



Scottish Information
Commissioner

Decision 213/2007 Mr Rory Speirs and East Renfrewshire Council

Request for a copy of a pothole incident report submitted to the Council's insurers

Applicant: Mr Rory Speirs
Authority: East Renfrewshire Council
Case No: 200700322
Decision Date: 08 November 2007

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 213/2007 Mr Rory Speirs and East Renfrewshire Council

Request for a copy of a pothole incident report that was prepared by East Renfrewshire Council and sent to its insurers – Commissioner upheld the application of section 36(1) of FOISA.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) (Effect of exemptions) and 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 Rory Speirs requested a range of road maintenance documents from East Renfrewshire Council (the Council). The Council responded by providing Mr Speirs with all of the information he requested with the exception of an insurance report which it withheld in terms of section 36 of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Speirs 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 Speirs that it was now withholding the report in terms of section 30(b), 33(1)(b) and 36(1) of FOISA. Mr Speirs remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council was entitled to withhold the report from Mr Speirs on the basis that it was exempt from disclosure in terms of section 36(1) of FOISA.



Background

1. In May 2006, Mr Speirs wrote to the Council seeking compensation for alleged damage to his car which he claimed was incurred when encountering several large potholes on Council-maintained roads in East Renfrewshire. Mr Speirs was subsequently sent an incident report form which he completed on 1 August 2006. On receipt of this form the Council produced a Report on the incident (the report) which it then sent to its insurers, Gallagher Bassett.
2. On 24 November 2006, Mr Speirs wrote to the Council requesting the following information:
 - a) *East Renfrewshire road maintenance standards and inspection requirements*
 - b) *Inspection and maintenance reports for Crookfur Road – dates 1st March to 30th June inclusive*
 - c) *Inspection and maintenance reports for Fruin Avenue – dates 1st March to 30th June inclusive*
 - d) *Inspection and maintenance reports for Broom Road – dates 1st March to 30th June inclusive*
 - e) *Inspection and maintenance reports for Waterfoot Road – dates 1st March to 30th June inclusive*
 - f) *Inspection and maintenance reports for Eaglesham Road – dates 1st March to 30th June inclusive*
 - g) *A copy of the report sent to Gallagher Basset, the Council's loss adjusters, shortly before the 14th September 2006.*
3. Following a further exchange of correspondence to clarify Mr Speirs' request, the Council responded to Mr Speirs' information request on 15 December 2006. The Council supplied Mr Speirs with inspection and maintenance reports in response to parts b), c), d), e) and f) of his initial request, and also provided a response in respect of part a) of his request. However, the Council withheld the information he sought in part g) of his request (i.e. the report) in terms of section 36 of FOISA, and argued that public disclosure of the sought document would constitute an actionable breach of confidence.
4. On 2 January 2007, Mr Speirs wrote to the Council requesting a review of its decision to withhold the report. In particular, Mr Speirs drew the Council's attention to the fact that the report was created by the Council and suggested that, as such, it should be available to a member of the public on request without any breach of confidentiality.



5. The Council notified Mr Speirs of the outcome of its review on 31 January 2007. The Council informed Mr Speirs that it upheld its original decision to withhold the report in terms of section 36 of FOISA. In addition, the Council advised Mr Speirs that it had also decided to withhold the report under the exemptions contained in section 30(b)(ii) and 33(1)(b), and 36(1) of FOISA.
6. On 4 March 2007, Mr Speirs 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.
7. The application was validated by establishing that Mr Speirs 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.
8. On 26 March 2007, the Council was notified in writing that an application had been received from Mr Speirs 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 requested and the case was then allocated to an investigating officer.

The Investigation

9. On 2 May 2007, a letter was sent to the Council, asking it to provide comments on the application in terms of section 49(3)(a) of FOISA.
10. The Council responded in writing on 22 May 2007. In its submissions, the Council explained that it was withholding the report in terms of section 30(b)(i) and (ii), 33(1)(b) and 36(1) of FOISA. Further information and clarification was provided in subsequent exchanges with my Office.

Council's arguments in favour of the exemption contained in 30(b)

11. The Council argued that it considered the report exempt from disclosure in terms of section 30(b)(i) and (ii) of FOISA. It explained that the report was produced with the purpose of advising Gallagher Bassett (its insurers) of the circumstances surrounding an incident which is currently the subject of an insurance claim. It argued that if the terms of the report were disclosed, it would discourage the inclusion of relevant information (in future reports) and would therefore inhibit the provision of advice. It would also inhibit the free and frank exchange of views and impact adversely on deliberations as to whether an insurance claim should be settled or defended.



Council's arguments in favour of the exemption contained in 33(1)(b)

12. The Council argued that disclosure of the report would prejudice the commercial interests of both the Council and Gallagher Bassett, and so it had withheld the report under section 33(1)(b) of FOISA. The Council explained that the report is compiled by the Council on behalf of Gallagher Bassett, and that it provides background information on an incident which is currently subject to a claim by the applicant. The Council maintained that the information contained in the report will form the basis of the Council's defence in any court proceedings brought by the applicant, and that disclosure of the sought document would substantially prejudice Gallagher Bassett's ability to settle a claim or defend litigation in this case. The Council contended that this increased liability would substantially prejudice the commercial interests of Gallagher Bassett since any increased claim payments will reduce their profit margins.
13. In addition, the Council argued that if the profit margins of Gallagher Bassett were reduced, it was likely that the insurance premiums paid by the Council would be increased. The Council asserted that an increase in its insurance premiums would adversely impact on the profit margins of its Roads Construction Unit, as all costs associated with the provision of this service is taken into account when determining whether there has been a profit, and that consequently this would substantially prejudice the commercial interests of the Council.

