



Scottish Information
Commissioner

**Decision 162/2007 Mr Mark Howarth and the
Scottish Ministers**

Two properties affected by the M74 completion scheme

**Applicant: Mr Mark Howarth
Authority: The Scottish Ministers
Case No: 200600276
Decision Date: 13 September 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 162/2007 Mr Mark Howarth and the Scottish Ministers

Request for all correspondence, notes and documents held by the Ministers relating to property at 38 and 58 Southcroft Road, Rutherglen – some information supplied – some information withheld under sections 33(1)(b) and 36 of FOISA – Commissioner partially upheld Ministers' decision

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General Entitlement); 2 (Effect of exemptions); 33(1)(b) (Commercial interests and the economy); 36 (Confidentiality).

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

Facts

Mr Howarth e-mailed the Scottish Ministers (the Ministers) requesting copies of all correspondence, notes and documents held relating to two properties located at 38 and 58 Southcroft Road Rutherglen. The Ministers supplied Mr Howarth with some information but withheld some on the basis that the exemptions in sections 33(1)(b) (Commercial interests and the economy) and 36 (Confidentiality) of FOISA applied. The Ministers' position was upheld on review and Mr Howarth applied to the Commissioner for a decision.

Following investigation, the Commissioner found that the Ministers had wrongly cited section 36 of FOISA in withholding certain information as subject to an obligation of confidentiality of one or other of the varieties caught by that section. However, he accepted the withholding of other information under that section and of certain other information under section 33(1)(b) of FOISA (being information whose disclosure would, or would be likely to, prejudice substantially a person's commercial interests).



Background

1. On 23 February 2005 Mr Howarth sent an email to the Ministers requesting the following information:

All correspondence and notes held by the Scottish Executive relating to property at the following two locations:

38 Southcroft Road, Rutherglen G73 1UG

58 Southcroft Road, Rutherglen G73 1UG

These properties fall under the route of the M74 completion scheme and were acquired by Scottish Ministers for the purposes of that scheme.

2. The Ministers sought clarification of Mr Howarth's request and on 1 March 2005 he wrote again to the Ministers, requesting the same information but adding a list of 5 points specifying the information he sought in greater detail.
3. In his 1 March email, Mr Howarth sought all correspondence, notes and documents referring to:
 - a) *the process by which the determination of route through said property was arrived at;*
 - b) *the process by which the ownership of said property was determined;*
 - c) *how, when, by whom and with whom the sale of said property to Scottish Ministers was negotiated, arranged and concluded;*
 - d) *any rental arrangements which pertain to said property which have come into force since the sale;*
 - e) *any involvement by Members of Parliament, Members of the Scottish Parliament or their representatives in the issues outlined above.*
4. The Ministers responded to Mr Howarth on 23 March 2005. In their response the Ministers supplied Mr Howarth with information relating to points (a)-(d). However, the Ministers withheld some information under headings (c) and (d) on the basis that the information was exempt under section 33(1)(b) (Commercial Interests and the economy) or section 36(1) (Confidentiality) of FOISA.
5. The information sought under heading (e) has previously been subject to an investigation, which culminated in my decision notice 071/2005.



6. Mr Howarth was dissatisfied with the Ministers' response and, on 23 November 2005, made a further request for the information that the Ministers had determined to be exempt in its 23 March letter.
7. The Ministers responded to Mr Howarth's further request on 15 December 2005, adhering to their previous decision to withhold the information under sections 33(1)(b) and 36(1) of FOISA.
8. On 15 December 2005 Mr Howarth requested that the Ministers review the decision contained in its letter dated of the same date, requesting specifically that it look again at the information withheld under section 36(1) of FOISA.
9. The Ministers responded to this request for review on 19 January 2006, upholding without amendment their original decision to withhold the information under sections 33(1)(b) and section 36(1).
10. Mr Howarth was dissatisfied with the Ministers' decision and on 2 February 2006 applied to me for a decision as to whether the Ministers had dealt with his request for information in terms of Part 1 of FOISA. The application was allocated to an investigating officer and validated by establishing that Mr Howarth 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 his request.

