

# Decision Notice



Decision 096/2009 Mr John Lindsay and Audit Scotland

Legal advice obtained by East Lothian Council

Reference No: 200900589

Decision Date: 4 August 2009

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Lindsay requested from Audit Scotland information on a number of topics, including legal advice obtained by East Lothian Council (the Council) and copied to Audit Scotland. Audit Scotland released some information but withheld the legal advice in terms of section 36(2) of FOISA. Following a review, Mr Lindsay remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Audit Scotland had partially failed to deal with Mr Lindsay's request for information in accordance with Part 1 of FOISA. While he found that Audit Scotland had acted correctly by withholding some of the information in terms of section 36(2) of FOISA, he found that the remainder was not exempt in terms of section 36(2) because it did not possess the necessary quality of confidence. He also found that Audit Scotland had breached the requirements of section 10(1) of FOISA by failing to respond to Mr Lindsay's request within the specified timescale.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(c) (Effect of exemptions); 10(1)(a) (Time for compliance) and 36(2) (Confidentiality)

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

## Background

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1. Mr Lindsay was in correspondence with Audit Scotland in relation to the Controller of Audit's statutory report on the Council (*Departmental reorganisation and voluntary redundancy of the chief executive SR 2007/1*). This correspondence included Audit Scotland writing to Mr Lindsay on 8 April 2008.
2. On 24 October 2008, Mr Lindsay emailed Audit Scotland requesting the following information:  
...
  3. *Correspondence between East Lothian Council and Audit Scotland and/or the Accounts Commission*



*Please provide me with copies of all communications between East Lothian Council and Audit Scotland, and between East Lothian Council and the Accounts Commission subsequent to the publication of the above Report to date.*

3. Audit Scotland responded on 21 November 2008, providing certain material in response to request 3, but advising that it was seeking the Council's comments before reaching a decision in respect of other information the Council had provided. It maintained this position in subsequent correspondence with Mr Lindsay.
4. On 13 February 2009, Audit Scotland responded to Mr Lindsay in relation to request 3. Whilst further information was released at this point, Audit Scotland withheld legal advice, obtained by the Council and provided to Audit Scotland, in terms of section 36(2) of FOISA.
5. On 16 February 2009, Mr Lindsay requested that Audit Scotland review its decision to withhold the legal advice.
6. On 20 February 2009, Audit Scotland responded to Mr Lindsay's request for review, upholding the decision to withhold the Council's legal advice in terms of section 36(2) of FOISA.
7. On 6 March 2009, Mr Lindsay wrote to the Commissioner, stating that he was dissatisfied with the outcome of Audit Scotland's review in relation to request 3 and applying to him for a decision in terms of section 47(1) of FOISA.
8. The application in relation to request 3 was validated by establishing that Mr Lindsay had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## **Investigation**

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9. Audit Scotland was informed that an application had been received from Mr Lindsay on 27 March 2009, having already provided the Commissioner with the withheld information in the course of correspondence on a related case. The investigating officer then contacted Audit Scotland on 31 March 2009, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, Audit Scotland was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
10. Audit Scotland responded on 7 April 2009, and again on 22 June 2009, providing submissions as to why it considered the legal advice to be exempt in terms of section 36(2) of FOISA. These arguments will be considered in the Commissioner's analysis and findings below.



## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Lindsay and Audit Scotland and is satisfied that no matter of relevance has been overlooked.

### Technical issues

12. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from the day following receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case. The Commissioner notes that, having received Mr Lindsay's request 3 on 24 October 2008, Audit Scotland did not respond to it (other than by advising that it was awaiting the advice of the Council) until 13 February 2009. It does not appear to have required clarification of the request – and certainly did not seek any in terms of section 1(3) of FOISA.
13. The Commissioner therefore finds that Audit Scotland failed to respond to this request within the 20 working days allowed by section 10(1) of FOISA and thereby failed to comply with Part 1 of FOISA. While consultation with a third party may well be a valuable part of the process of responding to a request for information, authorities should note that a third party's failure to respond to such consultation does not excuse the authority receiving the request from the obligation to respond within the relevant timescales specified in Part 1.

### Section 36(2) Confidentiality

14. Audit Scotland withheld the Council's legal advice, a joint opinion of Senior and Junior Counsel, under section 36(2) of FOISA.
15. Section 36(2) provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, 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 (this is commonly known as "the public interest defence").
16. Section 36(2) therefore contains a two stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that 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. 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.



17. Audit Scotland explained that the Council had provided it with a copy of the legal advice, along with a copy of the report under cover of which the advice had been presented to the Council for consideration (the Council report), in the context of its earlier production of the statutory report referred to in paragraph 1 above. In the circumstances, the Commissioner is satisfied that the information was obtained by Audit Scotland from another person, namely the Council, and consequently that the first part of the section 36(2) test has been fulfilled.
18. The second test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person or persons from whom the authority obtained the information or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
19. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
  - a. the information must have the necessary quality of confidence;
  - b. the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
  - c. unauthorised disclosure must be to the detriment of the person who communicated the information.

*Necessary quality of confidence*

20. Having considered the information contained within the legal advice, the arguments put forward by Audit Scotland, and the wider context, the Commissioner is not satisfied that all of this information contained has the necessary quality of confidence. In reaching this conclusion, he must note that Audit Scotland released the Council report to Mr Lindsay with its letter of 13 February 2009. The Council had explicitly agreed to the release of this report in an email to Audit Scotland dated 5 February 2009.
21. In substance, if not in precisely the same terms, the Council report sets out much of the content and conclusions of the legal advice. As these elements of the advice were disclosed to Mr Lindsay (in the Council report, with the Council's full knowledge and consent) in response to a request under FOISA, they could not be said thereafter to have the necessary quality of confidence in order for an actionable breach of confidence to be established.
22. Much of the remainder of the legal advice comprises details of the various changes in the Council's management structure from 1995 onwards, with conclusions of fact drawn by Council from this information. The history of the Council's management structure over the relevant period would have been in the public domain by the time of Mr Lindsay's request, while Counsel's conclusions from them are reflected elsewhere in the legal advice. The Commissioner cannot accept, therefore, that these parts of the advice possessed the necessary quality of confidence.



