



Scottish Information
Commissioner

**Decision 096/2007 Mr John Sexton and The
Scottish Executive**

*Request for various pieces of information relating to a dispute
regarding title to a particular property*

**Applicant: Mr John Sexton
Authority: The Scottish Executive
Case No: 200601597
Decision Date: 28 June 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 096/2007 Mr John Sexton and the Scottish Executive

Request for various pieces of information relating to a dispute over title to a particular property – Scottish Executive relied on the exemptions in sections 36(1) and 36(2) of FOISA – Commissioner upheld the Scottish Executive’s reliance on sections 36(1) and 36(2) of FOISA

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1)(a) and (b) (Effect of exemptions) and 36 (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 Sexton requested various pieces of information from the Office of the Solicitor to the Scottish Executive (the Executive) in relation to a dispute regarding title to a specified property. The Executive responded to Mr Sexton’s request and indicated that certain of the information that Mr Sexton had requested had already been disclosed to him by the Keeper of the Registers of Scotland (the Keeper) in response to an information request that he had made to them. The Executive sought to withhold other information from Mr Sexton and relied on the exemptions in sections 36(1) and 36(2) of FOISA for doing so. Mr Sexton was not satisfied with certain parts of this response and asked the Executive to review its decision in respect of the information that the Executive had relied on the exemptions in sections 36(1) and 36(2) for withholding from him. The Executive upheld its decision on review. Mr Sexton remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Executive had dealt with Mr Sexton’s request for information in accordance with Part 1 of FOISA.



Background

1. On 27 May 2006, Mr Sexton wrote to the Scottish Executive requesting the information relating to an application for registration to the Keeper, copies of precognitions of named individuals, correspondence relating to a specified matter (including named firms of solicitors) and correspondence regarding an account in relation to a specified case before the Lands Tribunal of Scotland.
2. On 15 June 2006, the Executive wrote to Mr Sexton in response to his request for information. In its response, the Executive indicated that certain of the information that Mr Sexton had requested had already been provided to him in response to an information request that he had submitted to the Keeper, but provided Mr Sexton with a further copy of the invoices he had sought. The Executive also advised Mr Sexton that it was withholding other information on the basis of the exemptions in sections 36(1) and 36(2) of FOISA.
3. On 12 July 2006, Mr Sexton wrote to the Executive requesting a review of its decision. Mr Sexton also made four new requests for information in his request for review, but these do not form part of this particular investigation.
4. On 9 August 2006, the Executive notified Mr Sexton of the outcome of its review. The Executive advised Mr Sexton that it was upholding its decision in respect of the information that he had requested previously in his request of 27 May 2006 and that it was relying on the exemptions in sections 36(1) and 36(2) of FOISA for withholding this information from Mr Sexton.
5. On 29 September 2006, Mr Sexton wrote to my Office, stating that he was dissatisfied with the outcome of the Executive's review and applying to me for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Sexton 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.
7. On 16 February 2007, the Executive was notified, in terms of section 49(3)(a) of FOISA, that an application had been received from Mr Sexton and was asked to provide my Office with specified items of information required for the purposes of the investigation. The Executive responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Executive, asking it to provide comments on the application and to respond to specific questions on the application.



The Investigation

9. This investigation considered whether the Executive was correct to rely on the exemptions in sections 36(1) and 36(2) of FOISA for withholding certain information from Mr Sexton, which would address his information request of 27 May 2006.

Submissions from the Scottish Executive

10. In its submissions to my Office, the Executive has advised that it is relying on the exemption in section 36(1) of FOISA for withholding the information that Mr Sexton requested in terms of the letters it had sent to North Lanarkshire Council (i.e. to North Lanarkshire Council), Trainer Alston Solicitors and Drummond Miller Solicitors, together with the two precognitions. The Executive is relying on the exemption in section 36(2) of FOISA for withholding the information in the letters that it received in response from North Lanarkshire Council and Drummond Miller solicitors.
11. I will consider the Executive's reliance on these exemptions further in my section on analysis and findings below.

The Commissioner's Analysis and Findings

Section 36 (1)

12. 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.



13. In this case, the Office of the Solicitor to the Scottish Executive, who were acting on behalf of the Keeper, sought and obtained precognitions from two members of the Keeper's staff. The Office of the Solicitor to the Scottish Executive also sent letters to North Lanarkshire Council, Trainer Alston Solicitors and Drummond Miller solicitors, in which they were seeking information, on behalf of their client, to ascertain who held title to a particular property.
14. It is these precognitions and letters that the Executive has sought to withhold from Mr Sexton under section 36(1) of FOISA.
15. In considering the Executive's reliance on this exemption for this information, I intend to consider the different types of information separately.