The Investigation

11. A letter was sent to the Ministers on 9 March 2006, in terms of section 49(3)(a) of FOISA, giving notice that an appeal had been received and that an investigation into the matter had begun. The Ministers were invited to comment on Mr Howarth's application as a whole, and more specifically were asked to provide a copy of the information withheld from Mr Howarth and their reasons for applying the exemptions claimed in relation to that information.
12. The Ministers responded, following further clarification from my Office, on 21 April 2006. The Ministers explained that they did not withhold any information in relation to headings (a) and (b) of Mr Howarth's request and (heading (e) having been the subject of my decision 071/2005) its submissions were in relation to headings (c) and (d) only.



13. The Ministers had supplied Mr Howarth with 3 packages of information which fell within the scope of parts (c) and (d) of his request. Packages A and B were released in full to Mr Howarth. Package C, which was supplied to my Office, contained redactions on the basis that the exemption within section 33(1)(b) of FOISA applied. Some information was also redacted from Package C on the basis that it did not fall within the scope of Mr Howarth's request.
14. A number of documents were also withheld in their entirety on the basis that either or both of the exemptions contained within sections 33(1)(b) and 36(1) of FOISA applied.
15. On 20 July 2006, having considered the information withheld, my investigating officer sought further submissions relating to the Ministers' application of section 36(1) of FOISA in withholding a number of documents.
16. The Ministers responded to this query on 13 December 2006. In their response, the Ministers provided a revised schedule of documents originally withheld (documents 1-36). In doing so, the Ministers clarified their reliance on section 36(1) of FOISA in withholding a number of documents. In addition, the Ministers considered that the exemption contained within section 36(2) of FOISA applied to a number of documents originally withheld under section 36(1).
17. During the course of the investigation, further submissions were sought by my office relating to specific documents withheld. The Ministers also released further information (documents 18, 20, 22, 25 and 34) to Mr Howarth during the investigation.

The Commissioner's Analysis and Findings

18. 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 Howarth and the Ministers and am satisfied that no matter of relevance has been overlooked.



Section 33(1)(b) (Commercial interests and the economy)

19. As stated earlier, the Ministers supplied Mr Howarth with 3 packages of information which fell within the scope of his request. Packages A and B were released in full to Mr Howarth. Package C was supplied to Mr Howarth subject to redaction and the removal of certain documents.
20. The Ministers redacted information from package C citing section 33(1)(b) of FOISA. The Ministers also withheld 4 documents in their entirety under the same exemption. Section 33(1)(b) specifies that information is exempt information where disclosure would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). The exemption in section 33(1)(b) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA.
21. Within their submissions, the Ministers argued that redactions were made on the basis that the redacted information would identify a third party to the proceedings and disclosure might have affected a commercial and contractual relationship, potentially resulting in loss of business and jobs. The Ministers submitted that the contractual relationship between these parties was not in any event relevant to the compensation payable for the properties and therefore there was little or no public interest in the release for the name.
22. Only in one instance was commercial information, other than the name of the third party redacted. The Ministers submitted that this information was commercially sensitive as it concerned details of the operations of a commercial body, which if released could be of use to its competitors with a prejudicial effect on the body in question. Again, it considered there to be little or no public interest in the release of this information.
23. Having reviewed the redactions made to package C, I am satisfied that the Ministers acted correctly in redacting this information under section 33(1)(b) of FOISA. In reaching this conclusion I am satisfied that the redactions made were economical in nature and related directly to sensitive commercial information which if released could cause damage to a business relationship of a third party and provide information to competitors which would prejudice substantially the commercial interests of that party.
24. I also note and accept the minor redactions made by the Ministers to remove information which was not relevant to Mr Howarth's request.
25. I am also satisfied that the public interest in maintaining the exemption outweighs that of disclosure in this instance. I see no compelling public interest in disclosure of this information, taking due account of the information which has previously been provided to Mr Howarth.



