

Decision Notice



Decision 079/2008 Chris Gallacher and the City of Edinburgh Council

Land occupied by Meadowbank Stadium

Reference No: 200701021

Decision Date: 14 July 2008

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Mr Chris Gallacher (Mr Gallacher) requested information relating to the land upon which Meadowbank Stadium is built from the City of Edinburgh Council (the Council). The Council provided some information but withheld information relating to the valuation of the land and any ongoing transactions in terms of section 33(1)(b) of FOISA. On review, the Council upheld its original decision but also noted that information relating to completed transactions was exempt under section 25(1) because it could be accessed in the Register of Sasines. Mr Gallacher remained dissatisfied and applied to the Commissioner for a decision.

After an investigation (in which other documents were identified, some of which were disclosed and others withheld by the Council in terms of section 36(1) of FOISA) the Commissioner found that the Council had partially failed to deal with Mr Gallacher's request for information in accordance with Part 1 of FOISA. The Commissioner found that the exemptions in sections 25(1) and 36(1) had been correctly applied by the Council, and so he found that the Council had acted in accordance with Part 1 of FOISA by withholding some of the information under consideration

However, the Commissioner found that information relating to the valuation of the land was not exempt in terms of section 33(1)(b). The Commissioner required two valuation reports to be disclosed to Mr Gallacher. The Commissioner was also critical of the Council's searches for information falling within the scope of Mr Gallacher's request.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 25(1) Information otherwise accessible); 33(1)(b) (Commercial interests and the economy) and 36(1) (Confidentiality)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.



Background

1. On 28 May 2007, Mr Gallacher wrote to the City of Edinburgh Council (the Council) requesting the following information:
 - a) How the Council lists in its assets the land currently occupied by Meadowbank stadium and sports centre and how the land is categorised.
 - b) The value of this land.
 - c) An overview of all the acquisitions of Meadowbank land it has made in the area of the stadium and sports centre - including land currently being acquired. Mr Gallacher indicated that the overview should provide the date of purchase, name of seller and how much money was spent on each purchase.
 - d) Information relating to a transaction by which the Council purchased 2.04 hectares of land in the vicinity of the stadium in 2005 for £100,000. Mr Gallacher asked the Council to provide as much information about this transaction as it was able and to clarify how it was able to purchase this land for such a small sum of money.
2. On 22 June 2007, the Council wrote to Mr Gallacher in response to his request for information. The Council provided a response to part a) of Mr Gallacher's request, indicating that the stadium is listed in the Council's assets as an operational stadium. The Council withheld the value of the stadium and information relating to the acquisition of land as it was considered exempt in terms of section 33(1)(b) of FOISA.
3. Mr Gallacher wrote to the Council on 24 June 2007, requesting a review of its decision.
4. On 18 July 2007, the Council wrote to Mr Gallacher and advised him that it had already provided him with a response to part a) of his initial request and it reiterated that Meadowbank Stadium is listed in the Council's asset register as an operational stadium.
5. In response to part b) of his initial request, the Council advised Mr Gallacher that it considered the current value of Meadowbank Stadium and sport centre to be commercially sensitive information and as such it was withholding it in terms of section 33(1)(b) of FOISA.
6. In response to part c) of his request, the Council advised Mr Gallacher that the information he sought regarding land transactions which have been concluded by the Council is publicly available in the Register of Sasines and is therefore exempt in terms of section 25 of FOISA. In relation to land transactions which were currently ongoing, the Council informed Mr Gallacher that it considered this information exempt in terms of section 33(1)(b) of FOISA.



7. Finally, in response to part d) of his request, the Council advised Mr Gallacher that the relevant purchase was one which was commercially negotiated, and it had no further information to add.
8. On 19 July 2007, Mr Gallacher wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying for a decision in terms of section 47(1) of FOISA. He indicated that he was dissatisfied with the response to part (a) of his request because he had asked about the listing and classification of the *land*, and the response had told him about the classification of the *stadium*. He submitted that he had twice been given an answer to a question he did not ask. With respect to the remaining parts of his request, he indicated that he believed that the information withheld should be disclosed.
9. The application was validated by establishing that Mr Gallacher had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.
10. On 31 July 2007, the Council was notified in writing that an application had been received from Mr Gallacher and was asked to provide the Commissioner 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.