The precognitions

16. In its submissions to me regarding its reliance on section 36(1) for the precognitions withheld from Mr Sexton, the Executive states that this information relates to communications between client and legal advisor. The Executive submit that the solicitor/client relationship is based on confidence and trust, and that it is vital to the successful working of such a relationship that both parties can be confident that all the information which is passed between them is treated confidentially. It is the view of the Executive that it is only then that clients will feel able to give a full and frank account of the facts and their position. The Executive also asserts that it is crucial to the quality and efficacy of the advice and representation given by the solicitors that they are in full possession of such information and that they too are able to speak and advise freely. It is the contention of the Executive that any impediment to this full and frank exchange would gravely undermine the solicitor/client relationship.
17. The Executive has provided me with a comprehensive submission as to why the precognitions taken from the two named individuals are communications between a client and solicitor, and also why this information should be covered by the exemption in section 36(1) of FOISA.
18. Having considered the precognitions from the two named individuals, together with the submissions which have been made by the Executive, I accept that these precognitions were taken from the named individuals by a solicitor, when the solicitor was acting in the course of their professional duties. I therefore accept that the information given by the two named individuals to the solicitor would be deemed to be confidential, and that this is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result I am satisfied that these precognitions are exempt in terms of section 36(1) of FOISA.



Letters to third parties

19. In its submissions regarding its reliance on section 36(1) in respect of the letters from the Executive to North Lanarkshire Council, Trainer Alston Solicitors and Drummond Miller solicitors, the Executive states that these letters were written by the solicitor to the Scottish Executive in the clear knowledge of possible litigation, and were intended to gain information to assist with the conduct of the Lands Tribunal case. As a result of this, the Executive has advised that it is its view that the information contained in these letters would be exempt under section 36(1) as they were communications post litem motam i.e. in contemplation of litigation.
20. In its justification of its reliance on the exemption in section 36(1) for the information in the letters, the Executive has also re-iterated its view that it is essential that a solicitor is in full possession of the facts in order to correctly advise clients and conduct a defence in as effective and appropriate manner as possible. The Executive asserts that it would be extremely prejudicial to a solicitor's ability to fully investigate a case if there was no assurance that the lines of investigation or the information obtained would remain confidential.
21. In Scots law the principle of confidentiality of communications and privileged communications embraces two concepts, these are – the confidentiality of communications between a legal adviser and client (which was discussed in respect of the precognitions), and the privilege of communications made post litem motam (in contemplation of litigation). Information which falls within the scope of either of these concepts would be exempt under section 36(1) of FOISA.
22. For information to come within the scope of the concept of the privilege of communications made post litem motam certain criteria would have to be taken into consideration. For example –
 - This privilege covers communications which take place in anticipation of civil litigation.
 - Litigation need not have started, but there should be a threat of litigation, and the privilege subsists even if litigation never in fact takes place or is concluded.
 - The point in time when the privilege starts is not settled and may occur as early as immediately following upon the events to which the communication relates.
 - The privilege covers any communication to or by a litigant in connection with the preparation of his case. The exception is that of reports prepared by employees who were present at the time of an accident for the benefit of their employers, even when the report is passed to the employers' insurers with a view to litigation starting.



- The communications should have some substance, as a chance remark about a case is not privileged.
 - A communication which is passed to a third party loses its confidential status.
 - If a communication, which is otherwise privileged, is to be founded upon in pleadings to the litigation or led as evidence, it will have to be disclosed in accordance with the usual Scots law civil procedure.
23. Having considered the letters from the Executive to North Lanarkshire Council, Trainer Alston Solicitors and Drummond Miller solicitors, together with the submissions from the Executive and the criteria set out above, I am satisfied that the information contained in these letters would come within the scope of the exemption in section 36(1) of FOISA. I am satisfied that these letters were sent to the third parties with the intention of gathering information in contemplation of litigation. I am also satisfied, on the basis of the submissions that have been presented to me by the Executive, that it has not done anything regarding these letters that would constitute its waiving its right to maintain the confidential status of these documents.
24. Although I am satisfied that the information contained in the precognitions and the letters from the Solicitor to the Scottish Executive to the third parties would come within the scope of the exemption in section 36(1) of FOISA, as this is a qualified exemption, I am required to consider the application of the public interest test set out in paragraph 2(1)(b) of FOISA to this information.

