



Scottish Information
Commissioner

**Decision 060/2006 Mr James Gilchrist and East Ayrshire
Council**

Papers relating to a land dispute

**Applicant: Mr James Gilchrist
Authority: East Ayrshire Council
Case No: 200501780
Decision Date: 11 April 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 060/2006 - Mr James Gilchrist and East Ayrshire Council

Request for information relating to a land dispute – whether the information is exempt under 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

Facts

Mr Gilchrist contacted East Ayrshire Council (the Council) on 18 February 2005, requesting information relating to a land dispute. The Council informed Mr Gilchrist that the information requested comprised confidential legal information relating to a court action raised in connection with the land dispute. The Council stated that the information requested related to confidential correspondence between the Council's legal and housing departments and was therefore exempt from release under section 36(1) of the Freedom of Information (Scotland) Act 2002, which relates to confidential communications in connection with legal proceedings. The Council also stated that public interest issues of client confidentiality in relation to the information under consideration outweighed any public interest in disclosure.

Mr Gilchrist wrote to the Council requesting a review of its decision to withhold the information. Mr Gilchrist specifically requested access to a legal opinion which had been obtained by the Council from a legally qualified expert in the field of conveyancing. After reviewing Mr Gilchrist's request the Council upheld its original decision to withhold the information. Mr Gilchrist was dissatisfied with the Council's response and applied to the Scottish Information Commissioner for a decision.

Outcome

The Commissioner found that East Ayrshire Council had acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to Mr Gilchrist's request.

The Commissioner found that East Ayrshire Council was correct to withhold the information on the grounds that it was exempt from disclosure by virtue of section 36(1) of the Freedom of Information (Scotland) Act 2002.



Appeal

Should Mr Gilchrist or East Ayrshire Council wish to appeal against this decision, there is a right of 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

1. On 18 February 2005, Mr Gilchrist contacted East Ayrshire Council (the Council) requesting papers relating to a land dispute which concerned Mr Gilchrist's mother.
2. The dispute in question concerned land which, according to Mr Gilchrist, had been sold by the Council to his mother and late father, as sitting tenants, in 1987. According to Mr Gilchrist, the land was then subsequently sold to the sitting tenants of a neighbouring property in 2004. Mr Gilchrist maintained that the land belonged to his mother and he submitted a request for information to the Council by means of a standard form provided by the Council.
3. The Council received Mr Gilchrist's request on 22 February 2005, and issued its response on 21 March 2005. In its letter the Council confirmed that it held the information requested. It stated that the file of papers it held, which related to the land dispute, comprised confidential legal information concerning a court action raised in connection with the land dispute. The Council informed Mr Gilchrist that it was unable to release the information and cited an exemption under section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Council stated that any information relating to confidential communications in connection with legal proceedings was deemed to be exempt.
4. The Council acknowledged that section 36(1) of FOISA did not confer an absolute exemption on the information in question and it had to consider whether it would be in the public interest for the information to be released. The Council argued that the information held related to confidential correspondence between the Council's legal and housing departments.