Investigation

11. On 21 September 2007, the investigating officer wrote to the Council, in terms of section 49(3)(a) of FOISA, inviting its comments on the application and asking it to respond to specific questions relating to the case. In particular, the Council was asked to provide details of the searches undertaken to identify relevant documents, and to explain its reasoning when applying the exemption in section 33(1)(b) of FOISA.
12. The Council responded in writing on 17 October 2007. In its submissions, the Council explained that it was withholding the information in terms of section 33(1)(b) of FOISA.
13. In subsequent exchanges, the Council identified further documentation it held in relation to Mr Gallacher's request. During the investigation, the Council decided to release to Mr Gallacher all but eight of the documents it had identified as falling within the scope of his request. With regard to these eight documents, the Council informed the Commissioner that it was withholding three of the documents in terms of section 25(1) of FOISA, that it was withholding a further two documents in terms of section 33(1)(b) of FOISA, and that it was withholding the remaining three items in terms of section 36(1) of FOISA.



Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented to him by both Mr Gallacher and the Council and he is satisfied that no matter of relevance has been overlooked.
15. Before going on, it should be noted that the Commissioner's decision must consider whether the Council responded to Mr Gallacher's information request in line with Part 1 of FOISA at the time of its review of the request in July 2007. When reaching his decision, the Commissioner has not taken into consideration any developments after this point regarding the future of the Meadowbank stadium and the land upon which it is built. His decision has been made in the light of the circumstances in July 2007.

Mr Gallacher's information request

16. In his application to this office, Mr Gallacher asked the Commissioner to investigate the Council's handling of his request as he was dissatisfied with the responses it had provided to him in relation to parts a), b), c) and d) of his original request (as outlined in paragraph 1 of this Decision Notice).

Withheld Information

17. In this case, the Council has withheld a total of eight documents from Mr Gallacher. The numbering adopted in the decision follows that given to the documents by the Council in two schedules, which were submitted to the Commissioner in August and November 2007. Paragraph 18 lists the documents, and the exemptions applied to each. It also indicates the schedule in which each document was listed by the Council. In the remaining parts of this decision, the documents will be referred to by their number alone.

18. Three documents have been withheld in terms of section 25(1) of FOISA:

- Document 4 (August schedule) – land register certificate
- Document 5 (August schedule) - disposition
- Document 6 (August schedule) - disposition

Two documents have been withheld in terms of 33(1)(b) of FOISA:

- Document 9 (August schedule) – marketing report
- Document 10 (August schedule) – marketing report

Three documents have been withheld in terms of section 36(1) of FOISA:

- Document 3 (November schedule) - memorandum



- Document 7 (November schedule) - memorandum
- Document 8 (August schedule) - email

Part a) of Mr Gallacher's request

19. In its submissions, the Council argued that it had already fully answered part a) of Mr Gallacher's request and it referred the Commissioner to documentation which supported its response to Mr Gallacher on this point. In particular, the Council provided extracts from its Asset Management Database and its Terrier database. These items were also provided to Mr Gallacher during the investigation.
20. Mr Gallacher remains dissatisfied with the Council's responses to this part of his request, because these have referred to the listing of Meadowbank Stadium, whereas his request had asked about the listing and categorisation of the land on which the stadium is sited.
21. In the extract from the Council's Asset Management Database, the entry does not refer to the land itself but refers to Meadowbank Stadium, whose address it lists as being 139 London Road, Edinburgh. The Council has argued that although Mr Gallacher has requested information on the category of the land occupied by Meadowbank Stadium (and not the stadium itself) the land in question is generally referred to as Meadowbank Stadium. The Council has further submitted that as the other parts of the Meadowbank 'complex' (e.g. the velodrome, pitches, walls and ramps) do not appear elsewhere in the Asset Management Database, they can only be part of the 'Stadium' listing.
22. The extract from the Council's Terrier database provides a map of the Meadowbank area, with the Meadowbank Stadium and the surrounding area (inclusive of tennis courts, pitches and velodrome) highlighted in pale green. The Council has argued that the pale green colour signifies that the whole stadium (including all of its surrounding sports facilities and land) comes under the remit of the Culture and Leisure account (now part of Corporate Services). The Council maintain that the land on which Meadowbank and its supporting facilities is built is generally referred to as Meadowbank Stadium, and has no other land-use classification.
23. Mr Gallacher has argued that the database excerpts provided by the Council do not prove that the entirety of the land in the Meadowbank area (including the stadium, pitches, tennis courts, velodrome, etc) is generally regarded as Meadowbank Stadium. Mr Gallacher has submitted that he is not interested in how the stadium is listed in the Council's Asset Management Database, as it is the land on which the stadium is built (and which surrounds it) that he is seeking information about.
24. The Commissioner has reviewed the database excerpts provided by the Council and while he notes that neither of them explicitly refer to the entire Meadowbank complex and land, he accepts that the Council has no other listing for the land in its asset management database. Under the circumstances, the Commissioner is satisfied that the Council has provided Mr Gallacher with sufficient evidence supporting its position that the entirety of the Meadowbank land is listed under the term Meadowbank Stadium in the Council's list of registered assets.



