



Scottish Information  
Commissioner

<b>Decision 158/2006 Mr Andy Wightman and City of Edinburgh Council</b>
<i>Request for copy of Counsel's opinion</i>

**Applicant: Mr Andy Wightman**  
**Authority: City of Edinburgh Council**  
**Case No: 200600561**  
**Decision Date: 21 August 2006**

**Kevin Dunion**  
**Scottish Information Commissioner**

Kinburn Castle  
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## Decision 158/2006 Mr Andy Wightman and City of Edinburgh Council

***Request for copy of Counsel's opinion – refused on basis of confidentiality of communications applied – public interest considered – public interest in disclosing the information requested outweighed by public interest in withholding it***

### Relevant Statutory Provisions and other Sources

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Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); section 36(1) (confidentiality of communications)

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

### Facts

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In January 2006 Mr Andy Wightman wrote to the City of Edinburgh Council (the Council) and requested a copy of Senior Counsel's opinion on a specified matter. The Council refused to supply the information requested citing section 36(1) confidentiality of communications. Mr Wightman was dissatisfied with this response and sought a review. The Council upheld its original decision on review. Mr Wightman applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had correctly relied on section 36(1) and that the public interest in disclosing the information was outweighed by the public interest in withholding it.

### Background

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1. On 11 January 2006 Mr Wightman wrote to the Council and requested a copy of the Opinion obtained from Senior Counsel referred to in Council Report no. CEC/50/05-06/CD. The Report was an agenda item at the Council meeting of 30 June 2005.



2. The Council responded to this request on 1 February 2006. The Council advised that the Opinion in question was considered exempt in terms of section 36(1) of FOISA and as such the Opinion was subject to legal professional privilege. The Council indicated that it did not consider that it was in the public interest for such information to be released.
3. The Council cited my decision 23/2005 in which I had indicated that the public interest argument for disclosure of legal advice would only apply in “highly compelling cases”. The Council indicated that it did not consider that to be case here.
4. Mr Wightman wrote to the Council on 8 February 2006 to seek a review. He set out his reasons why he considered that release of the Opinion would be in the public interest (these are discussed below).
5. The Council responded to this request for review on 16 February 2006. It upheld its original position. The Council indicated that legal advice, by its nature, has to examine all aspects of a matter, including examining any strengths and/or weaknesses of a particular stance. The Council indicated that it was clearly not desirable for all such information to be released to any third party upon request. The Council indicated that the applicant was entitled to seek his own legal advice in relation to the matter. The Council reaffirmed its views in respect of the public interest test.
6. Mr Wightman was dissatisfied with this response and on 9 March 2006 applied to me for a decision.
7. The case was allocated to an investigating officer.

## **The investigation**

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8. The officer formally contacted the Council on 20 March 2006 in terms of section 49(3)(a) of FOISA, asking it to comment on the application as a whole.

### Council's submissions

9. The Council indicated that the information was exempt by virtue of section 36(1) as the information was prepared for the Council by Senior and Junior Counsel. It indicated that the information constituted legal advice.
10. The Council went on to consider whether the public interest in disclosing the information was outweighed by the public interest in withholding it.



11. The Council argued, amongst other things, that the Opinion sought to ensure that the Council was able to resist a legal challenge should this be launched. Disclosure of the content of the Opinion would also mean that such comprehensive written legal advice would not be sought or proffered in the future as it might be released under FOISA. The Council indicated that this would not be desirable from an audit trail point of view, nor, arguably, would it be in the public interest.
12. The Council considered that the information was being sought by persons who might be adversely affected by plans for a specific area of Edinburgh. The Council argued that this represented a “sectoral interest” rather than a general public interest.

#### Mr Wightman’s submissions

13. Mr Wightman has an interest in Common Good land in Scotland and the way in which local authorities discharge their responsibilities in respect of this land. In this particular case, Mr Wightman is concerned that the Council has disposed of Common Good land without being aware of the nature of that land and/or that the Council has disposed of this land without the appropriate legal authority.
14. Mr Wightman has supplied me with detailed information about the background to this transaction and his concerns in respect of the Common Good land.
15. Mr Wightman indicated that he had subsequently discovered (after making this request for information) that the Council had obtained Counsel’s opinion on the proposed sale of the Common Good assets. He considers this to be the Opinion which contains the information he is seeking and has made a separate request for information in respect of that Opinion. However, he considers that the same public interest arguments apply to the Opinion the subject of this application given that the advice relates to a Common Good asset.
16. In his letter of review Mr Wightman made a number of submissions as to why disclosure would be in the public interest:
  - a) It concerns the disposal of Common Good land. This fact appeared not to have been disclosed to the Council when they took the decision to sell. In the interests of effective scrutiny and accountability of the decision making process Mr Wightman wanted to know whether this Opinion dealt with this important question.
  - b) It concerns Common Good land which belongs to the citizens of Edinburgh. Mr Wightman indicated that the Council held legal title but it was in the public interest that this Opinion be disclosed because the citizens had a right to know on what grounds their Common Good asset were being disposed of.



