



Scottish Information
Commissioner

**Decision 056/2006 MacRoberts and the City of Edinburgh
Council**

*Lists of properties in respect of which the City of Edinburgh Council
collects waste water charges and household water charges on behalf
of Scottish Water*

**Applicant: MacRoberts
Authority: The City of Edinburgh Council
Case No: 200501286
Decision Date: 24 March 2006**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 056/2006 MacRoberts and the City of Edinburgh Council

Requests for copies of the lists of properties in respect of which the City of Edinburgh Council collects the waste water charges and household water charges on behalf of Scottish Water – whether the information is held on behalf of another person under section 3(2)(a)(i) of the Freedom of Information (Scotland) Act 2002 – whether disclosure would constitute an actionable breach of confidence under section 36(2) – whether the information constitutes a trade secret under section 33(1)(a) – whether disclosure would, or would be likely to, prejudice substantially the commercial interests of any person under section 33(1)(b) – whether the information is otherwise accessible under section 25 – the Commissioner held that the information is held by the City of Edinburgh Council but is exempt in terms of section 36(2) and section 33(1)(b)

Facts

Between February and March 2005, MacRoberts, a firm of solicitors, submitted a number of requests to local authorities in Scotland for information relating to water charges. The information requested consisted mainly of copies of the lists of the properties which each authority uses to collect household and waste water charges on behalf of Scottish Water.

In the case of the City of Edinburgh Council (the Council), MacRoberts requested copies of the lists of properties in respect of which the Council collects the waste water and household water charges on behalf of Scottish Water. The Council initially refused to disclose the information on the grounds that the information was held on behalf of another Scottish public authority, namely Scottish Water. After reviewing MacRoberts' requests, the Council subsequently refused to disclose the information on the grounds that it is otherwise accessible under Scottish Water's publication scheme and that to disclose such information would constitute a breach of confidence actionable by Scottish Water. The Council also argued that to disclose the information would, or would be likely to, prejudice substantially the commercial interests of Scottish Water and that the list of customers constituted a trade secret.



Outcome

The Commissioner found that the information requested by MacRoberts was held by the City of Edinburgh Council (the Council) in its own right and was not held on behalf of Scottish Water in terms of section 3(2)(a)(i) of FOISA.

The Commissioner found that the Council was entitled to withhold the information requested on the basis of the exemption in section 36(2), which states that information is exempt if it was obtained by a Scottish public authority from another person 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 any other person. This is in light of the terms of the service level agreement entered into between Scottish Water and the Council which imposes a number of restrictions upon the use of the information in question.

The Commissioner found that the Council was entitled to withhold the information requested on the basis of the exemption in section 33(1)(b). This section states that information is exempt if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person. The Commissioner held that disclosure of such information by the Council would, or would be likely to, adversely affect Scottish Water's income from the provision of such information and this could prejudice substantially its commercial interests. The Commissioner also held that it would not be in the public interest to release such information on the grounds that the loss of the income which is currently obtained by Scottish Water in providing property search certificates and in entering into licensed arrangements with commercial organisations in respect of property searches would, or would be likely to, have the unintended consequence of increasing overall water and sewerage charges which would not be in the interest of the public.

However, the Commissioner found that the Council was not entitled to withhold the information requested on the basis of the section 25 exemption under FOISA. This section states that information is exempt from release under FOISA if an applicant can reasonably obtain the information other than by requesting it under section 1(1) of FOISA. The Commissioner held that the information requested by MacRoberts (i.e. lists of properties in respect of which the Council collects waste water charges and household water charges on behalf of Scottish Water) is not available through Scottish Water's publication scheme and is not reasonably obtainable other than by requesting it under section 1(1) of FOISA. Therefore, this exemption cannot be relied upon to withhold the information requested.



The Commissioner also found that the Council was not entitled to withhold the information requested on the basis of the section 33(1)(a) exemption under FOISA. Section 33(1)(a) states that information is exempt from release under FOISA if it constitutes a trade secret. The Commissioner held that the information (lists of properties in respect of which the Council collects waste water charges and household water charges on behalf of Scottish Water) does not constitute a trade secret, and therefore this exemption cannot be relied upon to withhold the information.

The Commissioner therefore found that the Council had failed to comply with Part 1 of FOISA in applying the exemptions contained in sections 25 and 33(1)(a) to the information, contrary to section 1(1). However, given that the Commissioner considers the information to be exempt under other exemptions in FOISA, he does not require the Council to take any remedial action in relation to this breach.

In relation to the Council's handling of MacRoberts' requests, the Commissioner found that the Council partially failed to comply with Part 1 of FOISA by failing to provide MacRoberts with details of its complaints procedures concerning the Council's handling of requests for information as required under section 19(a) of FOISA. The Council also failed, in its initial response, to provide MacRoberts with details of the right of application to the council for a review and of the right of application to the Commissioner for a decision in accordance with section 19(b) of FOISA. However, the Commissioner does not require the Council to take any remedial steps in relation to these breaches.

Appeal

Should MacRoberts or the Council wish to appeal against this decision, there is a right of 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.

Background

1. In February 2005, MacRoberts sent a number of requests for information to local authorities for copies of lists of the properties in respect of which each authority collects the household water charge on behalf of Scottish Water and for lists of the properties in respect of which each authority collects the waste water charge on behalf of Scottish Water.



2. In March 2005, MacRoberts submitted further requests to a number of local authorities for lists of the properties in respect of which each authority does not collect the household and waste water charge on behalf of Scottish Water.
3. In each of these cases, MacRoberts stated that the details of the owner, proprietor or occupier of the premises were not required. MacRoberts also stated that where any of the requested information contained personal data, the disclosure of which is exempt under section 38 of the Freedom of Information (Scotland) Act 2002 (FOISA), the information should be provided with the personal data redacted (i.e. edited out). MacRoberts additionally stated their preference for receiving the information in electronic format or, failing that, in hard copy format.
4. From the applications which have subsequently been made to me by MacRoberts, I note that local authorities withheld information from MacRoberts on the basis of a number of exemptions under FOISA. Different authorities considered different exemptions, but the exemptions that were cited consisted of the following:
 - Section 25 – the information is otherwise accessible under Scottish Water’s publication scheme;
 - Section 33(1)(a) – the information constitutes a trade secret;
 - Section 33(1)(b) – disclosure of the information would, or would be likely to, prejudice substantially the commercial interests of Scottish Water;
 - Section 36(2) – disclosure of the information would constitute a breach of confidence actionable by Scottish Water.
5. In each of these cases, where MacRoberts received a response, the information was withheld on the basis of one or more of the above exemptions. In some cases, the authorities also argued that they held the information on behalf of Scottish Water and therefore did not hold the information for the purposes of FOISA (section 3(2)(a)(i)). MacRoberts then sent an email to each authority asking them to review their decision to withhold the information (or, where no response had been received, to review the failure to respond).
6. In those cases where reviews were carried out by each authority (the vast majority of cases), the original decision to refuse disclosure of the requested information was upheld. MacRoberts remained dissatisfied with the outcome of the reviews and subsequently submitted 55 separate applications to me for decision under section 47(1) of FOISA.
7. An investigating officer was then assigned to these cases.



