

Decision 184/2006 – Hendersons, Chartered Surveyors and East Dunbartonshire Council
<i>Counsel's opinion on Flood Prevention (Scotland) Act 1961</i>

Applicant: Hendersons, Chartered Surveyors
Authority: East Dunbartonshire Council
Case No: 200600854
Decision Date: 11 October 2006

Kevin Dunion
Scottish Information Commissioner

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Decision 184/2006 – Hendersons, Chartered Surveyors and East Dunbartonshire Council

Request for Senior Counsel's opinion about section 11 of the Flood Prevention (Scotland) Act 1961 – information withheld under section 36 (Confidentiality) of the Freedom of Information (Scotland) Act 2002 (FOISA)

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 section 1(1) (General entitlement), section 2 (Effect of exemptions) and section 36 (Confidentiality)

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

Facts

Hendersons, Chartered Surveyors requested a copy of Senior Counsel's opinion, held by East Dunbartonshire Council (the Council), which related to compensation under section 11 of the Flood Prevention (Scotland) Act 1961.

The Commissioner found that the opinion was exempt in terms of section 36(2) of the Freedom of Information (Scotland) Act 2002 (FOISA) and that the Council had complied with Part 1 of FOISA in refusing to disclose the opinion.

Background

1. On 10 March 2006, Hendersons, Chartered Surveyors ("Hendersons") made a request to East Dunbartonshire Council (the Council) for a copy of legal advice (Senior Counsel's opinion). This advice, which had been referred to by the Council in an email to Hendersons, related to the interpretation of section 11 of the Flood Prevention (Scotland) Act 1961 (the 1961 Act).

2. The Council responded on 24 March 2006. It explained that the legal opinion had been obtained by another local authority which was also dealing with similar compensation issues in relation to a flood prevention scheme. The Council refused to disclose the copy of the opinion on the grounds that it constituted exempt information in terms of section 36 of the Freedom of Information (Scotland) Act 2002 (FOISA).
3. On 4 April 2006, Hendersons asked the Council to review the withholding of the legal opinion.
4. The Council communicated, on 20 April 2006, the findings of its review. This review upheld the initial decision that Senior Counsel's opinion was exempt information in terms of section 36 of FOISA.
5. Hendersons was dissatisfied with this review and wrote to my Office on 27 April 2006 requesting that I investigate.
6. The case was allocated to an investigating officer and the application validated by establishing that Hendersons had made a valid 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 their request.

The Investigation

7. A letter was sent by the investigating officer to the Council on 15 May 2006, formally asking for its comments on this application in terms of section 49(3)(a) of FOISA, and requiring a copy of Senior Counsel's opinion. The Council responded on 24 May 2006 providing a copy of the opinion and comments on the use of section 36 of FOISA.
8. The Council explained that between 1999 and 2002/3 it had constructed the River Kelvin Flood Prevention Scheme in exercise of its powers under the 1961 Act. This scheme had involved the construction of a large embankment on the banks of the River Kelvin and in its flood plain. This construction had given rise to compensation claims. Compensation in respect of flood prevention schemes is available under section 11 of the 1961 Act. This section provides that compensation is payable where the value of an interest in land has depreciated, or where damage is suffered as a result of disturbance in enjoyment of the land, in consequence of works carried out under the 1961 Act.

