



Scottish Information  
Commissioner

**Decision 053/2008 Mr Ian McKerracher and East Dunbartonshire  
Council**

*Road incident report*

**Applicant: Mr Ian McKerracher  
Authority: East Dunbartonshire Council  
Case No: 200701347  
Decision Date: 15 April 2008**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
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## **Decision 053/2008 Mr Ian McKerracher and East Dunbartonshire Council**

***Request for a copy of a road incident report - information withheld under section 36(1) of Freedom of Information (Scotland) Act 2002 – Commissioner upheld the Council's decision to withhold the report***

### **Relevant Statutory Provisions and Other Sources**

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Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 21(1), (4) and (5) (Review by Scottish public authority) 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.

Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the section 60 code).

### **Facts**

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Mr McKerracher requested from East Dunbartonshire Council (the Council) information relating to a specified road incident. The Council responded by releasing a range of documents. Mr McKerracher was not satisfied with this response and asked the Council to review its decision because a road incident report had not been supplied. The Council carried out a review and, as a result, notified Mr McKerracher that it was withholding the road incident report under section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr McKerracher remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had complied with Part 1 of FOISA in dealing with Mr McKerracher's request, finding that the road inspection report was exempt from disclosure under section 36(1) of FOISA.



## Background

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1. Mr McKerracher wrote to the Council (in an undated letter) requesting the following information in relation to an incident that had occurred in April 2007:
  - a. Copies of all correspondence between the Council and Gallagher Bassett [the Council's claim handlers] in respect of the incident.
  - b. Copies of inspection logs, maintenance schedules and relevant action regarding a particular section of road over a period of 1 year.
  - c. Copies of reports on how and when the Council were made aware of a defect.
2. The Council responded on 27 June 2007 releasing information in response to Mr McKerracher's request.
3. Mr McKerracher wrote to the Council on 11 July 2007 requesting a review of its decision. Mr McKerracher specifically expressed dissatisfaction that a copy of the road incident report (the Report) from the Council to Gallagher Bassett regarding his claim was not released to him.
4. On 23 July 2007, the Council wrote to Mr McKerracher informing him that the Report was being withheld under section 36(1) of FOISA, on the basis that it was information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings.
5. Mr McKerracher then wrote to my Office, in a letter dated 11 August 2007, 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. This letter was received by my office on 12 October 2007.
6. The application was validated by establishing that Mr McKerracher had made a request for information to a Scottish public authority (i.e. the Council) and had applied to me for a decision only after asking the authority to review its response to that request.



## The Investigation

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7. On 21 December 2007, the Council was notified in writing that an application had been received from Mr McKerracher and was asked to provide my Office with a copy of the Report. The Council responded on 7 January 2008 with the information requested and the case was then allocated to an investigating officer.
8. The Council's letter of 7 January provided details of the reasoning applied when withholding the Report. The investigating officer emailed the Council on 28 January 2008 formally inviting it to comment on the application in terms of section 49(3)(a) of FOISA, and asking it to confirm whether it wished to make any further submissions as to its reasons for withholding the Report. On 3 March 2008, the Council confirmed that it did not have any further submissions in addition to its response of 7 January 2008.
9. In correspondence with my Office, Mr McKerracher explained that he did not accept that the Council was entitled to withhold the Report. His correspondence also raised concerns about wider matters that fall outside my remit. I have taken Mr McKerracher's comments into consideration in this decision, insofar as they are relevant to the matters under FOISA that I am required to address.
10. On 6 March 2008 the investigating officer wrote to Mr McKerracher asking if he would like to submit any further public interest arguments as to why the Report should be released. No response was received to this letter (or to a subsequent follow-up letter).

## The Commissioner's Analysis and Findings

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### Section 36(1) - Confidentiality

11. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. One type of communication which falls into this category is communications 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).