23. The Commissioner therefore is not satisfied that the withheld legal advice was correctly withheld in terms of section 36(2) of FOISA, with the exception of the following sections (which were (and are) not common knowledge and could not readily have been obtained by Mr Lindsay through any other means):
- The second sentence on page 2, commencing “in addition”
  - The concluding words of the following sentence, from (and excluding) “redundancy”
  - The final sentence of the first paragraph under the heading “The Principal Matter at Issue”, from (and excluding) “regulatory framework”, with the quotation and the whole of the following paragraph (up to and including “the case”)
  - In the final paragraph on page 12 (extending onto page 13), the words between (and excluding) “Mr Lindsay” and “that the outgoing” in the first sentence, and those between (and excluding) “structure” and “however” in the final sentence
  - In the last two lines on page 20, the words between (and excluding) “and that” and “that this”
  - On page 27, the words between (and excluding) “basis that” and “the Departmental” in the third line
  - In the first paragraph under the heading “CONCLUSION”, the whole of the sixth line and the seventh line up to (and excluding) the words “on the basis”
  - The whole of pages 30 and 31
  - The footnotes.
24. The Commissioner must now consider whether this remaining information was provided in a manner which obliged Audit Scotland to maintain confidentiality.

*Obligation to maintain confidentiality*

25. The second condition to be met when considering whether the disclosure of information would constitute an actionable breach of confidence is that Audit Scotland must have received the information in circumstances which imposed an obligation on it to maintain confidentiality.
26. In this case, Audit Scotland provided evidence to show that it had been provided with the legal advice under cover of a letter marked “private and confidential”. This letter also made reference to the fact that the legal advice was being presented to a meeting of the Council in private, as exempt information by virtue of Schedule 7A of the Local Government (Scotland) Act 1973.
27. Whilst the legal advice may have been exempt information for the purposes of Local Government (Scotland) Act 1973, it does not necessarily follow that it would be exempt information in terms of FOISA. It is, however, relevant that the Council made so clear when providing the information to Audit Scotland that it was not intended for wider dissemination.



28. Having considered the circumstances of its provision to Audit Scotland, the Commissioner is satisfied that the legal advice was received by Audit Scotland in circumstances which imposed upon it an obligation to maintain confidentiality.

*Unauthorised disclosure which would cause detriment*

29. The third matter to be considered is whether the disclosure would be unauthorised *and* whether the disclosure would cause detriment.
30. The Commissioner notes that Audit Scotland consulted the Council prior to coming to a decision as to whether the legal advice could be released under FOISA, both in the course of dealing with Mr Lindsay's request and during this investigation. In response, the Council maintained that disclosure of the legal advice was not authorised and explained the detriment it could suffer as a consequence of disclosure (litigation in respect of the matters covered by the advice remaining ongoing). Having read the submissions from Audit Scotland, and its consultations with the Council, the Commissioner is satisfied that release of the legal advice, which was obtained by the Council in contemplation of litigation, would cause detriment to the Council.
31. Consequently, the Commissioner is satisfied that disclosure of the legal advice, insofar as it had the necessary quality of confidence, would constitute a breach of confidence actionable by the Council.
32. As indicated above, the law of confidence recognises that in certain circumstances the strong 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.
33. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.
34. In this case Audit Scotland stated that it could not identify any public interest arguments which would justify the release of the information requested, arguing instead that it was in the public interest to permit public authorities to communicate in confidence with their legal advisors in order to obtain comprehensive legal advice to inform views and make decisions in the public interest. Audit Scotland continued that it would also be against the public interest to disclose the information whilst litigation was ongoing because it might interfere with proper legal process.



35. Having considered all the arguments, the Commissioner does not consider there to be sustainable grounds in this case for the release of confidential information in the public interest and therefore cannot conclude that the public interest defence would justify disclosure. Accordingly, he concludes that Audit Scotland correctly withheld certain sections of the Council's legal advice under section 36(2) of FOISA, as specified in paragraph 23 above. As he cannot accept that the remainder of the legal advice possessed the necessary quality of confidence, he cannot accept that it was correctly withheld under section 36(2) and therefore must require its release.

## DECISION

The Commissioner finds that Audit Scotland partly complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Lindsay, while failing to comply with Part 1 in other respects.

The Commissioner finds that by withholding certain information in terms of section 36(2) of FOISA, Audit Scotland complied with Part 1.

However, the Commissioner also finds that certain information was incorrectly withheld in terms of section 36(2), in which respect Audit Scotland failed to comply with section 1(1) of FOISA. In addition, Audit Scotland failed to comply with section 10(1) of FOISA by failing to respond to Mr Lindsay's request for information within the specified timescale.

The Commissioner therefore requires Audit Scotland to provide Mr Lindsay with the withheld legal advice, with the exception of those sections specified in paragraph 23 above, by 18 September 2009.





## Appeal

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Should either Mr Lindsay or Audit Scotland wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**4 August 2009**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

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- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (c) section 36(2);

...

##### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) ... the receipt by the authority of the request; or

...



## 36 Confidentiality

...

- (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.