9. In dealing with those compensation claims, the Council was assisted by the District Valuer. The District Valuer is part of the Valuation Office Agency, which is an executive Agency of HM Customs, and is an independent agency which has been instructed by the Council to deal with compensation claims arising from the flood prevention scheme.
10. The issue in question was whether section 11 of the 1961 Act requires to be interpreted as to whether valuation refers to a part of a property affected (with a diminution of the value of that part of property) or to the whole of the property affected (which may therefore have less depreciation in value due to the construction which, for example, prevents future flooding).
11. In accordance with section 11(4) of the 1961 Act, disputes regarding compensation can be referred to the Lands Tribunal for Scotland. The Lands Tribunal for Scotland is an independent civil court. It has statutory power to deal with certain disputes involving land or property.
12. The Council had explained to Hendersons in an email of 23 February 2006 that it had given consideration to the 1961 Act and to a recent opinion from Senior Counsel (which had been obtained from another local authority), on the question of “betterment’ in relation to compensation payments. The Council advised Hendersons that it agreed with the District Valuer’s interpretation that betterment applied only under depreciation in value of interest in land and not on damage suffered by being disturbed in the enjoyment of land.
13. The Council explained that the District Valuer had adopted the view that claims under section 11(1) of the 1961 Act were governed by the provisions of the Land Compensation (Scotland) Acts. As a result of Senior Counsel’s opinion, both the Council and the Valuer have had to review their position on this interpretation and that the Lands Compensation Acts do not apply to compensation claims under section 11 of the 1961. The Council emphasised that the issue of interpretation is the Council’s interpretation – which is at issue – albeit it an interpretation informed by the legal opinion the Council obtained.

Submissions from the Council

14. The Council explained that the legal opinion was obtained from another local authority. This opinion was provided in confidence to the Council and when asked by the Council whether it objected to disclosure, that other local authority requested that the opinion be kept confidential.

15. The Council explained that the opinion had been sought by the authority in connection with current and prospective compensation claims under the 1961 Act and that it was possible that either or both Councils could be cited as respondents in one or more claims lodged with the Lands Tribunal of Scotland. Therefore, the opinion was obtained in contemplation of legal proceedings and, as such, was one in respect of which a claim of confidentiality could be maintained in legal proceedings in terms of section 36(1) of FOISA.
16. The Council also submitted that section 36(2) of FOISA applied. The local authority which had allowed the Council access to the opinion had done so in confidence and had intimated to the Council that it would consider action against the Council if the opinion were to be disclosed.

Submissions for the Applicant

17. Hendersons explained that it acted for clients who had been affected by the implementation of the Council's statutory River Kelvin Flood Prevention Scheme. It explained that it had been engaged in correspondence with the Council on the interpretation of section 11 of the 1961 Act, specifically about betterment. Hendersons said that the Council had referred to Senior Counsel's opinion to justify its interpretation of how to compute any compensation payable to Hendersons' clients. Hendersons wished access to the opinion to justify, and to explain, this position to their clients. To do so, Hendersons argued, it needed sight of the opinion mentioned by the Council. Sight of the opinion would, Hendersons argued, resolve the ongoing dispute with its clients, and would also be of benefit to council tax payers (i.e. by reducing protracted costs associated with the dispute).

The Commissioner's Analysis and Findings

Application of Section 36(2)

18. As section 36(2) is an absolute exemption (in that it is not subject to the public interest test required at section 2(1)(b) of FOISA) I will firstly examine this exemption. If I find that the Council was correct in withholding the information under section 36(2), I shall not consider the section 36(1) exemption and the public interest test which applies to it.
19. In terms of section 36(2) of FOISA, information is exempt if it was obtained by a Scottish public authority from another person and if disclosure by the authority to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person.