26. Originally two documents were also withheld in their entirety on the basis that the section 33(1)(b) applied. This was later revised to four documents following correspondence with my Office.
27. For ease of reference, I shall deal with the two documents originally withheld by the Ministers under this exemption in the first instance. In one document the Ministers withheld an e-mail exchange which contained bank account details of representatives of a party to the negotiation proceedings, which the Ministers did not considered particularly relevant to the request. The second document is a copy of presentation slides provided to the Ministers from that same party. This presentation contains a subjective valuation of part of a business, along with details of that business's contracts. The Ministers considered that this information would be of value to this party's competitors, potentially allowing them to gain a commercial advantage. It therefore considered that the release of this information would be likely to substantially prejudice the commercial interests of that party. Furthermore, in light of the volume of information already provided in response to Mr Howarth's request, the Ministers assessed that the information would not provide further insight on the negotiations and therefore the public interest in disclosure was outweighed by the public interest in preventing potential harm to the party's business.
28. Having reviewed the content of these documents, I am not satisfied that the first document falls within the scope of Mr Howarth's request. This document contains the bank details of the sellers' solicitors and will not be considered further in this decision.
29. However, I am satisfied that the second document, which details the financial negotiating position of one of the parties directly involved, does fall within the scope of Mr Howarth's request. Having considered the content of this document, I am satisfied that disclosure would prejudice substantially the commercial interests of the party who provided the information. In reaching this conclusion, I take the view that the self-evaluation of a company's assets and details of its existing contracts contained within the presentation, if released, could provide a commercial advantage to direct competitors.
30. I am also satisfied that the public interest in maintaining the exemption outweighs that of disclosure in this instance. I see no compelling public interest in disclosure of this information particularly, having taken into consideration the information which has previously been released to Mr Howarth.



31. As stated above, during the course of the investigation the Ministers applied section 33(1)(b) to a further two documents (documents 16 and 27). Having considered the content of these documents, I am not satisfied that they fall within the scope of Mr Howarth's request as they relate to exchanges of information which is not directly related to the sale of the properties in question or the associated negotiations.
32. As I have concluded that documents 16 and 27 fall outwith the scope of Mr Howarth's request, I shall not consider them further in this decision.

Section 36(1) (Confidentiality)

33. Section 36(1) of FOISA allows a public authority to withhold information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. One type of communications covered by the exemption are those which are subject to legal advice privilege. This covers advice from a solicitor to a client and information passed by a client to their solicitor for the purposes of obtaining legal advice, and this includes staff in a public authority taking legal advice from solicitors employed within the same authority. In such a case the public authority, as client, has the right to waive the legal advice privilege and must waive do so where, on balance, the public interest in disclosure of the information outweighs the public interest in maintaining the exemption in section 36(1).
34. A plea of confidentiality is most commonly claimed in respect of communications between solicitor and client, the justification for this being that there should be a safeguard to ensure that clients can be candid with their legal advisers.
35. In their original submission, the Ministers applied section 36(1) of FOISA in withholding a number of documents. The Ministers argued that this information reflected legal advice obtained in respect of the transaction and in relation to the conveyancing of the property in question. Upon review of the information withheld, my investigating officer sought further submissions from the Ministers relating to their reliance on this exemption.
36. As a result, the Ministers reconsidered its application of section 36(1) concluding that only 3 documents (documents 3, 4 and 5) constituted the provision of legal advice from solicitor to client.
37. However, the Ministers also applied section 36(1) to documents 8, 9, 11, 12, 14, 15, 17, 19, 21, 29-33 and 35. The Ministers distinguished these documents from those containing exchanges between solicitor and client and argued that these documents reflected exchanges between the then Office of the Solicitor to the Scottish Executive (OSSE) and various clients in the project team with the solicitors for the sellers of the property.



