

**Decision 033/2006 Mrs Eileen O'Donnell & East Dunbartonshire Council**

*Request for copy of senior counsel's opinion on proposed sale of land*

**Applicant: Mrs Eileen O'Donnell, on behalf of the  
Bearsden Action Group  
Authority: East Dunbartonshire Council  
Case No: 200502298  
Decision Date: 27 February 2006**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
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**Decision 033/2006 – Mrs Eileen O’Donnell, on behalf of the Bearsden Action Group and East Dunbartonshire Council**

***Request for counsel’s opinion on legality of proposed sale of site – information withheld under section 36(1) (Claim to confidentiality of communications could be maintained in legal proceedings)***

**Facts**

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Mrs O’Donnell requested a copy of senior counsel’s opinion on the applicability of the Crichton Down Rules in the proposed sale of a school site. East Dunbartonshire Council refused this request, citing section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), and upheld this refusal on review.

**Outcome**

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The Commissioner found that East Dunbartonshire Council had justified the withholding of the requested information under section 36(1) of the Freedom of Information (Scotland) Act 2002.

**Appeal**

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Should either East Dunbartonshire Council or Mrs O’Donnell 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 2 June 2005 Mrs O'Donnell made a request (on behalf of the Bearsden Action Group, of which she was a member) by e-mail to a councillor of East Dunbartonshire Council for a copy of legal advice (senior counsel's opinion) received by the authority on the applicability of the Crichel Down Rules (a non-statutory administrative policy for the disposal of land by a public authority where the land was originally acquired by compulsory purchase) to the Bearsden Academy site.
2. This request was dealt with by East Dunbartonshire Council and it replied on 16 June 2005, refusing to disclose senior counsel's opinion on the grounds that it constituted exempt information in terms of section 36(2) of FOISA.
3. On 19 June 2005, Mrs O'Donnell requested by e-mail of the authority that it review its withholding of this information.
4. The Council wrote to the applicant on 30 June 2005 upholding its decision not to provide Mrs O'Donnell with a copy of senior counsel's opinion. It said that this opinion was exempt information in terms of section 36(1) of FOISA (information in respect of which a claim of confidentiality could be maintained in legal proceedings) and that its initial refusal of 16 June 2005 should have specified 36(1) rather than 36(2) of the Act. It argued that disclosure of the information would not be in the public interest.
5. On 21 July 2005 Mrs O'Donnell applied to me for a decision as to whether the Council had dealt with her information request in accordance with Part 1 of FOISA.
6. The case was allocated to an investigating officer.

## The Investigation

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7. Mrs O'Donnell made her initial request by e-mail to a councillor of East Dunbartonshire Council and to an officer of the Council. The e-mail was passed to the Head of Legal Services of the Council since the request concerned a legal matter. The Council stated to my Office that members and staff had been issued with guidance requiring that information requests received by them should be passed to the Council's freedom of information officer. In this instance, on being passed to the Head of Legal Services the request was then dealt with in accordance with the Council's freedom of information procedures. Individual elected members of local authorities are not Scottish public authorities for the purposes of FOISA. In this case, the request had been addressed to the councillor as a senior member and representative of the council following a meeting (which also included a Council employee) between the applicant and the councillor on the subject of the Bearsden Academy site. At the meeting, the opinion of counsel had been discussed and the Council's position that it would not disclose the opinion was communicated. The request for information was addressed in addition to an officer of the Council. In general, a section 1 request to a councillor is not a request to a Scottish public authority since the council is a legal entity distinct from its members. However, in this case the request was also received within the Council and was forwarded to the appropriate Council department, which treated the email as a request to the Council for information it held. In the circumstances, I accept that there was a valid information request, in that the applicant had made a valid information request to a Scottish public authority and had appealed to me only after asking the public authority to review its response to her request.
8. A letter was sent by the investigating officer to the Council on 26 July 2005, asking for its comments on this application in terms of section 49(3)(a) of FOISA, including a detailed explanation of its consideration of the public interest test. The Council responded on 4 August 2005, providing a copy of senior counsel's opinion and its comments on the use of section 36(1) of the Act.

9. During the investigation, as a possible settlement, the Council offered to provide a synopsis of counsel's opinion (but not the opinion itself) which would include counsel's conclusion on the legality of the proposed sale, if the Bearsden Action Group would agree to provide any corresponding advice it had received, particularly if it conflicted with the Council's advice. In response to this offer, the Bearsden Action Group stipulated that it should have the opportunity to decide whether the synopsis was sufficient for its purposes before it would disclose if it had received legal advice (and the content of any advice) and consider withdrawing its application. After further discussion it was agreed that the Council would provide an unqualified synopsis of senior counsel's opinion to the applicant, and that the applicant would not have to provide any legal advice which the Bearsden Action Group had received (and, having considered the synopsis, could proceed with the application to me if it so wished). A synopsis was communicated to Mrs O'Donnell (9 January 2006). Having received the synopsis, Mrs O'Donnell asked that I give a decision on whether section 36(1) of the Act had been correctly applied.

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

10. The Council stated that the opinion was obtained from senior counsel in connection with possible legal proceedings relating to the Council's proposed disposal of the grounds of Bearsden Academy and its ongoing Public-Private Partnership (PPP) project for the construction and development of schools. The Council had been advised by the Bearsden Action Group that it was considering a legal challenge of the proposed sale on the grounds of the land being 'common good land' and the sale being in contravention of the Crichton Down Rules. Legal opinion therefore was sought by the Council on whether a petition for judicial review in the Court of Session would be successful. The opinion was obtained in contemplation of legal proceedings and as such was one on which a claim of confidentiality could be maintained in legal proceedings and therefore exempt information under section 36(1) of the Act.

