



Scottish Information
Commissioner

**Decision 048/2007 Mrs Stella Stephen and
Aberdeenshire Council**

Price offered for the proposed purchase of land

**Applicant: Mrs Stella Stephen
Authority: Aberdeenshire Council
Case No: 200600652
Decision Date: 12 March 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 048/2007 Mrs Stella Stephen and Aberdeenshire Council

Price offered for the proposed sale of land – information withheld - Commissioner found that the Council had correctly withheld information, which was exempt under section 36(2) – Commissioner found that the Council had acted in accordance with Part 1 of FOISA in withholding the information

Relevant Statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 33(1)(b) (Commercial interests and the economy) and 36(2) (Confidentiality)

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

Facts

Mrs Stephen asked Aberdeenshire Council (the Council) to inform her of the cost price of land understood to have been sold to Aldi. Following a review, the Council refused to supply the information requested. The Council failed to specify which exemption(s) it considered to apply to the information.

Mrs Stephen then made an application for a decision by the Commissioner on this matter. In the course of the investigation, the Council confirmed that it considered the information to be exempt under sections 33(1)(b) and section 36(2) of FOISA.

The Commissioner found that (at the time of the request's receipt and consideration by the Council) the information requested was exempt from disclosure under the terms of section 36(2) of FOISA. Therefore, he accepted that the Council had acted in accordance with Part 1 of FOISA by withholding this information.

However, he did not accept the Council's reliance on section 33(1)(b) of FOISA.



Background

1. Mrs Stephen wrote to the Council on 6 January 2006 asking to be informed of the sale price of land adjacent to Fraserburgh Cemetery agreed (subject to planning consent) with the company Aldi. Her letter made clear that this request was made under the terms of FOISA.
2. Following a review requested by Mrs Stephen, the Council gave her notice of its decision on review. This notice confirmed that the requested information would not be provided as the bargain [for the proposed sale of the land] had not been concluded and the matter was still one of commercial sensitivity. The notice stated that to disclose such information would be unfair to the offerer and might provide their competitors with an unfair advantage.
3. The Council's review notice did not explicitly specify any exemption which it had judged to apply to the information requested by Mrs Stephen. It also contained no explanation of why (if relevant) it had judged that the public interest in maintaining an exemption outweighed the public interest in the disclosure of the information.
4. Mrs Stephen wrote to my Office to apply for a decision by me on this matter on 22 March 2006. Her letter noted the contents of the Council's review notice but stated that she did not accept "commercial sensitivity" as a valid reason for withholding the information.
5. Mrs Stephen's application was received by my office on 27 March 2006. It was allocated to an investigating officer and then validated by establishing that Mrs Stephen had made a valid information request to a Scottish public authority under FOISA and had appealed to me only after asking the Council to review its response to her request.

Investigation

6. The investigating officer wrote to the Council on 6 April 2006, informing it that Mrs Stephen's application had been received and an investigation into the matters raised had begun. The Council was invited to comment on the case in terms of section 49(3)(a) of FOISA.



7. The Council was also asked to provide a range of background information to inform my investigation, including the sale price for the land agreed with Aldi. The Council was also asked to confirm which, if any, exemptions contained within Part 2 of FOISA had been judged to apply to the this information when reaching the decision to withhold this.
8. The Council's response to this request was received on 9 May 2006. Copies of the missives exchanged between the Council and Aldi (the documents forming the sale contract) were provided. These confirmed the price offered by Aldi for the relevant land, and the conditions attached to the offer. The Council explained that the proposed sale was conditional on the granting of planning permission for the site.
9. The Council's submissions to my Office confirmed that the information requested by Mrs Stephen had been judged to be exempt under sections section 33(1)(b), which applies where disclosure would, or would be likely to, prejudice the commercial interests of any person, and section 36(2), which applies where information has been obtained from a third party and its disclosure would constitute a breach of confidence actionable by any person. I will consider the Council's submissions on each of these exemptions in my analysis and findings below.
10. At the time of Mrs Stephen's request, a planning application for the site had been refused by the Council and was the subject of an ongoing planning inquiry. During my investigation into this matter, this planning inquiry concluded and confirmed that planning permission was refused. Following this outcome, I understand that it is now unlikely (although still possible) that the proposed purchase of the land will go ahead. The Council has confirmed that the outcome of the planning inquiry does not affect its views on Mrs Stephen's information request.
11. Mrs Stephen has also provided comments on this case. She submitted to me that the Council should not have made any agreements concerning the confidentiality of information provided to it, as this would have prejudiced both competitors and the ability to achieve the best price for public land. She also suggested that disclosure could not prejudice Aldi's commercial interests as there were no other competitors seeking to purchase the same land. Mrs Stephen also expressed concerns about the potential sale of the land to Aldi.
12. I have taken all submissions made in the course of my investigation into consideration when reaching my decision in this case.