Documents 3, 4 and 5 – legal advice from solicitor to client

38. Document 3 is an email exchange between OSSE and a member of the Ministers' managing agent's team in Glasgow City Council. The Ministers explained that under section 4 of the Roads (Scotland) Act 1984, Glasgow City Council had been appointed by them to undertake certain functions in relation to the M74 completion scheme as the Ministers' agent.
39. Having considered the content of document 3 and given the relationship between the Ministers and Glasgow City Council in relation to the M74 completion scheme, I am satisfied that this document comprises of a request for and provision of legal advice between solicitor and client.
40. Document 4 is an e-mail from OSSE to the M74 completion scheme project manager providing legal advice. I am satisfied that this email meets the requirements of section 36(1) of FOISA.
41. Document 5 is a file note of a telephone call between OSSE and a member of the managing agent's team at Glasgow City Council. Again, given the relationship between the Ministers and Glasgow City Council for the purposes of the completion scheme, I am satisfied that this file note records the provision of legal advice by a solicitor to a client. Therefore, I am satisfied that this document satisfies the requirements of section 36(1) of FOISA.
42. Section 36(1) is a qualified exemption in that it is subject to the public interest test. I must now go on to consider whether the public interest would be better served by the information being withheld (and the exemption maintained) or released.
43. In its submissions, the Ministers argued that the public interest in withholding such advice was high and that only in particularly compelling cases would release be considered. The Ministers submitted that decisions were informed by such legal advice from its advisers and that the danger in disclosure of such advice was twofold – firstly by unreasonably exposing legal positions to challenge, and secondly by potentially diminishing the range and quality of that advice which would in turn damage the quality of the Ministers' decision-making.
44. As I have noted in previous decision notices (for example, 023/2005 Mr David Emslie and Communities Scotland), 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.



45. Although I acknowledge the wide public interest in the M74 completion scheme, having considered the content of these documents, I can see no compelling public interest in disclosure which would outweigh the public interest in maintaining the exemption in this instance.
46. I therefore find that the Ministers acted correctly in applying the exemption contained with section 36(1) of FOISA to documents 3, 4 and 5.

Documents 8, 9, 11, 12, 14, 15, 17, 19, 21, 29-33 and 35

47. There are a number of relationships in respect of which a claim of confidentiality could be maintained in legal proceedings. In this case, the Ministers argued that the documents detailed above contain exchanges between OSSE and various clients in the project team with the solicitors for the third party. This, the Ministers argued, was correspondence between solicitors acting on behalf of clients representing the views of those clients and even sharing information supplied by third parties engaged as professional advisers. The Ministers argued that there was a professional relationship between solicitors on both sides of the transaction which created an assumption and expectation that information contained in correspondence between them would be treated as confidential. In supporting its position the Ministers has cited the Law Society for Scotland's Solicitors' Code of Conduct in relation to the duty of confidentiality:

“The observance of client confidentiality is a fundamental duty of solicitors. This duty applies not only to the solicitors but also to their partners and staff, and the obligation is not terminated by the passage of time. This principle is so important that it is recognised by the courts as being essential to the administration of justice and to the relationship of trust which must exist between solicitor and client. Only in special circumstances may a court require a solicitor to break the obligation of confidentiality.”

48. Although I recognise the importance of confidentiality of communications between client and solicitor, the statement highlighted above clearly does not extend to communications between solicitors acting on behalf of their respective clients in a transaction.



49. Having considered the content of documents 8, 12, 14, 15, 19 (insofar as within the scope of the request – see paragraph 50 below) , 30, 31 and 35, I am not satisfied that the Ministers have applied the exemption contained within section 36(1) of FOISA correctly. These documents are exchanges between a member of OSSE acting on behalf of the Ministers and the solicitors acting for the sellers of the property. In the circumstances I am not satisfied that the information could be described as having a confidential character as between solicitor and client. I cannot identify any other relationship which would give rise to a claim of confidentiality of communications and which would be relevant in this situation and therefore cannot accept that the exemption in section 36(1) applies to the above documents.
50. Having reviewed the remaining documents withheld by the Ministers under this exemption I consider that document 9 and (in part) document 19 comprise information which does not fall within the scope of Mr Howarth's request. In document 19, the information in question is that at points 3 and 4 of the e-mail of 29 March 2004 (11:04), which relates to fees charged by parties providing services to assist negotiations. Document 9 (insofar as it does not replicate information contained in documents 7 and 8) is an e-mail exchange between OSSE and the sellers' solicitors which provides details of the sellers' legal fees. I am satisfied that in neither case is the information directly related to the subject matter of Mr Howarth's request and therefore that it falls outwith its scope.
51. Document 29 is an exchange between OSSE and the Valuation Office. Having reviewed the content of this exchange, I note that it relates to a property other than those referred to in Mr Howarth's request for information, and therefore conclude that this document does not fall within the scope of the request either.
52. As I consider documents 9, 29 and parts of document 19 to fall outwith the scope of Mr Howarth's request, I shall not consider them further in this decision.
53. Document 11 is an internal e-mail exchange between OSSE and the project manager of the M74 completion scheme. I am satisfied that this document comprises a request for, and the provision of, legal advice and therefore engages the exemption contained within section 36(1) of FOISA.