5. In its refusal notice the Council stated that, having considered the issue of client confidentiality in relation to the information requested by Mr Gilchrist, it was of the opinion that in this case any public interest in disclosing the information was outweighed by the public interest in maintaining the exemption. The Council stated that the public interest in disclosing the information was outweighed due to the confidential nature of the communications between the Council's legal and housing departments and also in view of any further proceedings which might yet be initiated in respect of the original dispute.
6. The Council informed Mr Gilchrist of his right to require the Council to review its decision and of his right to apply to me for a decision if he was dissatisfied with the outcome of the review.
7. Mr Gilchrist wrote to the Council on 29 March 2005, requesting a review of its decision to withhold the information he had requested. In Mr Gilchrist's letter he stated that he had been in correspondence with Registers of Scotland who had acknowledged that a mistake had been made in issuing an indemnified Land Certificate to a third party in relation to the disputed land since the land in question was already registered to Mr Gilchrist's mother.
8. Mr Gilchrist suggested that a legal opinion that had been obtained by the Council from a legally qualified expert in conveyancing, and which concerned the land under dispute, might have been flawed. He stated that the legal opinion appeared to have been based on evidence given by the prospective purchasers of a property adjoining the disputed land and on certain affidavits given by other neighbours, copies of which had been supplied to Mr Gilchrist by Registers of Scotland.
9. Mr Gilchrist maintained that these papers suggested that the prospective purchasers occupied the land in question whereas Mr Gilchrist claimed that this was not the case. He was concerned that certain statements made in relation to the land, and in relation to a caravan which was periodically parked on the land, might have been conveyed in such a way as to influence the expert's legal opinion. According to Mr Gilchrist, a court case at which the legal opinion might have been utilised had been abandoned by the Council as a result of the alleged erroneous actions of Registers of Scotland who had registered title in favour of the prospective purchasers. The Council subsequently concluded the sale.
10. Mr Gilchrist stated that, in his opinion, the Council's actions represented bias towards the prospective purchasers and its continued refusal to make the documentation available only added to Mr Gilchrist's concerns and suspicions. He concluded his letter by stating that, in abandoning the case to prove ownership, the Council had knowingly sold the area of land under dispute twice.



11. The Council responded to Mr Gilchrist's request for review, on 22 April 2005. In carrying out its review the Council restated its position in relation to Mr Gilchrist's information request. It was of the view that in this case the public interest lay in maintaining the section 36(1) exemption under FOISA in respect of client confidentiality, particularly as further legal proceedings could yet ensue.
12. Mr Gilchrist was dissatisfied with the Council's response and applied to me for a decision on 16 May 2005.
13. An investigating officer was then assigned to this case.

The Investigation

14. Mr Gilchrist's application for a decision was validated by establishing that he had made a written request for information to a Scottish public authority, and had applied to me only after requesting a review from the authority concerned.
15. The investigating officer contacted the Council on 1 July 2005, giving notice that an appeal had been received and that an investigation into the matter had begun. The Council was asked to comment on the issues raised by Mr Gilchrist's case in terms of section 49(3)(a) of FOISA and to provide supporting documentation for the purposes of the investigation. The Council was also asked to provide a detailed analysis of its application of the public interest test.
16. The Council responded by letter on 4 August 2005. In its letter the Council stated that it held two large files relating to this matter, which dated back to 2002. The contents of the files fell into three categories:
 - a) Initial correspondence with the Gilchrist family concerning the issue of the land dispute
 - b) Correspondence between Council lawyers and lawyers representing the two owners in dispute and correspondence among Council lawyers;
 - c) Correspondence relating to freedom of information requests.
17. The Council stated that the information in paragraph 16(a) above was already in the possession of the Gilchrist family. The information in paragraph 16(b) had been withheld under section 36(1) of FOISA since it related to confidential communications in connection with legal proceedings, and the information in paragraph 16(c) was supplied to my investigating officer for the purposes of the investigation.



18. The Council maintained that correspondence between Council lawyers and lawyers acting for the Gilchrist family would already be available to them and it considered that correspondence between Council lawyers and lawyers for the other party in the dispute was covered by the confidentiality exemption under section 36(1) of FOISA since it concerned confidential communications between lawyers.
19. The Council stated that it appreciated that the application of the section 36(1) exemption was subject to the public interest test and it was of the view that whereas the information sought by Mr Gilchrist was of interest to him, it was not of serious concern and benefit to the public. The Council stated that it had been unable to identify any benefits to the public from the disclosure of such information.
20. The Council added that there had already been legal proceedings regarding this dispute and it was of the view that further legal proceedings may be initiated. It considered that it would harm the Council's position and that of the other party if the Council were to divulge the information in advance of such proceedings.
21. It was also noted by the Council that Mr Gilchrist had made requests for information on this matter to Registers of Scotland. Staff from Registers of Scotland had also been in contact with the Council regarding the release of the legal opinion to Mr Gilchrist, since Registers of Scotland also held a copy of the document which had been supplied by the Council.
22. Mr Gilchrist stated in an e-mail communication to the investigating officer, on 24 May 2005, that he would be happy to drop the matter and accept compensation that had been offered by Registers of Scotland if he could be satisfied that the Council had sought an unbiased legal opinion. It became clear from this communication that the legal opinion was central to Mr Gilchrist's request and the investigating officer contacted the Council in order to try and resolve the matter, on 12 August 2005.
23. The investigating officer brought to the Council's attention a similar instance where a public authority had sought a legal opinion relating to land issues from the same conveyancing expert. In that case the public authority had agreed to waive its right to legal privilege and decided to release the legal opinion to the applicant in response to the applicant's request. The investigating officer asked the Council if it would be willing to reconsider its decision to withhold the legal opinion from Mr Gilchrist, in light of the outcome of that case.