Council's arguments in favour of the exemption contained in 36(1)

14. The Council argued that the report is exempt from disclosure in terms of section 36(1) of FOISA, as it was prepared in contemplation of litigation. The Council explained that the report was prepared because there had been an insurance claim submitted by the applicant (which may result in litigation) and as a result the information contained within the report was such that a claim of confidentiality of communications could be maintained in legal proceedings.

Submissions from Mr Speirs

15. Mr Speirs argued that the Council was failing in its duty to road users and the general public by failing to maintaining its roads to a reasonable standard. Mr Speirs asserted that the Council had severely limited the repair funds available to maintain its roads, and was relying on "red tape" and "denial of liability" to divert potential claims. Mr Speirs acknowledged that he has a personal interest in obtaining access to the report, but he argued that the wider public interest lies in knowing how their taxes are being spent, and on discovering if the Council is minimising repair and maintenance spending on its roads.



The Commissioner's Analysis and Findings

16. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Speirs and the Council and I am satisfied that no matter of relevance has been overlooked.
17. The document withheld from Mr Speirs is an insurance report that was produced by the Council and was submitted to Gallagher Bassett (the Council's insurers) following a claim against the Council by Mr Speirs.

Application of the 36(1) exemption

18. The exemption in section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. One type of communication which falls into this category is those which are subject to legal professional privilege. Legal professional privilege can itself be split into two categories – legal advice privilege and litigation privilege (also known as communications *post litem motam*). Here, I am considering litigation privilege which covers communications made in anticipation of litigation. Documents created *post litem motam* are granted confidentiality in a court room setting in order to ensure that any person/organisation that is involved in a court action can prepare their case as fully as possible without the risk that their opponent will gain access to the material generated by their preparations. It is important to note that for litigation privilege to apply there need be no involvement of a legal advisor. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
19. The information requested by Mr Speirs which the Council holds to be exempt under section 36(1) comprises an insurance report, produced by the Council following the receipt of a claim from Mr Speirs. In its submissions to me, the Council argued that this document was created in contemplation of litigation (i.e. *post litem motam*). It also argued that such documentation constituted information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.



20. The Council has argued that it is reasonable for it to assume that an individual who submits an insurance claim to the Council will, if dissatisfied with the outcome of that claim, raise legal proceedings against it. The Council has contended that it prepared the insurance report in response to the insurance claim submitted to the Council by Mr Speirs, and that, as this claim may result in litigation, the report is a document prepared in contemplation of litigation. The Council has also referred to one of my previous decisions *096/2006 Mr George Waddell and South Lanarkshire Council* which was considered under the Environmental Information (Scotland) Regulations 2004, and in which I accepted that a loss adjusters report was privileged.
21. In order to determine whether a claim to confidentiality of communications could be maintained in legal proceedings relation to the report, I must establish whether it was prepared in contemplation of litigation. In this particular case, the Council received an insurance claim from Mr Speirs on 7 August 2006 (dated 1 August). The report sought by Mr Speirs was created by the Council on 8 September 2006, after it had received his claim. The Council has asserted that from the moment it received Mr Speirs' insurance claim it was preparing itself for litigation and that therefore the requested insurance report falls under the scope of section 36(1). To support its position, the Council has provided me with an email which indicates that Mr Speirs had advised the Council's insurers (in a phone call on 31 August 2006) that he was intending to seek legal advice regarding his claim against the Council.
22. I have considered the timing of the report, and it is clear to me that it was created by the Council after it had received Mr Speirs' insurance claim and after it had been advised by its insurers that Mr Speirs was considering legal action. In the light of these facts, and taking into account the content of the report, it is my view that the report was prepared in contemplation of litigation and that it falls under the exemption contained within section 36(1) of FOISA.
23. The exemption in section 36(1) is a qualified exemption, which means that the application of this exemption is subject to the public interest test set out in section 2(1)(b) of FOISA. Where a public authority finds that this exemption applies to the information that has been requested, it must go on to consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.
24. As I have noted in previous decision notices (such as *096/2006 Mr G Waddell and South Lanarkshire Council*), 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. I would apply the same reasoning when considering litigation privilege also.



25. Mr Speirs has submitted the following arguments in favour of release. He has asserted that the public interest is best served by the release of the document, and that its disclosure will indicate whether the Council has been remiss in its duty to maintain its roads to an acceptable standard. Mr Speirs has also argued that disclosure will lead to greater transparency of the Council's spending and decision-making processes, as it will reveal how the Council is spending taxpayers' monies, and will also indicate whether the Council is pursuing a strategy of low investment in its roads.
26. I have considered the arguments relating to the public interest put forward by Mr Speirs. While I acknowledge the comments made by Mr Speirs, and recognise that it is in the public interest to know whether or not the Council has properly fulfilled its duties with respect to roads maintenance, I would also note that other information has been made available to him that would contribute to this purpose. On the other hand, I accept that it is a matter of considerable public interest that the Council (like any other party to legal proceedings) is able to prepare for anticipated litigation, and to defend its position.
27. On balance I have found that the public interest in upholding the exemption in section 36(1) outweighs other public interest considerations in this case. I have therefore accepted that the exemption should be upheld in relation to the report
28. As I have found that the report is exempt from disclosure in terms of section 36(1) of FOISA, I will not go on to consider the application of the exemptions in 30(b)(i) and (ii) and 33(1)(b).

Decision

I find that East Renfrewshire Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Rory Speirs.



Appeal

Should either Mr Speirs or East Renfrewshire Council wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any appeal must be made within 42 days after the date of intimation of this notice.

Kevin Dunion
Scottish Information Commissioner
08 November 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.