54. Document 17 is a request for VAT advice from OSSE. It is not a request for legal advice and was not made to a solicitor. Having considered the substance of this document, and given the similarity of content to document 18 (released in full to Mr Howarth), I find that the Ministers incorrectly applied section 36(1) in withholding this information. Document 21 is a continuation of the e-mail exchange provided in document 17. Having considered the content of this document, I am satisfied that it is a request for instruction between solicitor and client. However, given the content of document 18 which has previously been released into the public domain, I am not satisfied that the confidential character of this communication remains. In neither of these cases can I identify any relationship other than the solicitor/client one which would give rise to a claim of confidentiality of communications and which would be relevant in the circumstances, and therefore I am not satisfied that section 36(1) of FOISA is engaged.
55. Document 32 is an internal e-mail between two members of OSSE. This e-mail exchanges information relating to an issue arising from the leases under discussion. Although not directly an exchange between solicitor and client, I am satisfied that this document relays a message to a solicitor to be picked up on the client's behalf. Under these circumstances I am satisfied that section 36(1) of FOISA applies.
56. Document 33 consists of one e-mail exchanged between Glasgow City Council (as managing agent) and OSSE in response to document 32. In the circumstances, I am satisfied that it is an exchange between client to solicitor and therefore that section 36(1) of FOISA applies.

Public interest test

57. Sections 36(1) is subject to the public interest test contained in section 2(1)(b) of FOISA. Having determined that documents 11, 32 and 33 fall within the scope of this exemption I must go on to consider whether the public interest in disclosing the information requested is outweighed by the public interest in maintaining the exemption.
58. In this instance I am satisfied that the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. In reaching this conclusion I have taken into account whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation; or whether this information would contribute to the effective oversight of expenditure of public funds. Having considered the information in question I am not satisfied that disclosure would provide any further information to assist either of these aims, and therefore am satisfied that the strong public interest in maintaining the exemption (see paragraph 44 above) should prevail.



Summary

59. I am satisfied that the Ministers acted correctly in withholding documents 3, 4, 5, 11, 32 and 33 under section 36(1) of FOISA.
60. However, I find that the Ministers acted incorrectly in applying section 36(1) of FOISA in withholding documents 8, 12, 14, 15, 17, 19, 21, 30, 31 and 35. The Ministers have also cited section 36(2) of FOISA in withholding documents 8, 12, 15, 19, 31 and 35. The application of this exemption will be considered below.
61. Further, I find that documents 9, 29 and parts of document 19 (see paragraph 50 above) do not fall within the scope of Mr Howarth's request.

Section 36(2) – Documents 1, 2, 6, 7, 8, 10, 12, 13, 15, 19, 23, 24, 26, 28, 31, 35 and 36

62. The Ministers also cited section 36(2) of FOISA in withholding the documents detailed above. On the same basis as I have concluded that document 9 and part of document 19 do not fall within the scope of Mr Howarth's request, I have reached the same conclusion in respect of the sixth and seventh sentences from the end of document 6 (i.e. from the words "My fee" to the word "thereafter") and the penultimate sentence in document 36 (i.e. from the words "given that" to the words "plus VAT"). Like document 9, these phrases relate to the sellers' legal fees. Document 24 simply duplicates the e-mail of 29 March 2004 (11:04) in document 19, and therefore I will not consider it separately in this decision.
63. Section 36(2) provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or by any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA, but it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest.
64. Section 36(2) outlines a two stage test which must be fulfilled before the exemption can be relied upon. Firstly, the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and includes another individual, another Scottish public authority or any other legal entity, such as a company or partnership.