The Investigation

8. MacRoberts' appeals were validated by establishing that each request had been made to a Scottish public authority and that MacRoberts had appealed to me only after asking each authority to review its response.
9. The applications for decision were submitted to my Office between 24 March 2005 and 16 June 2005.
10. Letters were sent to each of the local authorities that had received the requests for information from MacRoberts, informing them that a number of appeals had been received and that an investigation into the matter had begun. Each local authority was also given the opportunity to comment on the applications to them under the terms of section 49(3) of FOISA.
11. In this decision notice, I will consider the information requests MacRoberts made to the Council for copies of lists in respect of which it collects the waste water charges and household water charges on behalf of Scottish Water. I will discuss each of the remaining applications MacRoberts made to me in separate decision notices, although this decision should be taken as the lead decision, given that it considers in depth all of the issues raised in the other cases.

Household water and waste water charges collected by the Council on behalf of Scottish Water

12. On 21 February 2005, MacRoberts submitted two separate requests by email to the Council for "a copy of the list of the properties in respect of which the Authority collects the waste water charge on behalf of Scottish Water" and "a copy of the list of the properties in respect of which the Authority collects the household water charge on behalf of Scottish Water". MacRoberts stated in their emails that they did not require any details of the owner, proprietor or occupier of the premises concerned and requested that the information be provided with any personal data redacted.
13. The Council responded to both requests on 23 February 2005, stating that it was unable to provide MacRoberts with the information requested. The Council stated that, in collecting the charges on behalf of Scottish Water, the Council only held the information on their behalf and that Scottish Water would therefore have to decide whether it should be released. Details were provided by the Council to enable MacRoberts to contact Scottish Water.



14. The Council cited section 3(2)(a)(i) of FOISA as being applicable to the information requested. This section states that information is not held by a Scottish public authority for the purposes of FOISA if the authority holds the information on behalf of another person (including another Scottish public authority).
15. MacRoberts wrote to the Council on 1 March 2005, requesting a review of its decision to refuse access to the information requested. MacRoberts contended that the information requested is not held by the Council on behalf of another person, but is in fact held by the Council as collector.
16. On 23 March 2005, the Council responded to MacRoberts and notified them of the outcome of its review. The Council informed MacRoberts that, after carrying out a detailed review of MacRoberts' original requests, it was still unable to provide the requested information. The Council also apologised for providing MacRoberts with an incorrect reason for withholding the information in its initial response of 23 February 2006.
17. In its letter the Council stated that the information could not be provided to MacRoberts on the basis that it was exempt from disclosure under sections 25, 33(1) and 36(2) of FOISA.
18. Section 25 of FOISA states that information is exempt if the applicant can reasonably obtain it other than by requesting it under section 1(1) of FOISA. The Council asserted that section 25 of FOISA applied because the information was reasonably obtainable, or otherwise accessible, under part 14.4 of Scottish Water's publication scheme on payment of the relevant fee.
19. Section 33(1)(a) of FOISA states that information is exempt information if it constitutes a trade secret and section 33(1)(b) states that information is exempt from release if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person.
20. Section 36(2) of FOISA states that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and disclosure by the authority of the information to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person.
21. I would note at this point that the Council argued that the information was exempt in terms of sections 25, 33(1) and 36(2) of FOISA. It should be noted that the exemption under section 25 and that under section 36(2) of FOISA are mutually exclusive and can only ever be claimed as alternatives, on the basis that information which is otherwise accessible under section 25 is already available to the public (i.e. is already in the public domain) and so could not be held as confidential.



22. On 23 March 2005, Scottish Water wrote to all local authorities in relation to the information requests made by MacRoberts, seeking co-operation from the local authorities in refusing MacRoberts' request. The letter stated that Scottish Water considers that it would have a right to claim for damages for breach of confidence if the public authorities give out the information that MacRoberts have requested and that Scottish Water would raise an action against the local authorities if it suffers loss as a consequence of disclosure. The terms of this letter are discussed below in relation to each exemption considered.
23. MacRoberts wrote to me on 1 April 2005, applying for a decision and the case was assigned to an investigating officer. The case was validated by establishing that a valid request for information had been made to a Scottish public authority, and that MacRoberts had appealed to me only after requesting a review from the authority.
24. The investigating officer contacted the Council by letter on 26 April 2005. The Council was informed that MacRoberts had applied to me for a decision in relation to their dissatisfaction with the way in which the Council had dealt with their request for information. The Council was contacted on 26 May 2005 and it was invited to comment on the issues raised by MacRoberts' request in terms of section 49(3)(a) of FOISA.
25. The Council responded on 24 June 2005. It stated that the lists of properties where it collects water charges would match exactly a list of connections to Scottish Water's infrastructure. It maintained that a list of such properties was available from Scottish Water under part 14.4 of Scottish Water's publication scheme and the Council therefore took the view that the information requested by MacRoberts was exempt in terms of section 25 of FOISA.
26. In its letter, the Council stated that it considered that the section 33(1)(b) exemption under FOISA also applied to the requested information. This exemption concerns whether disclosure of information under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person.
27. The Council stated that it understood that Scottish Water derives a considerable income from the provision of information regarding connections to its infrastructure. The Council argued that disclosure of such information by the Council and other local authorities would be likely to substantially reduce Scottish Water's income from the provision of such information and this would affect its commercial interests.