11. The Council referred to my briefing ('The Public Interest Test') in justification of this interpretation and in its correspondence with my office stated that it did not maintain that the public interest must involve a national issue, as opposed to a local one, but argued that the public interest test should not be used to justify the position of a sectional interest group. In applying the public interest test, the authority claimed, a distinction should be made between matters which are in the interests of the public generally and matters which are in the interests only of particular sectional groups. In this case, it argued, the request was for information the release of which would serve the interests of a sectional group rather than those of the public generally and therefore did not meet the public interest test. It also stated that the applicant had given no arguments in favour of the public interest. On the public interest test, the authority said that disclosure would not enhance scrutiny of the Council's decision making processes, or accountability or participation, since the majority of the reports had been considered within the agenda of Council meetings and there already had been an extensive public consultation. The Council stated that there was a considerable public interest in the schools modernisation project progressing. A legal challenge to the proposed sale would delay the project and increase public expenditure, rather than contributing to the effective oversight of public expenditure and obtaining value for money. The Council stated that it was satisfied that its proposed sale was in accordance with the law and that any action would be successfully defended. To disclose legal advice to the Bearsden Action Group would give the Group an unfair advantage in any subsequent legal proceedings, however, and this was not in the public interest.

### **Submissions for the Applicant**

12. The applicant was part of a group (the Bearsden Action Group) that questioned the lawfulness of the proposed sale of the site of Bearsden Academy. The group had raised its concerns with the Council that the land, acquired under compulsory purchase, should be offered back to its original owner (under the Crichton Down Rules), and also that it was believed to be part of the common good belonging to the whole community. To address its concerns, the group wanted access to the opinion of counsel which gave a legal view on that issue. The applicant also stated that the description of the general applicability of the Crichton Down Rules on the Scottish Executive website seemed, in her opinion, to contradict the Council's opinion. The applicant accepted that the opinion from counsel would be covered by section 36(1), but argued that the authority's analysis of public interest was inadequate. In particular, she questioned the authority's argument that confidentiality was required to safeguard public monies involved and to allow the project to proceed. The group considered that this argument implied that the opinion of counsel cast doubt on the legality of the proposed sale.

13. Mrs O'Donnell argued that it was in the public interest for it to be known whether the proposed sale was legally justified. She stated that it was wrong for the Council to expand the public interest test to require a criterion of national significance since the test would never be met. In challenging the Council's position, she argued that disclosure was in the interests of the whole community affected by the proposed sale and not simply those of a sectional interest group.
14. Having seen the summary opinion, Mrs O'Donnell stated that the opinion was paid for with public funds and as such members of the public should be allowed to view it. She also said that the summary provided to her had raised further questions which would only fully be answered by sight of the opinion.

### **The Commissioner's Analysis and Findings**

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15. Section 36(1) provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is communications between a legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. Firstly, the information being withheld must relate to communications with a legal adviser. In this case the information withheld is the communicated legal advice to the Council (as client). 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. In this case the legal adviser is senior counsel giving legal advice on the applicability of the Cichel Down Rules to the Bearsden Academy site and whether the Council's proposed sale was unlawful or legally challengeable. This Opinion comprises professional legal advice within a relationship where the legal adviser has been asked to provide an opinion in his professional capacity to a client (the Council). I am satisfied that it is 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, and I understand that the applicant accepts that to be the case.
16. Section 36(1) is a qualified exemption and is subject to the public interest test. Therefore, even where an authority considers the information to be exempt it must still go on to consider whether the public interest in disclosing the information is outweighed by the public interest in withholding it.

17. In Decision 023/2005 - Mr David Emslie and Communities Scotland - I concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, while I will consider each case on an individual basis, I am likely only to order the release of such communications in highly compelling cases. The public interest issues in favour of releasing the information might include enhancing scrutiny of the legality of the actions of a public body and, by extension, effective oversight of expenditure of public funds and obtaining value for money. In this instance, disclosure of the opinion would make public a legal opinion on the likelihood of the Council being able successfully to defend a legal challenge to its proposed sale. In this way it would enhance scrutiny of the legality of the action of a public body. It might also be in the public interest to order disclosure where it would make a significant contribution to debate on a matter of public interest. Against any public interest arguments for disclosure, however, must be weighed any consequent harm to the public interest. It is in the public interest that an authority can communicate its position to its advisers fully and frankly in confidence, in order to obtain the most comprehensive legal advice in relation to its projects and defend its position adequately should that become necessary. It is also in the public interest that a public authority can receive the most comprehensive legal advice about its proposed actions. There is an established means of scrutinising the legality of the decisions of public bodies, through judicial review in the courts. 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.
18. I have considered the submissions made by each of the parties. I take the view that for the disclosure of information to be in the public interest that it needs to be in the interest of the public for it to be released. This does not mean that there needs to be national interest in the matter. Rather it could be in the interest of the public to establish whether certain standards are being upheld or maintained by an authority, even though the circumstances of a particular case are exercising the concern of only a sectional part of the population. In this case I recognise that there are reasons which might justify disclosing the opinion to the applicant, but in this case do not feel that they so highly compelling as to outweigh the public interest in the confidentiality of legal communications. In particular, I am not persuaded that sufficient arguments have been advanced as to why the interests of the affected community demand disclosure. Therefore, I am satisfied that on this occasion the Council correctly applied the public interest test in withholding senior counsel's opinion and that this information is exempt by virtue of section 36(1) of FOISA.



## **Decision**

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I find that East Dunbartonshire Council has dealt with Mrs O'Donnell's request for information in accordance with section 1(1) of the Freedom of Information (Scotland) Act 2002 (FOISA).

I find that East Dunbartonshire Council correctly applied the public interest test in withholding senior counsel's opinion and that this information is exempt by virtue of section 36(1) of FOISA.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**27 February 2006**