65. The second part of the test is that the disclosure of the information by the public authority would constitute a breach of confidence actionable either by the person who gave the information to the public authority 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.
66. Document 1 is a copy of a Counsel's Opinion obtained by the sellers of the property, along with the relevant letter of instruction to Counsel. During the course of the investigation my investigating officer queried the circumstances under which this document came into the possession of the Ministers. The Ministers explained that it was passed to the project manager of the M74 scheme from the lead negotiator for the sellers before detailed negotiations on the purchase price had begun.
67. I am satisfied that this information was obtained from another person, namely the chief negotiator of the sellers.
68. The second part of the test is that the disclosure of the information by the Ministers would constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person.
69. There are three main requirements, all of which must be met before a claim for breach of confidentiality can be established. These are:
- a) the information must have the necessary quality of confidence;
 - b) the public authority must have received the information in circumstances from which an obligation on the authority to maintain confidentiality could be inferred; and
 - c) there must be a disclosure or use of the information which has not been authorised by the person who communicated the information but which would cause damage to that person.
70. I am satisfied that the information requested has the necessary quality of confidence, as is it is not currently in the public domain and Mr Howarth would not be able to create the information himself.
71. Looking at the Ministers' explanation of the circumstances under which they obtained this information, I am satisfied that they received it in circumstances which imposed a duty of confidentiality. The information was shared between the representatives of two parties that were at the time embarking on commercial negotiations of some value, it would appear (and it is difficult to imagine any other intention) for the purposes of those negotiations. In the circumstances, I would accept that they were shared under an implicit obligation of confidentiality.



72. Finally, I am satisfied that disclosure of the information at the time the Ministers dealt with Mr Howarth's request would have been damaging to the third party which provided it. While I note that the relevant negotiations were completed at the time of Mr Howarth's request, I consider that the information would still at that time have been of some value to a competitor of the third party and therefore am satisfied that there would have been sufficient potential for detriment as a consequence of release. I am also satisfied that none of the relevant defences to an action of breach of confidentiality would apply, and in particular can identify no compelling public interest of a kind that would justify disclosure. In all the circumstances, therefore, I am satisfied that the Ministers were justified in applying the exemption in section 36(2) of FOISA to document 1.
73. The remainder of the information withheld by the Ministers under section 36(2) comprises parts of a course of correspondence between OSSE and the solicitors acting for the sellers of the property in relation to the negotiation and agreement of terms for its sale and lease. Of these, each of documents 8, 12, 15, 26 and 28 was partly generated by OSSE and partly duplicates other documents I have been asked to consider under this exemption. I will consider the content of the duplicated documents further below and therefore will confine my analysis of documents 8, 12, 15, 26 and 28 to those elements generated by OSSE.
74. OSSE, it should be borne in mind, is an integral part of the Scottish Ministers, and therefore its communications cannot be said to have been obtained from another person for the purposes of section 36(2), except of course to the extent that they contain information actually obtained from a person outwith the Ministers.
75. Having examined documents 8, 12, 15, 26 and 28, I can identify only one item of information that could reasonably be claimed to have been received from another person. That is the amount of compensation payable in respect of a property as advised by the District Valuer. That information has, however, been provided to Mr Howarth in the final concluded missives for the sale of that property and therefore I cannot accept that it has the requisite quality of confidence for section 36(2) to apply. Consequently, I cannot accept that the Ministers have applied section 36(2) of FOISA correctly to documents 8, 12, 15, 26 and 28



