



Scottish Information
Commissioner

**Decision 093/2007 Mr John Mowbray and Fife
Council**

Property at 222 High Street, Leslie

**Applicant: Mr John Mowbray
Authority: Fife Council
Case No: 200601854
Decision Date: 27 June 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 093/2007 Mr John Mowbray and Fife Council

Information relating to the property at 222 High Street, Leslie – information refused section 36(1) of FOISA – partially upheld by Commissioner

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1 (General entitlement); 2 (Effect of exemptions); 21(1) (Review by Scottish public authority) 36(1) (Confidentiality).

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

Facts

Mr Mowbray requested all information relating to the property at 222 High Street, Leslie from Fife Council (the Council). The Council responded by providing information. Mr Mowbray was not satisfied with this response and asked the Council to review its decision. The Council carried out a review and, as a result, notified Mr Mowbray that it could provide some more information in relation to his request but that other information was held by the Council but this was being withheld under various exemptions in FOISA. Mr Mowbray remained dissatisfied and applied to the Commissioner for a decision. During the investigation of Mr Mowbray's application for a decision, the Council released the majority of the information but maintained that three documents should continue to be withheld under section 36(1) of FOISA.

Following an investigation, the Commissioner found that the Council had generally dealt with Mr Mowbray's request for information in accordance with Part 1 of FOISA in that it was justified in maintaining the exemption under section 36(1) of FOISA to most the remaining information. He required the Council to release that information which he did not regard as exempt.



Background

1. On 12 May 2006, Mr John Mowbray wrote to the Council requesting the following information: copies of all documents / communications inclusive of any proposals on draft basis, electronic messages, inter departmental memos, file records with couple connections as well as reports designed in relation to the property at 222 High Street, Leslie.
2. On 7 June 2006, the Council wrote to Mr Mowbray in response to his request for information. The Council provided some information and advised that other information was already in the public domain.
3. On 26 June 2006, Mr Mowbray wrote to the Council requesting a review of its decision. In particular, Mr Mowbray considered that the Council's response to his request was too narrow and therefore that he did not receive all the information he had requested.
4. On 18 August 2006, the Council wrote to notify Mr Mowbray of the outcome of its review. The Council concluded that more information should have been provided and released this. However, the Council also advised that other information in relation to Mr Mowbray's request was also held but that it was exempt from release under sections 30(b) and (c); 36(1) and 38(1)(b) of FOISA.
5. On 22 November 2006, Mr Mowbray wrote to my Office, stating that he was dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of FOISA. In addition to not having received all the information he had requested, he was dissatisfied with the time taken by the Council to deal with his request for review.
6. The application was validated by establishing that Mr Mowbray had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request. The case was allocated to an investigating officer.



The Investigation

7. On 20 December 2006, the Council was notified in terms of section 49(3)(a) of FOISA that an application had been received from Mr Mowbray and was asked to provide my Office with specified items of information required for the purposes of the investigation. the Council responded with the information on 24 January 2007.
8. The Council supplied 52 items of correspondence that had been withheld under the various exemptions cited above. However, the Council also indicated that it was now willing to provide Mr Mowbray with the majority of these.
9. On 22 March my investigating officer received confirmation that the Council was willing to release all the documents excluding those numbered 15, 16 and 52, which the Council maintained should still be exempted under section 36(1) of FOISA.
10. In addition, the Council clarified its view that the documents numbered 23, 39, 40, 46, 49, 50 and 51 fell outside Mr Mowbray's request in that they did not relate to his request for information (i.e. they did not relate to the property at 222 High Street, Leslie.)
11. My investigating officer arranged for copies of the information (excluding those mentioned in paragraphs 9 and 10, above) to be supplied to Mr Mowbray.
12. As such, the majority of the 52 documents were not considered in the remainder of the investigation and will no longer be considered in this decision notice.
13. I will now consider the balance of the documents in these terms:-
 - Documents 23, 39, 40, 45, 46, 49, 50 and 51 – whether these are within the scope of Mr Mowbray's request.
 - Documents 15, 16 and 52 – whether the Council was justified in withholding these under the terms of section 36(1) of FOISA.



The Commissioner's Analysis and Findings

14. Turning to documents 23, 39, 40, 45, 46, 49, 50 and 51, the Council submitted that, as these did not relate to Mr Mowbray's request, there was no need, at the time of the request or in terms of the current investigation, to provide these to Mr Mowbray.
15. The Council submitted that this was because the information in these documents did not relate to the property at 222 High Street, Leslie. In addition the Council stated that document 45 contained some information about 222 High Street but that the majority of the document was not about 222 High Street. The Council provided Mr Mowbray with the relevant information in relation to 222 High Street extracted from document 45.
16. The Council explained that these documents had been supplied to my Office because they were held alongside the information appertaining to Mr Mowbray's request and provided for completeness.
17. Having viewed the information within these documents I am satisfied that this information (with the exception of some information within document 45, as supplied to Mr Mowbray) does not relate to Mr Mowbray's request. Therefore I agree with the Council that there was, and is, no requirement to provide Mr Mowbray with these documents.
18. I am left, therefore, only to consider documents 15, 16 and 52 and the Council's application of section 36(1) to that information.

Section 36 - Confidentiality

19. The Council has claimed that documents 15, 16 and 52 are exempt by virtue of section 36(1) of FOISA.
20. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communications can be maintained in legal proceedings. One type of communication covered by this exemption is communication 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 a professional capacity and the communications must occur in the context of a professional relationship with the client.