28. Section 33(1)(b) is subject to the public interest test and the Council contended that it is not in the public interest to deprive Scottish Water of such income. It argued that this would drive up water prices and consequently cost the public at large more money. The Council stated that it could see little benefit to the public in disclosure, save that some private entities would be able to harvest data for commercial benefit. I discuss the relevance and application of the section 33(1)(b) exemption below.
29. The Council also cited section 33(1)(a) of FOISA as being applicable in this instance. This section of FOISA states that information is exempt information if it constitutes a trade secret and the Council argued that a list of customers could constitute a trade secret. It stated that a list of properties and a list of customers are likely to be interchangeable due to the availability of the voters roll. The Council also referred to guidance on the website of the Department for Constitutional Affairs which stated that a trade secret must be “commercially valuable in its own right to its owner”. The Council argued that a list of customers, which could be compiled from the voters roll, is likely to be very valuable for, for example, marketing purposes. The applicability of the section 33(1)(a) exemption is discussed below.
30. In its letter of 24 June 2005, the Council outlined the arrangements it has with Scottish Water in relation to the collection of water charges. Lists of properties where the Council collects water charges on behalf of Scottish Water are supplied to the Council by Scottish Water under the terms of a service level agreement. This agreement provides that all information which one party receives from the other is to be regarded as confidential and is not to be disclosed to any third party. The Council was informed by Scottish Water that it would be pursued for damages if it breached the terms of the agreement by disclosing such information.
31. The Council also took into account the possibility that FOISA could constitute a statutory provision which required the information to be disclosed regardless of the terms of its agreement with Scottish Water. The Council therefore considered a three stage test to determine whether the information could be held to be confidential and therefore exempt under FOISA in terms of section 36(2). This section states that information is exempt information 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 any other person.



32. The Council considered the following:
- a) Whether the information had the necessary quality of confidence – the Council held that the lists of properties where water charges are collected are derived wholly from the lists of Scottish Water’s customers and properties connected to its infrastructure. It contended that such a list would be valuable and could easily be cross referenced with the voters roll in order to obtain names for these addresses. Accordingly, the Council considered that a list of connected properties would have the necessary quality of confidence;
 - b) Whether the information was received in circumstances imposing a duty of confidence – the Council held that a duty of confidence did exist under the terms of its agreement with Scottish Water which provides that any information received by either party from the other is to be treated as confidential;
 - c) Whether disclosure would cause damage – the Council stated that Scottish Water derives income from the provision of information relating to its infrastructure connections and that to release such information may impede Scottish Water’s ability to charge for the provision of such information. This, in conjunction with the statement from Scottish Water that it would pursue the Council for any breach of the agreement, led the Council to conclude that disclosure would indeed have damaging consequences for Scottish Water.

In considering these three tests, the Council concluded that the information satisfied the criteria required for it to be considered as confidential and was therefore exempt under section 36(2) of FOISA. The application of this exemption is considered below.

33. The Council also considered the provisions of section 3(2)(a)(i) of FOISA in relation to the information requested by MacRoberts. This section in FOISA concerns information that is held on behalf of another person by a Scottish public authority. If information is held on behalf of another person by an authority, the authority is not considered to be held the information for the purposes of FOISA and the information would therefore be exempt from consideration under this legislation.
34. The Council stated that it could be considered as only holding the lists of properties in relation to water charges for collection purposes on behalf of Scottish Water. It argued that it therefore does not hold the information for its own purposes and that the information is therefore not held by the Council in terms of FOISA. The Council suggested that while the information contained within the lists requested by MacRoberts could be compiled (at great cost) by extracting certain data from the Council’s own council tax registers, the specific lists requested by MacRoberts could only be compiled by using the list supplied by Scottish Water to the Council.



35. On this basis, the Council believed that since it was Scottish Water's information there was a very strong argument to suggest that the Council holds such information on behalf of another person. This is discussed in more detail below.

Submission from Scottish Water

36. On 4 May 2005, Scottish Water contacted me by letter requesting an opportunity to make representations in relation to MacRoberts' requests to local authorities for "information regarding Scottish Water's assets and customers". A letter was sent from my Office to Scottish Water on 18 May 2005, inviting comments on any of the issues raised by MacRoberts' requests. A further letter was sent to Scottish Water on 5 July 2005, once more inviting comments and requesting representative samples of the relevant information available through Scottish Water's publication scheme as well as details of the costs involved in accessing that information. This was followed up by a reminder email on 25 July 2005.
37. Scottish Water responded on 15 August 2005, providing representative samples of the information that is held in its publication scheme. In its letter, Scottish Water confirmed that information regarding the status of connections to public water and sewerage networks is available through its publication scheme and this is discussed in more detail in the next section below.
38. Scottish Water also provided details of its statutory duties concerning the provision of information relating to its infrastructure. These include section 58 of the Water Industry (Scotland) Act 2002, which states that Scottish Water may afford facilities for any person to inspect and, on payment of a reasonable fee, to obtain copies of or extracts from any records (in whatever form or medium) transferred to Scottish Water by virtue of the Water Industry (Scotland) Act 2002, created or acquired by Scottish Water in the exercise of any of its functions, or otherwise in its keeping.
39. Scottish Water carries out a property search service which provides reports on the existence of public water and sewerage connections to a property. These reports are usually required as part of the conveyancing process. The service is generally provided directly to solicitors or via local authorities or other private firm of searchers, rather than to private individuals. This service is distinct from the right of individuals to access and inspect network plans, usually in area offices, for which no charge is applied.



40. Scottish Water stated that such records are routinely inspected by search companies who sell the information to customers in response to requests for information regarding the status of connections to Scottish Water's infrastructure. In competition with search companies, Scottish Water runs a commercial service providing property search certificates for £40 plus VAT, in line with its published scheme of charges as required under section 29A of the Water Industry (Scotland) Act 2002. Each certificate is certified as being accurate and is covered by fully indemnified comprehensive insurance.
41. A property search certificate states:
- whether the property is connected to public water mains and whether these mains are *ex-adverso* (opposite to) the boundaries of the property;
 - whether the property is connected to the public sewer, whether these sewers are *ex-adverso* the boundaries of the property and whether there is a wastewater charge;
 - whether the water supply is charged by household water charge, business water charge or metered supply; and
 - whether any public mains or sewers of a strategic nature are located within the grounds of the property which may impact on future building plans or have "rights of access" by Scottish Water for maintenance or repair.
42. Under section 29(1)(a) of the Water Industry (Scotland) Act 2002, Scottish Water has the power to demand and recover charges for any services provided by it in the exercise of its core functions and under section 29(1)(b) it may fix, demand, and recover charges for any goods supplied or services provided by it in exercise of any of its other functions. The power conferred by section 29(1)(b) is exercisable by or in accordance with an agreement with the person to be charged.
43. The Water Industry Commissioner must, when required by the Scottish Ministers, advise them on the matters to be taken into, or left out of, account by Scottish Water in fixing charges in charges schemes having regard to the economy, efficiency and effectiveness with which Scottish Water is using its resources in exercising its core functions and the likely cost to Scottish Water. Scottish Water must send a charges scheme to the Water Industry Commission for Scotland for approval.
44. Scottish Water's current scheme of charges includes the following statement:
- "Scottish Water will not charge land owners who ask for copies of plans showing the location of assets on their land.



