



Scottish Information
Commissioner

**Decision 102/2006 – MacRoberts Solicitors and
North Ayrshire Council**

*Request for a list of all domestic properties and a list of all non
domestic properties.*

**Applicant: MacRoberts Solicitors
Authority: North Ayrshire Council
Case No: 200501868
Decision Date: 20 June 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 102/2006 – MacRoberts Solicitors and North Ayrshire Council

Request for a list of all domestic properties and a list of all non domestic properties – withheld on the basis of section 25 of the Freedom of Information (Scotland) Act 2002 (FOISA) – information otherwise accessible – section 33 of FOISA – commercial interests and the economy

Facts

MacRoberts Solicitors (MacRoberts) submitted two information requests to North Ayrshire Council (the Council) for a list of all domestic properties and a list of all non domestic properties. The Council did not disclose this information to MacRoberts on the basis that the information was available via the publication scheme for the Ayrshire Valuation Joint Board (the Joint Board), and was therefore exempt under section 25 of the Freedom of Information (Scotland) Act 2002 (FOISA). The Council also refused to disclose the information on the basis that to do so could prejudice substantially the commercial interests of the Joint Board, and it was therefore exempt under section 33(1)(b) of FOISA. The decision was upheld by the Council on review and MacRoberts applied to the Commissioner for a decision.

Outcome

The Commissioner found that the Council had applied the exemption under section 25 of FOISA correctly in withholding the information and that section 1(1) of FOISA was applied correctly. As such, the Commissioner found that Part 1 of FOISA was complied with.

The Commissioner found that the Council failed to comply with Part 1 of FOISA in withholding information from MacRoberts under the exemption in section 33(1)(b) of FOISA and that section 1(1) of FOISA was not applied correctly.

The Commissioner does not require the Council to take any remedial steps in relation to this breach.



Appeal

Should either MacRoberts or the 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 the receipt of this notice.

Background

1. MacRoberts made two separate requests to the Council on 20 March 2005, one for a list of all domestic properties and one for a list of all non domestic properties. Both of these requests are being considered in this decision notice.
2. The information requests that were submitted by MacRoberts clearly stipulated the preference that this information should be provided to them in electronic form, failing which in hard copy. The requests also stated that in so far as any of the information contains personal data, the disclosure of which is exempted under section 38 of FOISA, the information should be provided with the personal data redacted.
3. The Council responded to MacRoberts on 8 April 2005, indicating that it was refusing to release the information on the basis that it was exempt under sections 25, 33 and 36 of FOISA.
4. MacRoberts sought a review of the Council's decisions in relation to both requests in emails dated 14 April 2005.
5. The Council responded on 12 May 2005. It upheld its original decisions to withhold the information, but only on the basis of the exemptions contained in sections 25 and 33 of FOISA.
6. On 13 May 2005, MacRoberts submitted two separate applications to me for a decision as to whether the Council had breached Part 1 of FOISA in withholding the information. The case was subsequently allocated to an investigating officer.



The Investigation

7. The two applications submitted by MacRoberts were validated by establishing that valid requests had been made to a Scottish public authority under FOISA, and had been appealed to me only after requesting that the authority review its decisions.
8. This case was investigated alongside seven other similar appeals from MacRoberts acting on behalf of their client, regarding refusals by other local authorities in Scotland to provide copies of lists of domestic properties and lists of non domestic properties.
9. A letter was sent by the investigating officer to the Council on 9 June 2005, asking for its comments on MacRoberts' applications in terms of section 49(3)(a) of FOISA. The Council was asked to provide, amongst other items, a copy of the Joint Board's publication scheme with the relevant classes of information clearly marked and details of how and at what cost this information can be obtained from the publication scheme for. The Council was also asked to provide a detailed analysis of the application of the exemption under section 25 and section 33 of FOISA.

Submissions from the Council

10. As mentioned above, the Council has relied on the exemptions under sections 25 and 33 of FOISA to justify withholding the information that has been requested by MacRoberts.
11. I will consider the Council's reasoning for relying on this exemption further in the section on Analysis and Findings below.