Part b) of Mr Gallacher's request

25. In relation to part b) of Mr Gallacher's request, the Council has withheld two documents (9 and 10) which it claims are exempt from disclosure in terms of section 33(1)(b) of FOISA.
26. Section 33(1)(b) of FOISA states that information is exempt information if its disclosure 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).
27. There are certain elements to section 33(1)(b) of FOISA which an authority needs to demonstrate when relying on this exemption. In particular, it needs to indicate whose commercial interests might be harmed by disclosure, the nature of those commercial interests and how these interests would be prejudiced substantially by disclosure.
28. Even where an authority considers that section 33(1)(b) of FOISA applies to information which is the subject of the request, it must still go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
29. In this case, the Council has applied the exemption in section 33(1)(b) of FOISA to a 2004 marketing report on the value of the land upon which Meadowbank Stadium is built (document 9) and a 2006 report that provides a more up-to-date estimation of the property's value and the best options for its disposal (document 10). Both of these reports were commissioned by the Council and provided by external professional advisers.
30. The Council has argued that these two documents provide different valuations on the land, depending on different development scenarios. The Council has submitted that (at the time of its responses to Mr Gallacher, and disregarding any developments in the interim) the possibility existed that it would market the Meadowbank site in the future. It argued that if this happened it would be in the best interest of taxpayers for it to obtain the best price possible. The Council asserted that if the valuations of the land (contained within the two withheld documents) were released into the public domain, it would be likely to remove an element of competition from the marketing process. The Council further submitted that it is not unusual for Council assets to be sold at a substantially higher price than the valuation placed upon them internally, but if these valuations were made publicly known, this would be less likely to occur.
31. Mr Gallacher has argued that he, and a majority of the public the Council claim to serve, did not uphold the view that the Meadowbank site is Council land, available for it to sell in the pursuit of a maximum profit. Mr Gallacher maintained that the land upon which Meadowbank is built is public land which the Council has been entrusted to look after for the benefit of the city's residents and future generations. Mr Gallacher asserted that providing information on how the land had been independently valued would at least give the public a firm context in which to examine the land transactions conducted by the Council in the Meadowbank area.