There is no charge if the plans are requested to allow Scottish Water's pipelines and other assets to be located to avoid damage during site investigations works, excavation or other activities or to minimise potential safety and operational works, excavation or other activities or to minimise potential safety and operational issues.

We will make a charge if we are asked to provide details for an individual property through either:

- written information indicating whether a property is connected or adjacent to our water or waste water infrastructure;
 - property connection certificates;
 - property search certificates;
 - providing copies or extracts from our plans; or
 - any other administration or consultation for this type of service such as site visits or advice while inspecting plans.
- a) Charges will also apply when organisations or individuals request copy plans of asset locations on land that is not in their ownership."

45. Scottish Water pointed out that property search certificates are made available through its publication scheme and are listed under section 14.4 of the scheme: Customer (Household and Business and the Scheme of Charges). The scheme of charges provides details of the different services offered by Scottish Water and its current charges for household and business customers. Under the heading "Services for Developers and Property Enquiries", information is available which is described as follows: "Property clearance, connection certificate or written confirmation of connection to or adjacent to infrastructure". The relevant charge for this information is also provided.
46. Scottish Water also emphasised that it is willing to enter into licensing arrangements with search companies and others who wish to obtain and re-use information for commercial purposes. Scottish Water advised me that it has intimated to MacRoberts on a number of occasions that it would be happy to discuss similar arrangements with MacRoberts or their clients, but that this offer was not taken up by MacRoberts.



The Commissioner's Analysis and Findings

47. Responsibility for water and sewerage services in Scotland rests with Scottish Water, which was established under the Water Industry (Scotland) Act 2002. The collection of domestic customers' water charges and waste water charges is carried out by each local authority along with the council tax. Agreements were entered into between Scottish Water and each local authority in accordance with the Water Industry (Scotland) Act 2002 and the Water Services Charges (Billing and Collection) (Scotland) Order 2002, which has now been superseded by the Water Services Charges (Billing and Collection) (Scotland) Order 2005.
48. The Water Services Charges (Billing and Collection) (Scotland) Order 2005 (the 2005 Order) provides for each local authority in Scotland to be responsible for demanding and recovering charges payable in respect of water supply and sewerage services provided by Scottish Water to dwellings in the area of the local authority (other than charges for a supply of water taken by meter). Article 2 of the Order sets out the duty of local authorities to demand and recover charges:
- a) "Every local authority shall, as respects water supply and sewerage services provided in the relevant year by Scottish Water in the exercise of its core functions to dwellings within the area of the local authority, demand and recover the charges (other than charges in respect of a supply of water taken by meter) payable for those services under a charges scheme."
49. Provision is made in the 2005 Order for local authorities to account to Scottish Water for all sums collected. It sets out the forms to be used and the procedures to be followed by local authorities when demanding payment. It also provides for charge-payers to have a right of appeal to the relevant valuation appeal committee. Article 11 requires each local authority to keep accounts and records of all transactions under the 2005 Order and gives Scottish Water the right to inspect such accounts and records.
50. Scottish Water asserts that, under the terms of the service level agreements entered into between Scottish Water and Scottish local authorities, any information in whatever format provided by Scottish Water to a local authority remains Scottish Water's property. A local authority must not copy or use any data provided by Scottish Water for any purpose other than in connection with the collection of charges, except with Scottish Water's prior written consent. I will consider the terms of the agreement entered into between the Council and Scottish Water in greater detail when I look at the Council's use of the section 36(2) exemption below.



51. Scottish Water also maintained, in a letter issued to every Scottish local authority, that the information requested by MacRoberts which related to the status of connections to Scottish Water's networks should not be provided on the basis that Scottish Water considers such information to have considerable commercial value to Scottish Water. The applicability of the section 33(1)(b) exemption, which relates to commercial interests, was cited by the Council in its letter of 23 March 2005, and was also discussed by Scottish Water. I will consider this further below as well as the applicability of the section 33(1)(a) exemption which concerns trade secrets.
52. I will also consider the Council's use of the exemption under section 25 of FOISA. This concerns information that is deemed to be otherwise accessible (i.e. information that is already available to members of the public without having to provide an alternative right of access through FOISA). Firstly, I will discuss section 3(2)(a)(i) of FOISA and whether the information that MacRoberts had requested could be considered to be held by the Council on behalf of Scottish Water and therefore exempt from the provisions of FOISA.

Whether the information is held by the Council on behalf of Scottish Water – section 3(2)(a)(i)

53. In its initial response to MacRoberts' request, the Council refused to release the information on the grounds that it was held by the Council on behalf of Scottish Water. Although the Council did not subsequently rely on this particular section of FOISA in its response to MacRoberts' request for review it did state, in its letter to me of 24 June 2005, that it felt that there was a strong case for arguing that it held the information on behalf of Scottish Water.
54. The information requested by MacRoberts is created, maintained and validated by Scottish Water and the authorities which receive that information have no responsibility for its accuracy; they simply collect a levy on behalf of Scottish Water and remit this to Scottish Water. The lists of properties and their respective charges are derived from information held by Scottish Water and the information is not to be used by the authorities for any purpose other than collecting household and waste water charges on behalf of Scottish Water.



55. Since local authorities cannot add to or manipulate the data in any way it is not surprising that authorities might take the view that they hold the information on behalf of another person as set out in section 3(2)(a)(i) of FOISA. This section states that “information is held by an authority if it is held [...] by the authority otherwise than [...] on behalf of another person”. In other words, if it can be established that information is held by a Scottish public authority (such as the Council) on behalf of another public authority (in this case, Scottish Water) then that information is not “held” by the authority (the Council) for the purposes of FOISA. It is only information that is considered to be held by an authority at the time an information request is received by that authority which is subject to the provisions set out in FOISA.
56. In an email to my Office from Scottish Water, dated 24 August 2005, Scottish Water stated that “information held by local authorities regarding Scottish Water’s customers is held by them on behalf of Scottish Water in connection with the recovery of charges on behalf of Scottish Water.” Whilst there can be no doubt that charges are recovered by local authorities on behalf of Scottish Water, the issue of whether or not the information is held by local authorities on behalf of Scottish Water is not so clear.
57. In one of my earlier decisions (Decision 008/2005 - Mr Shields and the Scottish Parliament) I considered whether information was held on behalf of another person and stated, in paragraph 31:

“If an authority holds information on behalf of another person or organisation, it will not control that information in the same way as it would with information held in its own right. The authority would not have power to delete or amend that information without the owner’s consent; it would not be able to apply its own policies or procedures to it. It may have restricted access to it.”