24. The Council responded on 31 August 2005, stating that it had given consideration to the investigating officer's proposal concerning the possible release of the legal opinion. The Council stated that whilst it appreciated the efforts to broker a resolution it remained of the view that it would not be appropriate for the Council to release the legal opinion in question and that it could be prejudicial to the Council's interests if we were required to do so. The Council also noted with interest one of the Commissioner's earlier decisions (023/2005 - Mr David Emslie and Communities Scotland) which it considered supported its position in this matter.

The Commissioner's Analysis and Findings

Section 36(1) - confidentiality of communications

25. Section 36(1) of FOISA states that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.
26. 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.
- 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.



27. The information which the Council withheld from Mr Gilchrist included a memorial for a legal opinion which set out the areas where legal advice was required, the opinion it had obtained from a legally qualified expert in the area of land disputes and a number of e-mail communications between the Council's legal department and the legal services department of Registers of Scotland.
28. A plea of confidentiality is most commonly claimed in respect of communications between lawyer and client with the justification for this being that there should be a safeguard to ensure that clients can be candid with their legal advisers.
29. An important factor in this particular case was the nature of the relationship between the legal adviser and the Council. The expert who had been consulted in this case was legally qualified and provided legal advice in the form of a legal opinion to the Council. The legal 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 legal opinion would be covered by the exemption contained in section 36(1) of FOISA.
30. I am also satisfied that the correspondence that passed between the Council's legal department and other Council departments, as well as the correspondence between the Council's legal department and Registers of Scotland in relation to this matter, comprised information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, I am of the opinion that the information requested by Mr Gilchrist would be covered by the exemption contained in section 36(1) of FOISA.
31. 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.

The Public Interest test

32. 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 in a House of Lords case, *Three Rivers District Council and Others v Governor and Company of the Bank of England* (2004) UK HL 48.



33. 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.
34. 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 information would make public confidential communications between the legal departments of Scottish public authorities and other Council departments, and a memorial and legal opinion obtained by the Council from a legal adviser.
35. Disclosure of the legal opinion would make public legal advice which had been obtained by the Council in anticipation of possible legal action. In this way it would enhance scrutiny of the legal position of a public body.
36. 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.
37. 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.
38. 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 and there would require to be compelling countervailing arguments for disclosure to outweigh that public interest.
39. 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, the information relates to a private property dispute, although I accept that there may be a degree of wider public interest in the legality of the Council's actions in this as in any other sphere.



40. In this case I recognise that there are reasons which might justify disclosing the opinion to the applicant, but in this case I do not consider that they are so highly compelling as to outweigh the public interest in the confidentiality of legal communications. Therefore, I am satisfied that on this occasion the Council correctly applied the public interest test in withholding the memorial, the legal opinion, the correspondence between the Council's legal department and other Council departments, and correspondence between the Council's legal department and Registers of Scotland. I am satisfied that there are no compelling reasons in this case for the information to be released and that this information is exempt by virtue of section 36(1) of FOISA.

Decision

I find that East Ayrshire Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002, in deciding to withhold from Mr Gilchrist copies of documents it held which related to a land dispute on the grounds that the documentation constituted information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.

I find that East Ayrshire Council was correct to withhold the information requested by Mr Gilchrist on the grounds that it was exempt from release under section 36(1) of the Freedom of Information (Scotland) Act 2002.

Kevin Dunion
Scottish Information Commissioner
11 April 2006