32. In this case, the Council has argued that its own commercial interests would be substantially prejudiced by disclosure of the information, as disclosure (at the point in time that is relevant for this decision) would harm its ability to obtain the best value for the land belonging to the Meadowbank site if details of the two marketing reports were released. The Council submitted that it is required (as are all local authorities) to obtain best value on behalf of its taxpayers, and that therefore it is incumbent upon it to act in a commercial manner in relation to the sale of heritage. In short, the Council has asserted that it is required to obtain as much money as possible from the sale of land to enable it to improve the funding of its other activities.
33. In decision 233/2006 *Mr Mike Portlock and Glasgow City Council*, the Commissioner established that public authorities can have commercial interests but only where a particular commercial activity is being carried out. Furthermore, this decision set out the differences between financial and commercial interests, and advised that while financial interests will generally relate to the financial affairs of an organisation (and will include, but will not be limited to, the revenue generated by an organisation and the management of its financial assets) commercial interests will relate more directly to trading activity undertaken by an organisation, and will include activity relating to the ongoing sale and purchase of goods and services by that organisation, frequently for the purpose of revenue generation.
34. The Council has submitted that the commercial activity it is involved in is the selling of land and property for maximum value in a competitive commercial market. In this case, the Commissioner accepts that the activity of selling land and property on the commercial market is an activity in which the Council has commercial interests (as described in section 33(1)(b) of FOISA).
35. The Council has also submitted that its commercial interests (in relation to its ability to sell land for maximum profit) would be substantially prejudiced if the valuations of the (Meadowbank) land were made publicly available, as this would remove an element of competition from the marketing process. The Council indicated that disclosing the valuation reports would make it less likely for it to obtain a higher than average price for the land on the open market, as potential bidders would be aware of the Council's valuation before submitting a bid.
36. The Commissioner accepts that the information contained within documents 9 and 10 might well have been commercially sensitive at one time, as it outlines various options for its development and valuations of the land based upon each scenario. However, in previous decisions, the Commissioner has recognised that the commercial sensitivity of information may well diminish over a period of time. In this case, the Commissioner has noted that Mr Gallacher made his request for information to the Council on 28 May 2007. The valuation reports that have been withheld by the Council were produced in December 2006 and May 2004.
37. The Commissioner acknowledges that both reports contain information in addition to valuation data, but he questions whether disclosure of a marketing report produced three years before Mr Gallacher's initial request would be likely to substantially prejudice the commercial interests of the Council at the time of it conducting its review in July 2007. It seems unlikely that a commercial developer (and potential bidder) would base a bid on or gain any significant advantage from land valuations from 2004.



38. In respect of the more recent report the Commissioner accepts that disclosure of the information could have the capacity to adversely affect the Council's commercial interest if it was disclosed immediately prior to or in the course of selling the property. However, it is clear that at the time of Mr. Gallacher's request, that the marketing of the property was not underway nor was it imminent at the time of the Council's review of the application in July 2007. Given that the property market changes rapidly and that any potential developer would be highly likely to commission their own valuations before making any bid, it also seems unlikely to the Commissioner that the report of December 2006 would have provided any information of significant value to potential buyers at an uncertain future date, had it been disclosed at the time of the Council's review in July 2007.
39. The Commissioner is therefore of the view that the passage of time and change of circumstances has significantly affected the commercial sensitivity of the disposal options outlined in both reports. The second (2006) report itself notes that circumstances had changed significantly in the period since the 2004 report. The 2006 report is far briefer in nature than the 2004 report and the Commissioner finds it difficult to see how its disclosure would, or would be likely to, prejudice substantially the commercial interests of the Council, insofar as those interests are defined as enabling the Council to obtain the highest price for the land it chooses to sell, and the relevant point for consideration is July 2007.
40. Consequently, the Commissioner does not accept that disclosure of the two marketing reports (documents 9 and 10) at the time of responding to Mr Gallacher's request for review would, or would be likely to have, prejudiced substantially the commercial interests of the Council, and he does not uphold the application of the exemption contained in section 33(1)(b) to these two documents.
41. Accordingly, the Commissioner finds that the Council should now disclose documents 9 and 10 to Mr Gallacher.

Part c) of Mr Gallacher's request

42. In relation to part c) of Mr Gallacher's request, the Council has withheld three documents which it claims are exempt from disclosure in terms of section 25 of FOISA, and one document which it considers to be exempt in terms of section 36(1) of FOISA.
43. The following paragraphs will only discuss the three documents withheld in terms of section 25(1) of FOISA. The document withheld in terms of section 36(1) will be discussed later in this decision, along with the two documents relating to part d) of Mr Gallacher's request which the Council has also withheld in terms of section 36(1).
44. Section 25(1) of FOISA states that information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information. This is an absolute exemption in that it is not subject to the public interest test required by section 2(1)(b) of FOISA.