I would like to make it clear that although the ability to lawfully amend, delete or disclose information is a significant factor which might indicate legal control, it is not a conclusive test. There is a distinction between a situation in which an authority would never have the ability to amend or process information in any way and a situation where an authority holds information in its own right but is then subject to various contractual limitations on what it would otherwise be entitled to do with that information.



58. The concept of "holding" information for the purposes of FOISA is not simply a question of physical fact. It is possible for an authority which keeps in its physical possession information "on behalf of another person" not to be considered the holder of that information for the purposes of FOISA. For example, if the information in question was simply held on the Council's premises for storage or safe-keeping (e.g. an off-site archive) for Scottish Water then this could constitute information held 'on behalf of' another person (i.e. Scottish Water), especially if the Council had no access to or control over the information.
59. However, in this case, I am satisfied that the information in question is held by the Council in its own right, in conjunction with duties which it is obliged to perform by statute, i.e. under section 2 of the 2005 Order, which obliges local authorities to demand and recover charges payable for water supply and sewerage services provided by Scottish Water. Scottish Water may have provided the necessary information, but that does not mean that it is held on its behalf.
60. As I have found that the information is not held by the Council on behalf of Scottish Water, I will now address the question of whether the information requested by MacRoberts is exempt under any of the exemptions contained in Part 2 of FOISA.

Consideration of the use of the section 36(2) exemption

61. In its letter of 1 March 2005, which Scottish Water issued to every local authority in Scotland, Scottish Water asserted that section 36(2) of FOISA applied to the information that had been requested by MacRoberts. This exemption was also cited by the Council as being applicable in this case.
62. Section 36(2) of FOISA relates to confidentiality and is an absolute exemption. This means that this exemption is not subject to the public interest test, although it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is justified in the public interest. Section 36(2) of FOISA states:

"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."



63. Scottish Water maintained that the information requested was obtained by the Council from Scottish Water and its disclosure by the Council to the public would constitute a breach of confidence actionable by Scottish Water. The Council provided me with a copy of the service level agreement which it had entered into with Scottish Water. Scottish Water has similar agreements with every other local authority in Scotland and has confirmed that, although there may be slight differences in some of the terminology and in the arrangements for the collection of fees payable and pay-over terms, the confidentiality provisions in the service level agreements are identical.
64. The Council wrote to me on 29 June 2005, and brought to my attention a number of clauses within the service level agreement which support the view that the Council has a contractual obligation not to disclose the information in question to the public. On the issue of confidentiality, the Council restated the fact that Scottish Water had informed it that any breach of the terms of the agreement would be actionable by Scottish Water, thereby strengthening the argument that the release of the information would amount to an actionable breach of confidence.
65. In order to ascertain whether or not section 36(2) of FOISA applies in this case, I will consider the terms of the service level agreement between Scottish Water and the Council. I will then go on to consider whether the three main requirements of confidentiality have been met.
66. A service level agreement between Scottish Water and the Council was entered into in February 2004. The agreement is still in force. The agreement was drawn up in order to formalise arrangements whereby the Council provides billing, collection and recovery of water services charges on behalf of Scottish Water. The Council is required by law (see above) to demand and recover such charges from dwellings in the area of the local authority on behalf of Scottish Water (other than charges for a supply of water taken by meter).
67. The agreement contains a wide confidentiality clause, the effect of which is to prohibit the release of all information relating to the agreement. The effect of this clause is such that it restricts the extent to which my reasoning behind the consideration of this exemption can be set out. However, it can be said that, in terms of the agreement, all data in whatever format transferred from Scottish Water to the Council remains the property of Scottish Water. The Council must not copy or use any data provided by Scottish Water for any purpose other than in connection with the collection of charges, unless Scottish Water provides prior written consent. The agreement also states that all information and data provided to and received from the other party to the agreement in connection with the billing, collection and recovery of charges will be considered confidential information.



68. The lists of properties and attendant charges which are provided to local authorities by Scottish Water are supplied under the terms of this agreement and Scottish Water has informed the Council that it would pursue the Council for damages if it breached the terms of the agreement by releasing the information requested by MacRoberts.
69. Before signing up to an agreement containing a confidentiality clause, an authority should consider whether to do so very carefully and should resist such a request unless there is a clear justification for the confidentiality. This is set out in the 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), which states that an authority must have good reasons for accepting such a clause and must be able to justify its decision to me (i.e. that its decision to accept the confidentiality obligation was taken in good faith and for proper purposes). However, I note that the agreement between the Council and Scottish Water was entered into prior to the Section 60 Code coming into force.
70. I will now go on to consider the three main requirements of an actionable breach of confidence to discuss whether they have been fulfilled in this instance. These are as follows:
- 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.
71. The lists of properties in respect of which household water charges and waste water charges are collected by local authorities are compiled by Scottish Water and are derived wholly from information held by Scottish Water. In order for information to have the necessary quality of confidence, it must not, in general, be common knowledge and a member of the public would have to apply skill and labour to produce the information him or herself. Where, for example, a company says that certain information is confidential yet publicises that information on its website, it is unlikely to be able to argue that the information has the necessary quality of confidentiality. In this instance, on the basis of information provided by Scottish Water, the information is not common knowledge and such lists would require a great deal of skill and labour to compile. I therefore consider the information to have the necessary quality of confidence.



