June.
72. Section 21(1) of FOISA gives a Scottish public authority a maximum of 20 working days following receipt of the requirement to comply with a requirement for review, again subject to exceptions which are not relevant here. In this case, taking due account of the provisions of FOISA relating to the giving of notice and the fact that there was a bank holiday on 28 May 2007, the Commissioner is of the view that the Council responded to the requirement for review timeously and did not breach the requirements of section 21(1) of FOISA.

Content of notices

73. In their submissions on behalf of their client, Anderson Strathern also provided comments on the content of the Council's responses to the request for information and request for review. They argued that the initial response failed to provide any proper explanation as to why the relevant exemptions were considered to apply, making no mention of the public interest test in relation to any of them. They also claimed that there was inadequate analysis of the public interest in the response to the request for review



74. The Commissioner accepts the applicant's criticisms in relation to the Council's response to the information request. Section 16(1) of FOISA requires an authority, when refusing a request for information on the basis that the information is exempt, to specify the exemption(s) claimed (section 16(1)(c)) and state (if not otherwise apparent) why each exemption applies (section 16(1)(d)). In this case, the Council quoted certain exemptions in Part 2 of FOISA (in a somewhat confused manner), providing no reasons why it considered these exemptions to apply.
75. Section 16(2) of FOISA provides that where an authority is applying a non-absolute exemption, it must state its reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information. The Commissioner agrees that the Council failed to make any mention of the public interest test in its initial response to the request, either directly or indirectly, and consequently could not be said to have provided reasons as required by section 16(2).
76. Section 21(5) of FOISA requires an authority to provide a statement of its reasons for any decision it reaches on review. The Council's response to the applicant's request for review states that the public interest test has been applied, where relevant, but provides no indication of the reasons why it arrived at the conclusions it did in respect of the public interest. In this respect, the Commissioner considers the Council to have failed to comply with section 21(5).
77. By failing to provide adequate reasons for its decision and by failing to provide reasons for its application of the public interest test, the Commissioner finds that the Council has failed to comply with the requirements of section 16(1) and (2) of FOISA. The Commissioner does not require the Council to take any action on this occasion but would again urge the Council to ensure that future requests under FOISA are responded to appropriately.
78. Although the Commissioner has identified certain breaches of technical provisions of FOISA in the Council's handling of the applicant's request, he does not consider it appropriate in the circumstances to require any action on these matters at this stage. He would, however, urge the Council to note the breaches and consider what steps it can take to ensure more timely responses and more informative notices. The breaches will be noted and may be taken into account in determining whether any future action should be taken in respect of the Council under the Commissioner's Enforcement Strategy.

DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Anderson Strathern on behalf of Sir Tom Farmer.



The Commissioner finds that the Council acted in accordance with Part 1 of FOISA in withholding the legal advice provided by the Council Solicitor (document 4) in terms of section 36(1) of FOISA. He also finds that the Council acted in accordance with Part 1 by withholding documents 5 and 6 under section 25(1) of FOISA, and in responding to the applicant's request for review within the 20 working days allowed by section 21(1) of FOISA.

However, the Commissioner finds that the Council incorrectly applied the exemptions in sections 33(1)(b) and 36(2) of FOISA to documents 1, 2, 3 and 8, and consequently failed to comply with Part 1, and in particular section 1(1), of FOISA.

The Commissioner also finds that the Council failed to comply with Part 1 by not responding to the applicant's request for information within the 20 working days allowed by section 10(1) of FOISA, by failing to state why it considered specific exemptions to apply and why the public interest favoured the maintenance of these exemptions (and thus not complying with sections 16(1) and (2) of FOISA), and by failing to provide full reasons for its decisions on review as required by section 21(5) of FOISA. The Commissioner does not require the Council to take any action in respect of these breaches in response to this particular application

The Commissioner therefore requires the Council to provide the applicant with copies of documents 1, 2, 3 and 8 within 45 days after the date of intimation of this decision notice, that is by 23 August 2008.

Appeal

Should either Anderson Strathern 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 after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
9 July 2008



Appendix

Relevant statutory provisions

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.

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 –
- (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
- ...
- (c) section 36(2);
- ...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- ...



16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

...

- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.
- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

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.
- (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.