The Commissioner's Analysis and Findings

12. In its response to my Office, the Council indicated that it does hold the information which MacRoberts are seeking, in that this information is provided to it by the Joint Board. However, the Council also indicated that it was unwilling to disclose the information on the basis that the information is otherwise accessible as defined in section 25 of FOISA. The Council has also stated that for the information to be made available to MacRoberts at no cost would be prejudicial to the Joint Board and would therefore be exempt under section 33 of FOISA.
13. I will look at the application of each of these exemptions in turn together with the submissions from the Council.
14. Section 25 of FOISA exempts information which an applicant can reasonably obtain other than by requesting it under section 1(1). The exemption under section 25 is an absolute exemption; this means that where a public authority finds that the information that has been requested falls within the terms of section 25 of FOISA then the information is exempt from disclosure. There is no requirement for the public authority to consider the terms of the public interest in this case.
15. The exemption under section 33(1)(b) exempts information which, if disclosed under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). The exemption under section 33 is a qualified exemption; this means that where a public authority finds that the information that has been requested falls within the terms of section 33 of FOISA, then the public authority must then go on to consider the application of the public interest test contained in section 2(1)(b) of FOISA. In considering the application of the public interest test, the public authority must determine whether, in all the circumstances of the case, the public interest in withholding the information requested outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.



16. The exemption under section 33(1)(b) also contains a harm test, in that the public authority would have to show that release of the information would, or would be likely to, prejudice substantially the commercial interests of any person, including another Scottish public authority. Although there is no definition under FOISA as to what would constitute substantial prejudice, it is my view that in order for a public authority to be able to rely on this exemption, it would have to show that the damage caused by disclosing the information would be real or very likely, not hypothetical. The harm caused must be significant, not marginal, and it would have to occur in the near future and not in some distant time.

The application of section 25 – information otherwise accessible

17. As indicated above, the exemption under section 25 is an absolute exemption. The exemption under section 25 of FOISA states:

25 Information otherwise accessible

(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

(2) For the purposes of subsection (1), information –

(a) may be reasonably obtainable even if payment is required for access to it;

(b) is to be taken to be reasonably obtainable if-

(i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or

(ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by,

members of the public on request, whether free of charge or on payment.

- (3) For the purposes of subsection (1), information which does not fall within paragraph (b) of subsection (2) is not, merely because it is available on request from the Scottish public authority which holds it, reasonably obtainable unless it is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.



18. In justifying its reliance on the exemption under section 25, the Council has advised that the information that MacRoberts are seeking is available via the publication scheme for the Joint Board. The Council has submitted that it does hold a copy of the information that has been requested by MacRoberts, but that this is provided to it by the Joint Board and as such the Council was unwilling to disclose the information.
19. The Council has explained that the Ayrshire Joint Valuation Board is a joint board established in terms of section 62A of the Local Government (Scotland) Act 1973. The Council has submitted that the Joint Board appoints the Assessor, who is responsible for the preparation and maintenance of the Valuation Roll and the Valuation List. The Council has advised that these documents are required for the three Councils in Ayrshire to enable them to gather in non-domestic rates and Council Tax.
20. The Joint Board is a separate public body in terms of Part 3 of Schedule 1 to the FOISA.
21. In its response to my Office and to MacRoberts, the Council advised that the information they were seeking was available via the publication scheme for the Joint Board. However, in making this response to MacRoberts, the Council did not advise MacRoberts which classes of documents they should be seeking to access under the publication scheme to obtain the information that they had requested or provide MacRoberts with a website address or address for the Joint Board.
22. In order to determine whether the Council has relied on the exemption under section 25 correctly, I must be satisfied that the information which MacRoberts has requested is otherwise accessible.
23. In determining whether this is the case I have considered the submissions that have been made by the Council. I have also considered the terms of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (the section 60 Code) and the content of my own guidance note on the application of the exemption under section 25 of FOISA.
24. As expressed in my guidance note on the application of the exemption under section 25 of FOISA, it is my view that where a public authority receives a request for information which it holds but which has not been made available under its own publication scheme, and is aware that the information is already available through another public authority's publication scheme, then it would be open to the authority to claim that the information is otherwise accessible. However, the public authority should check that the information is in fact available from the other authority before refusing an applicant's request on these grounds.