76. Of the remaining documents withheld under section 36(2), documents 2, 19 (insofar as falling within the scope of the request), 31 and 35 each contain a combination of communications from OSSE and communications from the solicitors acting for the sellers of the property. In the communications emanating from OSSE, once again the only information I can identify that could reasonably be claimed to have been received from another person are figures originating with the District Valuer which Mr Howarth will have in the concluded missives. I cannot therefore accept that the Ministers have applied section 36(2) of FOISA correctly to those parts of documents 2, 19, 31 and 35 comprising communications from OSSE.
77. I accept that the communications in documents 2, 6 (insofar as falling within the scope of the request), 7, 10, 13, 19 (insofar as falling within the scope of the request), 23, 31, 35 and 36 sent to OSSE by the solicitors acting for the sellers of the property, along with one other email in document 35 which was created by another professional adviser and forwarded to OSSE by the sellers' solicitors, all qualify as information obtained from another person for the purposes of section 36(2). Additionally, some of these documents contain information which evidently originated with another third party, the District Valuer.
78. I have considered whether the communications listed in paragraph 77 above could be said to possess the requisite quality of confidence for section 36(2) to apply. They relate to negotiations which led to the concluded missives of sale and lease in relation to the property, which have been released to Mr Howarth. To a large extent, they say what would be expected in the course of any transaction of this kind and much of what is said is reflected in the final missives in any event. I do, however, accept that the precise terms of these documents are not in the public domain and that Mr Howarth would not be in a position to recreate them himself.
79. While I accept that these communications may have passed under an implicit expectation of confidentiality, I have difficulty accepting that any obligation of confidentiality which may have existed in relation to them continued to apply in full at the time Mr Howarth submitted his request. By that time, ownership had passed to the Ministers almost 11 months before, the missives were binding and irrevocable, and indeed they remained in force only for the purposes of the leaseback to the sellers pending the Ministers requiring full access to the site. In any event, Mr Howarth was provided with copies of the concluded missives of sale and lease in response to his request for information and therefore I have difficulty accepting that there could still have been a binding obligation of confidentiality applying to those parts of the communications which simply reflected what was in the concluded missives or narrated aspects of routine commercial conveyancing practice.



80. Similarly, while I accept that a degree of damage to the seller (perhaps small, but still sufficient to engage the exemption in section 36(2)) could be said to follow from the release of elements of the communications where views on aspects of the negotiations were expressed with some candour (particularly where the sellers' position is not reflected in the final missives), I cannot envisage damage of any kind arising from disclosure of the majority of the information withheld in these documents.
81. In conclusion, I find that the Ministers incorrectly applied the exemption contained within 36(2) of FOISA to documents 2, 6 (insofar as falling within the scope of the request), 7, 8, 10, 12, 13, 15, 19 (insofar as falling within the scope of the request), 23, 26, 28, 31, 35 and 36, with the following exceptions (which I would accept as being exempt under section 36(2):
- a) The tenth and eleventh sentences in document 6 (i.e. from the words "If my" to the words "year's time";
 - b) The sixth paragraph of document 7;
 - c) The fourth, sixth, tenth and eleventh paragraphs of document 10 (with any relative handwritten notes);
 - d) The second paragraph of document 13;
 - e) In the email of 30 March 2004 (09:55) in document 31, the third, seventh and eighth.

Decision

I find that Scottish Ministers (the Ministers) complied with Part 1 of FOISA in applying the exemption in section 36(1) to the information in documents 3, 4, 5, 11, 32 and 33, the exemption in section 36(2) to document 1, and the exemption in section 33(1)(b) to the redactions made to Package C and to one of the documents originally withheld in their entirety under this exemption (the other documents withheld under this section not falling within the scope of Mr Howarth's request).

However, I find that the Ministers misapplied sections 36(1) and/or 36(2) of FOISA in withholding the following documents (insofar as falling within the scope of Mr Howarth's request): 2, 6, 7, 8, 10, 12, 13, 14, 15, 17, 19, 21, 23, 26, 28, 30, 31, 35 and 36. I require the Ministers to disclose this information to Mr Howarth within 45 days after the date of intimation of this notice.



Appeal

Should either Mr Howarth or the Ministers 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 after the date of intimation of this notice.

Kevin Dunion
Scottish Information Commissioner
13 September 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.

33 Commercial interests and the economy

- (1) Information is exempt information if-
 - (a) ... ; or
 - (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

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.