The Commissioner's analysis and findings

13. The main question to be addressed in this case is whether or not the Council acted in accordance with Part 1 of FOISA when withholding the information requested by Mrs Stephen. Although it did not state which exemptions it considered to apply when responding to Mrs Stephen, the Council has since confirmed in the course of my investigation that it believes the information to be exempt under the terms of section 33(1)(b) and 36(2) of FOISA. I will consider each of these exemptions in turn below.

Section 33(1)(b) – commercial interests

14. Section 33(1)(b) provides that information is exempt information where its disclosure would prejudice substantially the commercial interests of any person. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
15. In this case, the Council has submitted that this exemption applies on the grounds that disclosure would be likely to prejudice substantially the commercial interests of Aldi. It stated that disclosure of the price agreed would be unfair to the company and might provide its competitors with a commercial advantage. The Council suggested that should this type of information be disclosed before missives were concluded, competitors might be able to use FOISA to find out what bids have been submitted and increase or decrease their offers. It went on to state that such uncertainty and potential unfairness was not in the interests of the public.

Conclusion on section 33(1)(b)

16. In considering this exemption, I must ask whether the disclosure of the specific information under consideration would be likely to prejudice substantially Aldi's commercial interests.
17. The Council has not made explicit precisely how it believes disclosure would be likely to prejudice that company's interests. Certainly disclosure would confirm the price offered (although never actually paid) by a commercial organisation for a specific piece of land. However, I note that where any sale of land is completed, the value of that land becomes available in publicly-available registers. Therefore, Aldi would have made its bid for the land knowing that the price it proposed to pay would ultimately be available to its competitors and the general public, should the sale be finalised.



18. Therefore, I must ask whether disclosure at the point where a price had been agreed but the missives not yet concluded (as was the case when the Council received Mrs Stephen's request) would be likely to have a substantially prejudicial effect on Aldi's commercial interests.
19. The Council has suggested that disclosure of this type of information before missives were concluded could lead to a competitor increasing (or, less plausibly decreasing) a bid in relation to a sale of land.
20. While I accept that such steps by a competitor could (hypothetically) have led to the possibility of Aldi failing to secure the purchase, the Council has not submitted any evidence (for example, showing that multiple organisations were keen to purchase the relevant land) to suggest that this would be likely in this case. I also have no reason to believe that a modified bid of the kind suggested by the Council would have been accepted: I do not understand it to be normal (or for that matter good) practice for the seller to do so in such circumstances. Furthermore, even if this outcome was likely, the Council has submitted no evidence to suggest how such a turn of events would have had a substantially prejudicial effect on Aldi's commercial interests.
21. In the circumstances, I have therefore concluded that the Council has not demonstrated that the exemption in section 33(1)(b) applies.
22. As I do not accept that this exemption applies, there is no need for me to consider the public interest test in section 2(1)(b) of FOISA in relation to the information requested by Mrs Stephen.