20. There is a two stage test which must be fulfilled before this 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 means another individual, another Scottish public authority or any other legal entity, such as a company or partnership: since the opinion was supplied by another local authority, which has legal personality, the first part of this test can be considered fulfilled.
21. The second part of the test is that 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. Although there was no discussion about the meaning of the word "actionable" when the Freedom of Information (Scotland) Bill was being considered in Parliament, I take the view that actionable means that the basic requirements for a successful action must appear to be fulfilled.
22. There are three main requirements which must be met before a claim for breach of confidentiality can be established. These are:
 - the information must have the necessary quality of confidence;
 - the public authority must have received the information in circumstances from which an obligation on the authority to maintain confidentiality could be inferred; and
 - there must be a disclosure which has not been authorised by the person who communicated the information but which would cause damage to that person.
23. Having considered the information requested by Hendersons I am satisfied that it fulfils the criteria of having the necessary quality of confidence, in that the information is not common knowledge, and could not be readily obtained by Hendersons through any other means. The client (the commissioning local authority) has indicated that it does not wish the information disclosed, and the author of the opinion (Senior Counsel) would be under a duty of confidentiality in respect of the opinion communicated to the client.
24. A public authority will be under an obligation to maintain confidentiality where the information was disclosed to the authority with an express statement that the information should be kept confidential, or where an obligation to maintain confidentiality can be inferred from the circumstances. I note that the information was provided with an express statement of confidentiality.
25. I therefore accept that the opinion was supplied with the understanding that it was confidential information and I accept that there existed, at the time of the request, an obligation on the Council to maintain confidentiality.

26. The third requirement is that there must be a disclosure which has not been authorised by the person who communicated the information, but which would cause damage to that person. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence.
27. The Council submitted that both it and the commissioning local authority may be required to defend actions to which the advice relates. The Council stated that to release the opinion would damage the ability of the Council or commissioning local authority to participate in such litigation and to defend interests by providing information which would give an unfair advantage to a potential litigant.
28. I am satisfied that there could be some detriment to the commissioning local authority, in the sense required for there to be an actionable breach of confidence, should the information be released. This detriment is essentially that the authority would be put at a disadvantage in the respect of potential application to the Lands Tribunal for Scotland, inasmuch as a potential applicant would be able to view advice received by the commissioning authority, and this advice could be used to inform any application against the authority. The Lands Tribunal of Scotland is an independent civil court. I accept that access to the opinion would be a detriment – in the sense that it gives an advantage in an adversarial process – even if awareness of the content of the opinion would reduce the likelihood of a potential applicant initiating an action.
29. Public interest considerations must also be taken into account when applying this exemption. However, the public interest considerations which have to be taken into account are different from the public interest test contained in section 2(1)(b) of FOISA. As mentioned above, the exemption in section 36(2) is not subject to the public interest test in section 2(1)(b). The law of confidence recognises that there is a strong public interest in ensuring that people respect confidences and the burden of showing that a breach of confidence would be in the public interest is therefore a heavy one. Nevertheless, in certain circumstances the public interest in maintaining confidences may be outweighed by the public interest in disclosure of information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure.
30. The courts have considered this public interest defence when deciding, for example, whether withholding information would cover up wrongdoing, whether it would allow the public to be misled or would unjustifiably inhibit public scrutiny of matters of genuine public concern. Showing that a breach of confidence would be in the public interest therefore places a heavy onus on whoever is trying to argue that is the case.

31. In this case the arguments are that access to the opinion would allow Hendersons to provide justification to their clients about the way in which compensation is to be calculated and would resolve the dispute, with a possible reduction on the public purse i.e. that protracted litigation may be avoided. However, I do not consider that the merits of this argument are sufficient where I have determined that disclosure would constitute an actionable breach of confidence. In this case, there is no suggestion of wrong doing or specific concern over the questions of compensation and there is a legal forum (the Lands Tribunal for Scotland) available formally to interpret section 11 of the 1961 Act in respect of the scheme. I do not see that there is a strong argument for the release of the information on the public interest grounds applicable to this exemption.
32. Having considered the contents of the opinion, I do not find that the Council would have a defence to an action of breach of confidence on public interest grounds in the event that it discloses the information.
33. I therefore accept that the information withheld falls within the exemption in section 36(2).

Application of section 36(1)

34. Having decided that the information is exempt under section 36(2), I shall not consider the application of section 36(1) of FOISA to the information.

Decision

I find that East Dunbartonshire Council (the Council) dealt with Hendersons' request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 and was therefore correct to refuse to disclose the legal advice.

Appeal

Should either the Council or Hendersons wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
11 October 2006

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 provisions 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.

3 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.