12. In this instance 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 allow any person or organisation involved in a court action to 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; all that it required is that the document was prepared in contemplation of litigation.
13. The Report requested by Mr McKerracher which the Council holds to be exempt under section 36(1) is a road incident report produced by the Council following the receipt of a claim from Mr McKerracher. In its submissions to me, the Council argued that this document was created in anticipation of possible proceedings by Mr McKerracher and was therefore a communication *post litem motam*.
14. The Council referred to a number of my previous decisions, which it considered to be relevant to this case. In particular the Council made reference to *Decision 213/2007 Mr Rory Speirs and East Renfrewshire Council* in which I upheld that authority's decision to withhold a similar report which had been requested in similar circumstances.
15. In order to determine whether a claim to confidentiality of communications could be maintained in legal proceedings in 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 McKerracher in April 2007. The Report sought by Mr McKerracher was created by the Council on 10 May 2007, after it had received his claim. The Council has asserted that the Report was prepared in anticipation of possible legal proceedings by Mr McKerracher and that therefore the Report falls under the scope of section 36(1).
16. 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 McKerracher's insurance claim. I am satisfied in the light of these facts and the Report contents that it was prepared in contemplation of litigation and that it falls under the exemption contained within section 36(1) of FOISA.
17. 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 decides 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.



18. As I have noted in previous decision notices (such as *Decision 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. The same reasoning applies when considering litigation privilege.
19. The Council submitted that there is an important public interest in maintaining the confidentiality of communications made in anticipation of legal proceedings, which should not be overridden except in the most exceptional of cases. The Council considered the guidance I have issued on section 36(1) of FOISA and it stated that none of the public interest factors are present in Mr McKerracher's case, nor are there any other factors which would justify breaching the confidentiality which Scottish law attaches to communications post litem motam.
20. Mr McKerracher did not provide detailed comments explaining why he believed it was in the public interest for the Report to be released, although he made clear that he did not accept the Council's assertion that the public interest favoured withholding the Report. In considering the balance of public interest in this case, I have noted that disclosure would enable some insight into the Council's response to claims made by members of the public and into Mr McKerracher's own claim, and provide some insight into whether the Council has fulfilled its duty to maintain its roads to an acceptable standard.
21. I have considered the arguments relating to the public interest from both parties. I acknowledge Mr McKerracher's comments on this matter, and accept that there is some public interest in favour of releasing the information. In particular, I 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 and the handling of claims by members of the public. However, I also 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.
22. On balance I have found that the public interest in maintaining the exemption in section 36(1) outweighs the public interest in disclosing the information. I have therefore accepted that the exemption should be maintained in relation to the Report.

## **Section 21 - Review Response**

23. Mr McKerracher expressed dissatisfaction in his application to my Office that the Council reviewed its own decision in response to his initial request.
24. The key elements of a review under FOISA are:



- a. The review must be carried out and the applicant notified of the outcome within 20 working days of receipt of request for review.
  - b. Although FOISA itself is not prescriptive, the Section 60 Code states that procedures should be appropriate and accessible, fair and impartial and should allow for different decisions to be taken if appropriate (paragraph 65). It should generally be carried out by staff not involved in the original decision (paragraph 66).
25. I am satisfied that the Council complied with the timescale for review, and that the review was conducted by an officer other than the officer who first dealt with the request. I have concluded that the Council complied with the requirements of section 21 of FOISA (and particularly sections 21(1), (4) and (5)) in this case.
26. The review process followed by the Council was in line with that required by FOISA. This provides that a person should seek an internal review by an authority if they are dissatisfied with a response to their information request. Where an applicant remains dissatisfied with the outcome of this internal review process, they have the right to make an application to me for a on the case.

## Decision

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I find that East Dunbartonshire Council (the 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 McKerracher..



## **Appeal**

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Should either Mr McKerracher 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 after the date of intimation of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**15 April 2008**





## Appendix

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### 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.

##### 21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.  
[...]
- (4) The authority may, as respects the request for information to which the requirement relates-
  - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
  - (b) substitute for any such decision a different decision; or
  - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

##### 36 Confidentiality

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