72. A public authority will come under an obligation to maintain confidentiality where the information was disclosed to the authority in circumstances from which an obligation on the authority to maintain confidentiality could be inferred. In this case, the Council has entered into an agreement with Scottish Water which limits the purposes for which the Council can use the information (i.e. only for the collection of charges, as mentioned above). The agreement explicitly says that the information is to be confidential. The Council is aware that Scottish Water considers the information to be confidential. I therefore find that the Council received the information in circumstances which imposed an obligation on the authority to maintain confidentiality.
73. For a breach of confidence to occur, the disclosure of the information must not have been authorised by the person who communicated the information. In this instance, Scottish Water did not authorise the Council to disclose the information and an express term in the agreement between the two parties stated that prior written consent would be required from Scottish Water for the information to be copied or used for any purpose other than in connection with the agreement.
74. In order for a breach of confidence to be actionable, there must also be some detriment to the person who provided the information. (I note that Scottish Water has threatened to sue the Council for damages if it breached the terms of the agreement by releasing the information. While this is a factor which I can take into account, this is not, of course, conclusive proof that such an action would succeed.) In this case, as discussed below in relation to the section 33(1)(b) exemption under FOISA, Scottish Water has demonstrated that disclosure of the information in question would, or would be likely to, prejudice substantially its commercial interests. On the basis of information which has been provided to me by Scottish Water, I am satisfied that there would be detriment to Scottish Water should the information be released.
75. Public interest considerations must also be taken into account when applying this exemption. In this case the public interest considerations which have to be taken into account are different from the public interest test contained in section 2(1) of FOISA. The exemption in section 36(2) is not subject to the public interest test in section 2(1). However, 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 failure to maintain confidentiality would be in the public interest is therefore a heavy one. However, 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.



76. The courts have considered that there may be a public interest defence to actions of breach of confidentiality where to enforce an obligation of confidence would cover up wrongdoing, allow the public to be misled or unjustifiably inhibit public scrutiny of matters of genuine public concern. In this instance, I have considered whether disclosure of the information in question would enhance the scrutiny of decision-making processes and thereby improve accountability and public participation; whether disclosure would contribute to ensuring that the Council or Scottish Water are adequately discharging their functions; and whether disclosure would contribute to the effective oversight of the expenditure of public funds and that the public obtain value for money. In considering these factors, and taking into account the fact that it is the role of the Water Industry Commission for Scotland to oversee the operations of Scottish Water, in none of these instances listed here can I see a reasonable basis to conclude that the Council would have a defence to an action of breach of confidence on public interest grounds in the event that they disclosed the information.
77. Finally, there are several other defences to an action for breach of confidentiality which must also be considered in deciding whether a release of information would constitute an actionable breach of confidence. These defences include the defence that the information was known to the recipient before the information was given in confidence, that the obligation relates to information that is useless or trivial or that the information in question has subsequently become public knowledge, i.e. it has subsequently entered into the public domain. None of these defences are applicable in this instance. On the basis of the above considerations, I am satisfied that the Council was correct to withhold the information in question on the grounds that the information was obtained from Scottish Water and its disclosure to the public by the Council (otherwise than under FOISA) would constitute a breach of confidence actionable by Scottish Water.

Consideration of the section 33(1)(a) exemption – trade secret

78. Section 33(1) of FOISA relates to trade secrets and commercial interests. It states:
- “Information is exempt information if –
- (a) it constitutes a trade secret; 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).”



79. Section 33(1)(a) applies where the information is held to constitute a trade secret and the Council argued that this exemption could apply to the information requested by MacRoberts on the grounds that a list of properties could be cross-referenced with the voters roll to produce contact details of customers for marketing purposes. The Council also argued that such a list would be of significant commercial value.
80. Section 33(1)(a) allows a public authority to withhold information which constitutes a trade secret. Even if information does constitute a trade secret, the information should still be disclosed if the public interest in the release of the information is greater than the public interest in withholding the information. There is no definition of a trade secret in FOISA, but I have published guidance on section 33 which includes some issues to consider when deciding whether information constitutes a trade secret. The guidance can be found on my website at <http://www.itspublicknowledge.info/legislation/briefings/section33.htm>.
81. In my guidance I have suggested to public authorities that they should consider the following types of questions in determining whether something is a trade secret:
- Is the information used for the purpose of trade?
 - Would the release of the information cause harm?
 - Is the information common knowledge?
 - How easy would it be for competitors to discover or reproduce the information for themselves?
82. I will now consider each of these questions in turn in relation to the information that was requested by MacRoberts. Firstly, is the information used for the purpose of trade? In this case the information is used by Scottish Water for commercial purposes by selling lists of properties to commercial search companies. However, it should be noted that information can be commercially sensitive without being the sort of secret information which gives a company a “competitive edge” over its rivals.
83. Secondly, would the release of the information cause harm? The release of the information could conceivably cause harm to the commercial interests of Scottish Water by impacting on its ability to offset its operational costs from the proceeds of issuing property search certificates and selling lists of properties to commercial organisations. However, the information being considered here does not consist of unique pricing calculations or secret details of products or services which could be construed as being central to Scottish Water’s operations.



84. Thirdly, is the information common knowledge? Although the specific details of the lists of properties are not commonly known, this information is distributed by Scottish Water to every local authority in Scotland. Scottish Water's service level agreement may restrict the use of the information and imposes strict confidentiality arrangements upon local authorities, but where information is known beyond a narrow circle, it is unlikely to constitute a trade secret.
85. Finally, how easy would it be for competitors to discover or reproduce the information for themselves? Generally the less skill, effort, or innovation that was required to produce the information in the first place, the less likely the information is to constitute a trade secret. Similarly, the easier it would be for a competitor to recreate or discover that information through its own efforts, the less likely it is to be a trade secret. The Council stated that the list of properties could be compiled by extracting data from its council tax registers albeit at a considerable cost. However, the fact remains that alternative methods could be used whereby the same information as that contained in the lists of properties requested by MacRoberts could be constituted from pre-existing sources. The information in question is therefore not in any way unique and could be reproduced by a competitor. It is therefore unlikely to constitute a trade secret.
86. Whilst the information requested by MacRoberts could be held to be of commercial value to Scottish Water since it obtains revenue from supplying such information to commercial organisations, I do not accept that such information constitutes a trade secret for the reasons stated above and therefore I do not accept that the information should be withheld under section 33(1)(a). As the exemption cited is not upheld there is no requirement for me to consider the public interest in withholding or releasing the information in relation to section 33(1)(a).

Consideration of the section 33(1)(b) exemption – commercial interests

87. Where an authority considers that section 33(1)(b) applies to information which is the subject of a request, it needs to indicate whose commercial interests might be harmed by disclosure (e.g. Scottish Water in this case), the nature of those commercial interests and how these interests will be prejudiced substantially. Where an authority is arguing that the commercial interests of a third party will be harmed, the authority must make this clear and must indicate the nature of those commercial interests and how these interests will be prejudiced substantially.