25. As has been shown above, the Joint Board is a Scottish public authority for the purposes of FOISA. Under section 23 of FOISA each Scottish public authority, as defined in FOISA, is required to adopt and maintain a publication scheme approved by me. The purpose of this scheme is to provide access to information that an authority readily makes available, without an applicant having to go through the formal process within FOISA.
26. Each publication scheme sets out the classes of information that are published by the authority and, for each class, details the manner in which the information is made available and whether a charge will apply.
27. Section 25(3) of FOISA creates the presumption that where information is made available in accordance with an authority's publication scheme, it is reasonably accessible, and so subject to an absolute exemption from release under the terms of Part 1 of FOISA. Instead, the information should be made available under the terms set out in the publication scheme.
28. In its submissions to my Office, the Council provided me with a link to the Joint Board's publication scheme. Having accessed this link, I found that the information which would satisfy MacRoberts requests was available from the publication scheme of the Joint Board. I found that the relevant information which MacRoberts were seeking is contained within the publication scheme at paragraph 2.1.1 under the heading of Valuation Roll and at paragraph 2.1.2 under the heading of Council Tax Valuation List. The publication scheme indicates that there is a charge associated with accessing this information and these charges are laid down under paragraph 6.2, which states that the cost of the Valuation Roll for the North Ayrshire area is £50 and the cost of the Council Tax Valuation List is £670 for the North Ayrshire area. The publication scheme provides details of who the applicant should contact to request the information and states that this information can be provided in either microfiche or CD Rom format.
29. Having accessed the publication scheme for the Joint Board, as indicated above, I am satisfied that the information which MacRoberts is seeking is contained within the scheme. I am therefore satisfied that this information is available from another public authority's publication scheme and is therefore exempt from release by virtue of section 25 of FOISA.

The application of section 33(1)(b) – Commercial interests and the economy

30. As indicated above, the exemption contained in section 33(1)(b) of FOISA is a qualified exemption which is subject to the application of the public interest test and the substantial prejudice test as detailed in paragraphs 15 & 16 above.



31. Where an authority considers that section 33(1)(b) applies to information which is the subject of a request, it must indicate whose commercial interests might be harmed by disclosure (e.g. the Joint Board in this case), the nature of those commercial interests and how those interests will be prejudiced substantially.
32. In its submissions, the Council has asserted that the Joint Board has a reasonable expectation that it should be able to recover the cost of producing information. The Council states that for the information that has been sought by MacRoberts to be made available without payment of what it deems to be reasonable charges would have an impact on the financial viability of the organisation, particularly given the use to which the information may be put in commercial terms. In relation to its justification of its reliance on the exemption under section 33(1)(b), the Council has also asserted that, although the Joint Board is a public body, it still has to minimise its costs. The Council conclude that if it were to offer the information sought by MacRoberts then this would deprive the Joint Board of funds, and would therefore be prejudicial to the Joint Board.
33. In applying the terms of the harm test and the public interest test to the information that has been withheld, the Council has indicated that it is of the view that as the information is otherwise available through the Joint Board no prejudice would be suffered by the public in North Ayrshire if the Council did not disclose this information.
34. In determining whether the Council has correctly relied on the exemption under section 33(1)(b) of FOISA, I must satisfy myself that the information withheld would come within the scope of section 33(1)(b). I must also be satisfied that release of this information would, or would be likely to, prejudice substantially the Commercial interests of any person. If I am satisfied that release of this information would or, would be likely to prejudice substantially the commercial interests of any person and would therefore be exempt under section 33(1)(b), I must then go on to consider the application of the public interest test.