45. In this case, the Council has argued that information relating to land transactions concluded by the Council in the vicinity of Meadowbank Stadium (which includes the three withheld documents) are available in the Register of Sasines, which can be viewed by any member of the public. Consequently, the Council has submitted that the three withheld documents (4, 5 and 6) are publicly available and are therefore exempt in terms of section 25 of FOISA.
46. Mr Gallacher has submitted that the Register of Sasines is written in arcane legal jargon and that it is not readily understandable or searchable to a non-specialist. Mr Gallacher has argued that the Council and its solicitors should attempt to provide a better public service and demonstrate transparency by translating this information into a simple spreadsheet to enable an equal and informed dialogue to take place between the public and the Council.
47. The Commissioner has noted Mr Gallacher's arguments in relation to the Register of Sasines and acknowledges that although the Register is publicly accessible to anyone, it is not necessarily easily understandable for everyone. However, for information to fall under section 25(1) of FOISA, it only has to be reasonably obtainable to the applicant. In this case, the Commissioner is satisfied that the information can reasonably be obtained by Mr Gallagher via the public search facilities at the Registers of Scotland.
48. Therefore, the Commissioner is satisfied that the exemption in section 25(1) of FOISA has been correctly applied to the three withheld documents (4, 5 and 6). In the circumstances, the Council is under no obligation to synthesise such information from its own records and to present it in the form requested by Mr Gallacher.

Part d) of Mr Gallacher's request

49. In relation to part d) of Mr Gallacher's request, the Council submitted that it was withholding two documents (3 and 7) in terms of section 36(1) of FOISA. As stated above, the Council has also withheld another document (8) relating to part c) of Mr Gallacher's request in terms of section 36(1).
50. 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 communications which fall 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).
51. It is the first of these categories, i.e. legal advice privilege, which has been claimed by the Council in this particular case. This covers communications between lawyers and their clients, where legal advice is sought or given.
52. The exemption in section 36(1) of FOISA is subject to the public interest test as required by section 2(1)(b) of FOISA. This means that even if the Commissioner finds the information to be exempt in terms of section 36(1) of FOISA, he must order release of the information unless he is satisfied that the public interest in maintaining the exemption outweighs the public interest in the disclosure of the information.



53. In this case, two of the three documents are memoranda between the Council and its solicitors with the remaining document consisting of an email between the Council's solicitor and two other members of Council staff.
54. Having considered the information which has been withheld under section 36(1) and the relevant submissions made by the Council, the Commissioner is satisfied that the three documents identified by the Council are subject to legal advice privilege. The Commissioner has found that all three documents constitute communications between the Council and its legal advisors, wherein legal advice is provided to the Council by its legal advisors acting in their professional capacity and occurring within the context of their professional relationship with the Council.
55. As a result, the Commissioner accepts that this information is exempt in terms of section 36(1) of FOISA. Consequently, he is required to consider the application of the public interest test in section 2(1)(b) of FOISA.
56. 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.

Public Interest

57. As the Commissioner has stated in previous decisions, 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 and there are many judicial comments on the fundamental nature of this confidentiality in our legal system. Many of the arguments in favour of maintaining confidentiality of communications were discussed in *Three Rivers District Council and Others v Governor and Company of the Bank of England* (2004) UK HL 48: <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>
58. In Decision 023/2005, the Commissioner concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client and therefore, while he will consider each case on an individual basis, he is likely to order the release of such communications in highly compelling cases only. The Commissioner has reiterated this in a number of subsequent decisions.
59. The Council has argued that any public interest which may lie in disclosure of the three withheld documents (3, 7 and 8) is heavily outweighed by the need for local authorities to be able to obtain and consider legal advice in private. In light of this, the Council has submitted that there is no public interest argument in favour of disclosure.



60. Mr Gallacher has submitted that the public needs to have confidence that the Council is spending public money and managing public assets in the correct manner. To meet this requirement, Mr Gallacher has contended that any relevant communication between the Council and its solicitors relating to the management of public assets should be disclosed. Mr Gallacher has argued that release of this information would enable the public to assess whether the Council was managing their money and assets in a correct and acceptable manner, and that this transparency is in the public interest.
61. In relation to the purchase of land by the Council, Mr Gallacher has stressed that the Council needs to make the details of this land transactions publicly accessible, so that the public fully understand how it was able to purchase such a large piece of land for such a relatively small sum (£100,000). Mr Gallacher has argued that the issues raised by the purchase, combined with the Council's determination to sell public assets to private property developers, raises questions as to whether the Council is operating in the best interests of the public. Mr Gallacher has urged the Council to disclose all of the information it holds in relation to the transaction in order to increase transparency and reassure the public that no impropriety took place.
62. The Commissioner acknowledges the arguments put forward by Mr Gallacher regarding the public interest in ensuring that the Council is discharging its obligations with respect to managing its land and assets for the benefit of the public. However, the Commissioner has considered the three withheld documents, and it is his view that the information they contain is so routine that it would add few, if any, insights into how the Council manages its assets or disposes of its land, nor would it increase the transparency that Mr Gallacher is seeking.
63. Therefore, having considered the competing public interest arguments in relation to the specific documents in question, the Commissioner is of the view that the public interest in allowing legal advice to be received and discussed in confidence, outweighs that in disclosing the information in this case.
64. On balance, therefore, the Commissioner is satisfied that on this occasion the Council correctly applied the public interest test in withholding the information in the documents withheld under section 36(1) of FOISA.