Public interest test

25. As noted above, section 36(1) of FOISA is a qualified exemption and is subject to the public interest test required by section 2(1)(b). 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 is in disclosure, the information must be released.
26. As I have said in previous decisions (e.g. 045/2005 and 159/2006), 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 towards the end of 2004 in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48.
27. In considering the application of the public interest test in section 2(1)(b) of FOISA, the Executive has submitted compelling arguments to support its conclusion that the public interest in disclosure of the requested information is outweighed by that in maintaining the exemption in section 36(1).



28. Having considered the information that has been withheld by the Executive, I can understand why Mr Sexton would want to have access to this information, and why it would be of interest to him. However, when considering the application of the public interest test I cannot simply consider what would be in the interests of one individual, I must consider what would be in the interests of the public as a whole.
29. In taking this into account I am of the opinion that I can see no interest to the public as a whole in the disclosure of this information. The information that has been withheld is specific to Mr Sexton's own case and I can see no particular benefit to the public as a whole in release of this information. I am not of the opinion that the release of this information would inform the public, or assist in making the Executive more transparent or accountable in its practices.
30. Having considered all the submissions in this matter, I am of the view that, in this case, the public interest would be better served by the exemption in section 36(1) being maintained. I recognise, as I have said, that there are reasons which might justify disclosure to Mr Sexton. However, I do not consider that they outweigh the wider public interest in the confidentiality of legal communications. Therefore, I am satisfied that on this occasion the Executive correctly applied the public interest in withholding the precognitions and letters to third parties and that this information is exempt by virtue of section 36(1) of FOISA.

Section 36(2)

31. I will now examine whether the information that has been withheld regarding the letters from North Lanarkshire Council to the Executive, together with the letter from Drummond Miller Solicitors to the Executive, can be withheld under section 36(2) of FOISA.
32. Section 36(2) of FOISA relates to confidentiality and is an absolute exemption. This means that this exemption is not subject to the public interest test, although 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. I address that point below.
33. In order to rely on section 36(2), an authority needs to demonstrate certain elements. Firstly, the information must have been obtained by the Executive from another person.
34. Having considered the information that has been withheld from Mr Sexton, I am satisfied that the letters in question have been obtained by the Executive from another person, i.e. North Lanarkshire Council and Drummond Miller Solicitors.



35. 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 the 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:
- 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. It is established that the detriment may be potential rather than actual and need not be financial.
36. To have the necessary quality of confidence, the information could not be generally accessible. In this case, the information is not currently (and was not at the time of Mr Sexton's request) in the public domain and Mr Sexton would not be (or have been) able to produce the information himself.
37. In order for the breach of confidence to be actionable, the Executive must have received the information in circumstances which imposed an obligation on the authority to maintain confidentiality. The Executive has provided me with a submission from North Lanarkshire Council which clearly indicates that North Lanarkshire Council were not prepared to accede to the Executive's request as to whether they would agree to release these letters to Mr Sexton, and that in fact North Lanarkshire Council indicated that it had passed these to the Executive in confidence. I am therefore satisfied that the Executive received these letters in circumstances which imposed an obligation on it to maintain confidentiality. I am also satisfied on the basis of the submissions that I have received from the Executive that the letter from Drummond Miller Solicitors was also passed to it in confidence.



38. The third part of the test requires that disclosure of the information must be unauthorised by, and cause damage to, the person who communicated it. I am satisfied on the basis of the submissions that I have received from the Executive there is a potential for damage to be caused by the release of the information. I note that the Executive contacted North Lanarkshire Council to ask whether it would allow the Executive to release the letters to Mr Sexton, and that North Lanarkshire Council were not willing to provide their consent to this action. Therefore release of this information in response to an FOISA request would be unauthorised, and could found an actionable claim for breach of confidence. The Executive has also provided me with a submission regarding the letter that it received from Drummond Miller solicitors, and has advised that this letter was passed to them in confidence and that release of this letter would breach the obligation of confidentiality on the part of the solicitors.
39. 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.
40. However, in the circumstances of this particular case, I cannot see a reasonable basis to conclude that the Executive would have a defence to an action of breach of confidence on public interest grounds in the event that it disclosed the information.
41. In this instance, having examined the information that has been withheld and having considered in full the Executive's submissions, I am satisfied in the circumstances that the relevant legal tests are all met and therefore that the Executive was justified in withholding the letters from North Lanarkshire Council and the letter from Drummond Miller solicitors to the Executive under section 36(2) of FOISA.



Decision

42. I find that the Executive acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Sexton.

Appeal

Should either Mr Sexton or the Executive 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
28 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 –
 - (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.

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.