35. In considering whether the information withheld by the Council is exempt under section 33(1)(b), I have taken cognisance of the submissions made by the Council and the content of my briefing on the section 33(1)(b) exemption. From reading the submissions from the Council, it is my understanding that the Council are concerned about the financial implications that the release of this information by the Council would have on the Joint Board. The exemption under section 33(1)(b) relates to the release of the information prejudicing substantially the commercial interests of any person (this includes another public authority). In my briefing on the exemption I have highlighted that commercial interests are different from financial interests and, further, that commercial interests relate to a person's ability to successfully participate in a commercial activity, for example the sale and purchase of goods and services.
36. From the submissions made by the Council, I am not satisfied that the provision by the Joint Board of the Valuation Roll and the Council Tax Valuation List, for a fee amounts to the sale of goods or services. The information contained within these lists is prepared and maintained by the Assessor to the Joint Valuation Board as a result of a statutory function under section 84 of the Local Government Finance Act 1992. The Local Government Finance Act 1992 is the legislation which allows Scottish local authorities to charge Council Tax and Non domestic rates. This legislation prescribes the duties that must be carried out by Scottish local authorities in relation to determining what valuation banding individual dwellings should come under, and therefore what level of Council Tax occupants will have to pay. The same applies in respect of the calculation for non domestic rates. Part of the duties prescribed within the legislation is a duty on the Assessor appointed by the Joint Valuation Board to prepare and maintain a list of all domestic and non domestic properties in their area. These lists are known as the Valuation Roll and the Council Tax Valuation List. Section 91 of the Local Government Finance Act 1992 states that the Assessor has a statutory duty to make information available in relation to these Valuation Lists under certain circumstances. Furthermore, the website for the Ayrshire Valuation Joint Board clearly indicates that these lists are prepared and maintained by the Assessor to the Joint Valuation Board under a statutory requirement and that these two documents are public documents which are open to inspection and scrutiny by members of the public. I am therefore not satisfied that the information contained in the Valuation Roll and the Council Tax List is information which is provided in a commercial environment for commercial interest.
37. For the reasons given above, I am not satisfied that the information which MacRoberts are seeking is information which is produced by the Joint Board as a service which they charge for in a commercial environment. I accept that if the Council were to release this information to MacRoberts it may cause financial detriment to the Joint Board. However, I am not satisfied that it would be detrimental to the Joint Board's commercial interests.



38. In considering the application of the substantial prejudice test in relation to this exemption, the Council has provided submissions as to why it believes that release of this information would, or would be likely to, prejudice substantially the commercial interests of the Joint Board. These submissions are detailed above. The Council has asserted that no prejudice would be suffered by the public of North Ayrshire if the Council did not disclose this information to MacRoberts. I do not believe that the Council has interpreted the substantial prejudice test under section 33(1)(b) correctly. In applying the substantial prejudice test the Council is required to detail what substantial prejudice it believes would be suffered by the Joint Board if it were to release the information sought by MacRoberts. I am not satisfied that the Council has done this. In other submissions, the Council did indicate that it was of the view that if it did release this information this would deprive the board of funds and would be prejudicial to them. I accept that this may have financial implications on the Joint Board, but not that it would affect the Board's commercial interests. Taking into account all the submissions from the Council in respect of this, I am not satisfied that the Council has shown that release of this information by the Council would be substantially prejudicial to the commercial interests of the Joint Board. I am therefore not satisfied that the information which the Council has withheld from MacRoberts is exempt under section 33(1)(b).
39. As I am not satisfied that the information which the Council has withheld from MacRoberts is exempt under section 33(1)(b) of FOISA, I am not required to go on to consider the application of the public interest test.
40. Although I have not accepted that the information is exempt under section 33(1)(b) of FOISA I do not require the Council to take any action as I have found that the Council relied on the exemption under section 25 correctly.



Decision

I find that North Ayrshire Council (the Council) dealt with MacRoberts' requests for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). I find that the exemption in section 25 was relied upon correctly by the Council and, as a result, that section 1(1) of FOISA was applied correctly.

I find that the Council did not deal with MacRoberts' requests for information in accordance with Part 1 of FOISA in relying on the exemption contained in section 33(1)(b). As a result, I find that section 1(1) of FOISA was not applied correctly.

I do not require the Council to take any action in relation to this breach as the information requested has been found to be exempt under section 25 of FOISA.

Kevin Dunion
Scottish Information Commissioner
20 June 2006