88. Even where an authority can demonstrate that disclosure of information would, or would be likely to, prejudice substantially a third party's commercial interests, it must still go on to consider whether the public interest in disclosing the information is outweighed by the public interest in withholding the information. It must release the information if it believes that the public interest would be better served by the release of the information.
89. Scottish Water, the third party in this case, pointed out that although it is a public authority it is charged with operating as if it were a privatised company: its regulators benchmark it against privatised water companies in the rest of the UK (which are not subject to the provisions of freedom of information legislation). In its letter to each local authority, Scottish Water argued that disclosure of the information would, or would be likely to, prejudice substantially its commercial interests since Scottish Water derives a considerable income from the provision of information regarding water and sewerage connections. Scottish Water argued that it is funded by its customers and the income derived from providing this information to solicitors, search companies and the public helps to defray Scottish Water's operating costs.
90. It should be noted that the information provided by Scottish Water in its property search certificates is not only guaranteed to be accurate but there is also a cost to Scottish Water in producing such information. Where a customer complains to his or her local authority that they should not be charged for water or waste water services the matter is referred to Scottish Water to check the position from records of connection consents and from GIS map data. In some cases, Scottish Water is asked by local authorities to confirm the status of new properties and between 8,000 and 10,000 connections are checked by Scottish Water each year. In some cases this involves a site visit.
91. In this instance, it would appear to be the case that disclosure of the information requested by MacRoberts, from local authorities such as the Council, would be highly likely to reduce Scottish Water's income from the provision of such information to solicitors, search companies and the public.
92. I am satisfied that Scottish Water has commercial interests in relation to its provision of property searches and in entering into licensed agreements with commercial organisations in respect of property searches. I am of the opinion that disclosure of the information requested by MacRoberts under FOISA would, or would be likely to, result in a significant loss of income for Scottish Water and would, or would be likely to, prejudice substantially its commercial interests, especially in relation to this particular area of its operations.



93. The exemption in section 33(1)(b) is subject to the public interest test. In this case, this means that even although I am satisfied that the release of the information would prejudice substantially Scottish Water's commercial interests, I must go on to consider whether the public interest in the release of the information would outweigh the public interest in withholding the information. If I find that the public interest would be better served by the information being released, I must order release of the information.
94. Scottish Water has argued that, in situations where a public authority owns intellectual property which it can exploit commercially to the benefit of the public, it would not be in the public interest to hand over such information for exploitation by private enterprise.
95. As I am required to do, I have considered the public interest in favour of release as well as the public interest in favour of the information being withheld. In considering the public interest in favour of release, I have taken into account the fact that the release of the information to parties other than Scottish Water might reduce the cost of obtaining the information which otherwise must be obtained from Scottish Water by way of a property search certificate, as outlined above.
96. It could be argued that the cost of obtaining property search certificates might be reduced either because that information has been made publicly available or because third parties could compete with Scottish Water in order to provide the information. However, I am not convinced that any potential benefit obtained by commercial organisations as a result of them obtaining access to the information in question would necessarily be passed on to the consumer. It is also worth noting that the section of the public which would benefit should any savings be passed on to the consumer would be those persons involved in the purchase of properties. This should be balanced with the possibility that releasing the information under FOISA would, or would be likely to, prejudice substantially Scottish Water's commercial interests in this area and could result in increased household and waste water charges to the detriment of the public at large.
97. It is also difficult to see how it could be argued that it would be in the public interest for commercial organisations to be able to deprive Scottish Water of income that it is legally entitled to collect and charge for, in line with its scheme of charges which is approved by the Water Industry Commission for Scotland. The release of such information under FOISA would, or would be likely to, significantly harm the finances of Scottish Water in relation to its property search services and this loss of income could in turn have the unintended consequence of driving up water and sewerage prices which would be to the detriment of the public at large. The only obvious advantage in disclosing such information under FOISA would appear to be to commercial companies who would be able to harvest such data for their own commercial benefit.



98. In my briefing on the public interest, which is available on my website (<http://www.itspublicknowledge.info/legislation/briefings/publicinterest.htm>), it is stated that the public interest is not defined within FOISA but has been variously described as “something which is of serious concern and benefit to the public”, not merely something of individual interest or of sectional interest to particular groups in society. It has also been held that public interest does not mean “of interest to the public” but “in the interest of the public”, i.e. it serves the interests of the public. In this instance it could be argued that there is a sectoral interest in releasing the information rather than a general public interest. In other words, whereas release of the information could be argued on the basis that it would be of benefit to commercial operators or to persons involved in the purchasing of properties, the public interest test involves the consideration of whether or not release of the information would be in the interests of the public as a whole.
99. MacRoberts argued that the information was being withheld on the basis that Scottish Water wishes to keep such information within its possession “in order to support (and exploit) its statutory monopoly on water and water information”. In my view, the matter of whether there is an argument for opening up the water industry market in Scotland as a whole to commercial competition is not relevant to the matter in hand. Although the retail market for non-domestic customers is being opened up to competition from 2008, I must consider the law as it now stands. Scottish Water was established under the Water Industry (Scotland) Act 2002 and has to operate within a legal framework. Matters such as the issue of water privatisation are matters for the Scottish Ministers and the Water Industry Commission for Scotland and have no bearing on the public interest arguments being considered in this case, although I have considered the public interest in increasing competition in the narrow area of the supply of information.
100. Having considered these matters and, on the basis of information supplied for the purposes of my investigation by Scottish Water (such as an estimate of its commercial operations in relation to the provision of property search certificates), I am of the view that, on balance, it would not be in the public interest for the information to be released given that the harm caused to Scottish Water’s commercial interests could impact upon water and sewerage charges issued to the public. I am satisfied that the public interest in increasing competition in the narrow area of the supply of information is not sufficient on its own to outweigh the public interest in avoiding a likely increase in charges.



Consideration of the use of the section 25 exemption

101. Under section 23 of FOISA, every Scottish public authority must adopt and maintain a publication scheme which relates to the publication of information by the authority and is approved by me. The purpose of this scheme is to provide access to information that an authority readily makes available, without an applicant having to go through the formal request process within FOISA.
102. A publication scheme must specify:
- (a) classes of information which the authority publishes or intends to publish;
 - (b) the manner in which information of each class is, or is intended to be, published; and
 - (c) whether the published information is, or is intended to be, available to the public free of charge or on payment.
103. The Council claimed that the information requested by MacRoberts was exempt from release under FOISA in terms of section 25 on the grounds that it was otherwise accessible via Scottish Water's publication scheme. This is an absolute exemption (i.e. it is not subject to the public interest test) and is set out in FOISA in the following terms:

“25 Information otherwise accessible

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

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

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

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

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

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

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



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

104. Section 25(1) of FOISA states that information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. This section should be read in conjunction with section 25(3) which creates the presumption that where information is made available in accordance with an authority's publication scheme, it is reasonably accessible, and so subject to an absolute exemption from release under the terms set out in Part 1 of FOISA. Instead of requiring the applicant to go through the formal request process within FOISA, the information is made available under the terms set out in the relevant authority's publication scheme.
105. MacRoberts argued that the information should be provided by the authority most able to provide it, or which can in fact provide it. I have provided advice to Scottish public authorities in relation to information which is available through another public authority's publication scheme. This advice is available on my website (<http://www.itspublicknowledge.info/yourrights/faqs/faqspas.htm>) and states:

“If the information is available through another authority's publication scheme then the information may fall within the “information otherwise accessible” exemption contained in sec. 25(2)(a). This means that you do not have to provide the information to the applicant (although if you do hold it, you can choose to release the information in the usual way).