Section 36(2) – actionable breach of confidence

23. The Council has also relied upon the exemption in section 36(2) of FOISA when withholding the information requested by Mrs Stephen. This exemption applies where information has been supplied to a public authority by a third party, and disclosure of that information would constitute a breach of confidence actionable by that third party or any other person.
24. In order to rely on section 36(2), an authority needs to demonstrate certain elements. Firstly, the information must have been supplied by another person. I am satisfied that the price agreed between the Council and Aldi for the proposed sale of land was initially supplied to the Council by Aldi.
25. The second test is that the disclosure of the information by the public authority would constitute a breach of confidence actionable either by the person from whom the authority obtained the information or by any other person. I take view that actionable means that the basic requirements for a successful action must appear to be fulfilled. There are three main requirements, all of 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 about it. It must not be generally accessible to the public already.
 - b) The information must have been received by the public authority in circumstances from which an obligation on the authority to maintain confidentiality could be inferred. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the agreement between the parties.
 - c) There must be a disclosure or use of the information which is not authorised by the person who communicated the information but which would cause detriment to that person.
26. In my published briefing on Section 36 I indicated that the type of information which can be protected by the law of confidence is very wide and can range from highly personal information to information about trade and business and historical information about government. In order for information to have the necessary quality of confidence, it must not, in general, be common knowledge and a member of the public would have to apply skill and labour to produce the information him or herself.
27. The Council has noted that there is no explicit statement of confidentiality within the missives exchanged between the Council and Aldi. However, it has noted that the terms of these, and the price payable, would not normally be disclosed before the terms of the missives were concluded.
28. I am satisfied that in the context of the type of commercial sale of land proposed between Aldi and the Council, there would be a general expectation between the parties that the terms of missives would remain confidential until they were finalised. At the point where Mrs Stephen's request for information was received by the Council (and when the Council carried out its review), I am therefore satisfied that the agreed sale price held the necessary quality of confidence, and that it had been supplied in a context which imposed a duty of confidentiality, at least until the missives were concluded.
29. I am also satisfied that disclosure of the information requested by Mrs Stephen, at the point at which her request was considered by the Council, would also have had a detrimental impact on Aldi, by allowing competitors to know the price agreed in an incomplete sale process.



30. The exemption under section 36(2) is an absolute exemption and is not subject to the public interest test under section 2 of FOISA. However, public interest considerations must also be taken into account when applying this exemption. Although the law of confidence recognises that there is a strong public interest in ensuring that people respect confidences, and the burden of showing that a failure to maintain confidentiality would be in the public interest is therefore a heavy one, in certain circumstances the public interest in maintaining confidences may be outweighed by the public interest in disclosure of information. The courts have considered that there may be a public interest defence to actions of breach of confidentiality where to enforce an obligation of confidence would cover up wrongdoing, allow the public to be misled or unjustifiably inhibit public scrutiny of matters of genuine public concern.
31. However, in the circumstances of this particular case (and having considered Mrs Stephen's comments on the case), I cannot see a reasonable basis to conclude that the Council would have a defence to an action of breach of confidence on public interest grounds in the event that it disclosed the information.
32. Therefore, I am satisfied that at the time of Mrs Stephen making her request, disclosure of the sale price of the land agreed between Aldi and the Council would have constituted a breach of confidence actionable by Aldi. I have concluded that the information requested by Mrs Stephen was exempt from disclosure at the time of the request under the terms of section 36(2) of FOISA. Therefore, I conclude that the Council acted in accordance with Part 1 of FOISA by withholding this information from Mrs Stephen.

Decision

I find that Aberdeenshire Council (the Council) acted in accordance with the requirements of Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by withholding the price agreed between Aldi and the Council for the proposed sale of land in Fraserburgh.

I have concluded that, at the point where the Council considered the request for information, disclosure of this information would have constituted a breach of confidence actionable by Aldi. As a result, this information was exempt from disclosure under the terms of section 36(2) of FOISA. However, I do not find that the exemption in section 33(1)(b) of FOISA applies to this information.



I do not require any action to be taken in response to this decision.

Kevin Dunion
Scottish Information Commissioner
12 March 2007

Appeal

Should either Mrs Stephen or Aberdeenshire 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.



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

33 Commercial interests and the economy

(1) Information is exempt information if-

- (a) it constitutes a trade secret; or
- (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) [...]

(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.