Adequacy of searches

65. In part d) of his request, Mr Gallacher sought any information that the Council held relating to its purchase of 2.4 hectares of land in the Meadowbank area in 2005. In its responses, the Council advised Mr Gallacher that this land purchase was negotiated commercially and that it had no further information to add.
66. Later, in communications with the Commissioner, the Council advised that the negotiations for the purchase were conducted orally, by the Council's then Property Development Manager (who no longer works there) and that it held no record of any exchange of correspondence between the parties prior to missives.



67. The Council submitted it had searched the email accounts and files of the Property Development Manager along with the files of a surveyor who had assisted the Property Development Manager (and who had now also left the Council) and had found nothing relating to the transaction.
68. When questioned further in order to understand why there would be no records prior to the missives relating to transaction, the Council explained that the purchase was carried out under delegated authority in terms of paragraph 2.7.1 of its Department of City Development's Operational Handbook. The Council explained that this permitted its Property Development Manager to purchase land (up to a cost of £100,000) for a specific project that had been budgeted for.
69. In later communication, the Council confirmed that (contrary to its earlier submission it did not hold any correspondence relating to the purchase prior to missives being exchanged) it had identified a number of documents relating to this purchase that dated from before the missives were exchanged. The Council apologised for this oversight but submitted that it was withholding two of these documents in terms of section 36(1) of FOISA (discussed above), and it undertook to disclose others to Mr Gallacher at that stage. The Council reiterated that it appeared that the negotiations for this purchase took place orally, either at a meeting between the parties or by telephone; but in either case no notes of the discussions have been recorded or were held by the Council.
70. The Council also advised that it had now searched its email and paper records several times and had located no further documentation related to this purchase.
71. Although the Commissioner is surprised that so little information was held by the Council in relation to a significant land purchase, he is satisfied following detailed investigation that the Council has now located all of the material falling within the scope of Mr Gallacher's request.
72. However, the Commissioner is disappointed that the Council did not identify all relevant information when Mr Gallacher initially submitted his request. Additionally, he is concerned that the Council only located the documents created and exchanged prior to missives being exchanged in relation to the transaction after several requests from his Office. It is the Commissioner's view that during its handling of Mr Gallacher's request and the investigation by his Office, the Council repeatedly failed to conduct adequate searches. The delay in identifying relevant information had a significant impact on the time Mr Gallacher had to wait to receive additional information and a decision in this case.
73. The Commissioner recommends that the Council review its procedures for handling information requests, and particularly for identifying relevant information, in the light of the failures identified in this case.



DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Gallacher.

The Commissioner finds that by withholding documents 4, 5, and 6 in terms of section 25(1) and documents 3, 7 and 8 in terms of section 36(1) of FOISA, the Council complied with Part 1.

However, the Commissioner has found that the Council misapplied the exemption in section 33(1)(b) when withholding documents 9 and 10 (the two marketing reports) from Mr Gallacher. In so doing, the Council failed to comply with Part 1, and in particular section 1(1) of FOISA.

The Commissioner therefore requires the City of Edinburgh Council to disclose documents 9 and 10 to Mr Gallacher by 29 August 2008.

Appeal

Should either Mr Gallacher or the City of Edinburgh 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
14 July 2008

Decision 079/2008
Mr Gallacher
and the City of Edinburgh Council





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.

25 Information otherwise accessible

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

33 Commercial interests and the economy

- (1) Information is exempt information if-
...
 - (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.