If you choose not to provide the information, you should first be sure (checking if necessary) that the information is actually available from the other authority's publication scheme [...] The Commissioner would like to remind public authorities that another public authority's publication scheme should only be relied on if the public authority which received the request knows for certain that the information is contained within the other publication scheme.”



106. The Council contended that the information requested was available within the publication scheme of Scottish Water and that therefore the information was reasonably obtainable in terms of sections 25(1) and 25(2) of FOISA. However, on the basis of the information supplied to me by Scottish Water (i.e. extracts from its publication scheme which detail the information held and any respective charge that applies, copies of sample property search certificates which, if completed, would specify, *inter alia*, whether a named property is connected to the public water supply or to the public sewer system and whether that property is subject to household water charges and waste water charges) and with reference to sample lists of properties used by local authorities to collect household water and waste water charges, I am satisfied that the information requested by MacRoberts from the Council is not available from Scottish Water in accordance with the provisions contained in its publication scheme. My reasons for this are as follows.
107. MacRoberts requested lists of properties where the Council collects household water charges and waste water charges on behalf of Scottish Water. Whereas it could be argued that such information could be obtained by requesting multiple copies of individual property search certificates under the terms of Scottish Water's publication scheme, it could also be argued that the information requested and the information which would be made available under the publication scheme are not the same.
108. There is a significant difference between a comprehensive list of properties, which states which charge is applicable to which property, and an individual certificate which contains the information for only one property. Whereas the information in the lists of properties could be provided to MacRoberts *en masse*, and would satisfy the terms of their request, the same could not be said about the information contained within each certificate. For MacRoberts to be able to use Scottish Water's publication scheme to obtain a list of properties, they would presumably have to supply Scottish Water with a list of all of the properties in the Council area and ask for an individual search to be carried out in relation to each property.
109. I am therefore of the opinion that the lists of properties requested by MacRoberts are not obtainable under Scottish Water's publication scheme.
110. On the basis of the above considerations, I am of the opinion that the Council was wrong to rely upon the exemption under section 25 of FOISA, since a list of properties in respect of which the Council collects waste water charges or household water charges on behalf of Scottish Water is not contained within Scottish Water's publication scheme. The information requested is therefore not otherwise accessible in terms of being reasonably obtainable under Scottish Water's publication scheme.



Content of notices

111. Regarding procedural matters, in its initial refusal notices the Council failed to provide MacRoberts with details of its complaints procedures concerning the Council's handling of requests for information as required by section 19(a) of FOISA. The Council also failed, in its initial refusal notices, to provide MacRoberts with details of their rights of application to the Council for a review and to the Commissioner for a decision in accordance with section 19(b) of FOISA. These rights are conferred by sections 20(1) and 47(1) of FOISA respectively. I do not require the Council to take any further remedial steps in relation to these breaches.

Decision

I find that the information requested by MacRoberts is held by the City of Edinburgh Council (the Council) and is not held by it on behalf of another person (in this case Scottish Water) in terms of section 3(2)(a)(i) of FOISA.

I find that Council was correct to withhold the information requested on the basis of the section 36(2) exemption under FOISA which states that information is exempt if 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 any other person. This is in light of the terms of the service level agreement entered into between Scottish Water and the Council which imposes a number of restrictions upon the use of the information in question.

I find that the Council was correct to withhold the information requested on the basis of the section 33(1)(b) exemption under FOISA. This section states that information is exempt if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person. I hold that disclosure of such information by local authorities would, or would be likely to, prejudice substantially Scottish Water's income from the provision of such information and this could adversely affect its commercial interests, especially in this area of its operations. I also hold that it would not be in the public interest to release such information on the grounds that the loss of income which is currently obtained by Scottish Water in providing property search certificates under the provisions of its publication scheme and in entering into licensed arrangements with commercial organisations in respect of property searches would, or would be likely to, have the unintended consequence of increasing overall water and sewerage charges which would not be in the interest of the public.



However, I find that the Council was not entitled to withhold the information requested on the basis of the section 25 exemption under FOISA. Section 25 states that information is exempt from release under FOISA if an applicant can reasonably obtain the information other than by requesting it under section 1(1) of FOISA. I hold that the information (lists of properties in respect of which the Council collects waste water charges and household water charges on behalf of Scottish Water) is not available through Scottish Water's publication scheme, is not reasonably obtainable other than by requesting it under section 1(1) of FOISA, and therefore this exemption cannot be relied upon to withhold the information.

I find that the Council was not entitled to withhold the information requested on the basis of the section 33(1)(a) exemption under FOISA. Section 33(1)(a) states that information is exempt from release under FOISA if it constitutes a trade secret. I hold that the information (lists of properties in respect of which the Council collects waste water charges and household water charges on behalf of Scottish Water) does not constitute a trade secret, and therefore this exemption cannot be relied upon to withhold the information.

I therefore find that the Council failed to comply with Part 1 of FOISA in applying the exemptions contained in sections 25 and 33(1)(a) to the information, contrary to section 1(1). However, given that I consider the information to be exempt under other exemptions in FOISA, I do not require the Council to take any remedial action in relation to this breach.

In relation to the Council's handling of MacRoberts' requests, I find that the Council partially failed to comply with Part 1 of FOISA by failing to provide MacRoberts with details of its complaints procedures concerning the Council's handling of requests for information as required under section 19(a) of FOISA. The Council also failed to provide MacRoberts with details of the right of application to the council for a review and of the right of application to me for a decision in accordance with section 19(b) of FOISA, in its initial refusal notices. I do not require the Council to take any further remedial steps.

Kevin Dunion
Scottish Information Commissioner
24 March 2006