21. Having viewed the information in question, I am satisfied that documents 16 and 52 (insofar as falling within the scope of Mr Mowbray's request – document 52, in particular, contains information which does not) comprise information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The information takes the form of the communications between the Council's legal service and various other departments relating to the, as yet uncompleted, compulsory purchase of a property. As a result I am satisfied that the information is exempt in terms of section 36(1) of FOISA.
22. I am not satisfied, however, that the same can be said of document 15. While this refers to the obtaining of legal advice on a certain matter (in a communication between two officers outwith the legal service), given the context and all other relevant circumstances I am not satisfied that by itself is sufficient to engage the exemption. No other exemption having been claimed in relation to that document, I require that it be released to Mr Mowbray.
23. Having viewed document 15, I note that its contents do not refer only to the subject of Mr Mowbray's request (i.e. the property in question). Only the first, second and final paragraphs of document 15 refer to that property, the remainder refers to other properties in Leslie. Therefore, I consider that, although the Council has not made the case for exempting document 15 under section 36(1) of FOISA, there is no obligation placed upon the Council to release the information not relevant to Mr Mowbray's request.
24. I therefore order the Council to release the first, second and final paragraphs of document 15 to Mr Mowbray.

Public interest Test

25. I must now consider whether the public interest lies in maintaining the exemption in section 36(1) of FOSIA in relation to documents 16 and 52.
26. Section 36(1) of FOISA is a qualified exemption and is subject to the public interest test laid down by section 2(1)(b) of FOISA. Where an authority considers the information to be exempt it must still consider, whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. If the public interest lies in disclosure, the information must be released.



27. I have stated in previous decisions (e.g. 045/2005 – Mr Geoffrey Jarvis, Clyde Heritage Trust, and Glasgow City Council; and 159/2006 – Mr Andy Wightman and the City of Edinburgh Council), that 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. 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) UKHL 48.
28. There will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, I am likely only to order the release of communications in highly compelling cases.
29. The public interest arguments in favour of disclosure of the information might include, for example, greater transparency and accountability on the part of the Council, so that local tax payers can see what factors the Council are taking into consideration in respect of making a decision on planning considerations and property transactions in the local area.
30. However, I also accept that there is a general public interest in a public authority being able to communicate its position to its legal advisers fully and frankly in confidence, in order to obtain comprehensive legal advice and secure an effective legal service. By doing so, the authority can act with full knowledge of the legality of its actions.
31. In its submissions to my Office, the Council has provided detailed and compelling arguments as to why, at least until the satisfactory conclusion of the proceedings in question (i.e. the Compulsory Purchase Order process for the property in question), the public interest in disclosure of the information would be outweighed by the public interest in maintaining the exemption in section 36(1).
32. Having considered all submissions in this matter, I am content that in this case the public interest would be better served by the exemption in section 36(1) being maintained. I recognise that there are reasons which might justify disclosure to Mr Mowbray. However, I do not consider that they outweigh the public interest in the confidentiality of legal communications and agree with the Council that this will be relevant at least until the resolution of the Compulsory Purchase Order process for the property in question.
33. I am satisfied that, on this occasion, the Council correctly applied the public interest in withholding documents numbered 16 and 52 and that they are exempt by virtue of section 36(1) of FOISA.

Provision of all documents relating to Mr Mowbray's request



34. Mr Mowbray stated that he suspected that the Council had still further information in relation to his request for information and this had not been released or provided to this office. However, Mr Mowbray could indicate no specific reason for believing this to be so but provide examples of the sort of information he believed the Council still retained. Mr Mowbray asked that the investigation also consider whether this was the case.
35. Upon further inquiries, the Council confirmed that, other than i) information it had already released to Mr Mowbray as part of his request, and ii) his own personal information (which, in any event would have been absolutely exempt from release under FOISA) this office had received all of the information it held in relation to Mr Mowbray's request. The Council added that it had released Mr Mowbray's personal information to him rather than maintain the exemption under section 38(1)(a) of FOISA.
36. In the circumstances, I am satisfied that the Council has provided my investigating officer with all the relevant information it holds in relation to Mr Mowbray's request. My remit as Commissioner does not extend to consideration of Mr Mowbray's own personal information but should he have concerns on that matter, he is, of course, free to request that the Information Commissioner (who has responsibility for the Data Protection Act 1998 and its enforcement) pursue the matter on his behalf.

Delay in responding to a request for review

37. Mr Mowbray stated in his application to me that he was dissatisfied with the time taken by the Council to deal with his request for review.
38. Section 21(1) of FOISA states that a request for review must be complied with within 20 working days of the receipt of that request for review.
39. I find that the Council failed to comply with Part 1 of FOISA by taking in excess of the 20 working days laid down in section 21(1) of FOISA to deal with Mr Mowbray's request for a review.
40. I do not, however, require the Council to take any action in respect of this breach.



Decision

I find that Fife Council (the Council) generally acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Mowbray in that it provided Mr Mowbray with the relevant information in relation to his request and was justified in exempting documents 16 and 52 under section 36(1) of FOISA.

However, I also find that document 15 was wrongly withheld by the Council under section 36(1) of FOISA and therefore that the Council failed to comply with section 1(1) (and therefore with Part 1) of FOISA in this respect. I find that only part of that document is relevant to Mr Mowbray's request. I require the Council to provide Mr Mowbray with the first, second and final paragraphs of this document within 42 days from the date of receipt of this decision notice.

Finally, I find that the Council failed to comply with Part 1 of FOISA by taking in excess of the 20 working days laid down in section 21(1) of FOISA to deal with Mr Mowbray's request for a review. I do not require the Council to take any action in respect of this breach.

Appeal

Should either Mr Mowbray or Fife 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 decision notice.

Kevin Dunion
Scottish Information Commissioner
27 June 2007



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 –
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

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.

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.