- c) The Council had a fiduciary duty in respect of Common Good assets and it was thus in the public interest for this Opinion to be disclosed in order that the citizens could see that this fiduciary duty was being properly discharged and that the public was obtaining good value.

## Commissioner's analysis and findings

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17. Mr Wightman requested a copy of the Opinion by Senior Counsel referred to a specified Council Report. I consider it helpful to set out briefly the context to this request.
18. The Council Report (dated 30 June 2005) concerns negotiations on the disposal of Council premises at East Market Street/Cranston Street in Edinburgh. The Report sets out two different proposals in respect of these premises. Both proposals concern off-market approaches. The Report refers to the evaluations/options appraisal the Council had obtained and states that:  
  
"In light of these off-market approaches and to ensure that the Council complies with its statutory duties, the Council solicitor has obtained Senior Counsel's opinion. In essence Senior Counsel is satisfied that securing the Mountgrange proposal by means of a land transaction appears to meet the Council's statutory duties and presents a low risk for the Council."  
  
19. It is access to this Counsel's Opinion that Mr Wightman is seeking.
20. Section 36(1) provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is communications between a legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. Firstly, the information being withheld must relate to communications with a legal adviser. In this case the information withheld is the communicated legal advice to the Council (as client). The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of his/her professional relationship with his/her client.



21. In this case the legal adviser is Senior Counsel giving legal advice on the off-market approaches and the specific proposals in respect of East Market/Cranston Street. This Opinion comprises professional legal advice within a relationship where the legal adviser has been asked to provide an opinion in his professional capacity to a client (the Council). I am satisfied that it is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result the opinion would be covered by the exemption contained in section 36(1) of FOISA.
22. Section 36(1) is a qualified exemption and is subject to the public interest test contained in section 2(1)(b) of FOISA. Therefore, even where an authority considers the information to be exempt it must still go on to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
23. In *Decision 023/2005* I concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, while I will consider each case on an individual basis, I am likely only to order the release of such communications in highly compelling cases.
24. The public interest issues in favour of disclosing this information might include enhancing scrutiny of the legality of the actions of a public body and, by extension, effective oversight of expenditure of public funds and obtaining value for money. In this instance, disclosure of the opinion would make public a legal Opinion on the strength and weaknesses of these specific proposals. In this way it would enhance scrutiny of the legality of the action of a public body. It might also be in the public interest to order disclosure where it would make a significant contribution to debate on a matter of public interest.
25. Against any public interest arguments for disclosure, however, must be weighed any consequent harm to the public interest. It is in the public interest that an authority can communicate its position to its advisers fully and frankly in confidence, in order to obtain the most comprehensive legal advice in relation to its projects and defend its position adequately should that become necessary.
26. It is also in the public interest that a public authority can receive the most comprehensive legal advice about its proposed actions. I also take the view that there is an established means of scrutinising the legality of the actions of public bodies, through judicial review in the courts. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds.



27. I have considered the submissions made by each of the parties. I take the view that for the disclosure of information to be in the public interest that it needs to be in the interest of the public for it to be released. This does not mean that there needs to be national interest in the matter. Rather it could be in the interest of the public to establish whether certain standards are being upheld or maintained by an authority, even though the circumstances of a particular case are exercising the concern of only a sectional part of the population, as the Council claims in this case.
28. In this case I recognise that there are reasons which might justify disclosing the Opinion to the applicant. However, I do not feel that they are so highly compelling as to outweigh the public interest in the confidentiality of legal communications. Therefore, I am satisfied that on this occasion the Council correctly applied the public interest test in withholding Senior Counsel's opinion and that this information is exempt by virtue of section 36(1) of FOISA.

## **Decision**

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I find that the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in withholding the information requested by Mr Wightman in that the information is exempt by virtue of section 36(1).

## **Appeal**

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

**Kevin Dunion**  
**Scottish Information Commissioner**  
**21 August 2006**



## APPENDIX

### Relevant Statutory Provisions

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

##### **1 General entitlement**

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

##### **2 Effect of exemptions**

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
  - (a) the provision does not confer absolute exemption; and
  - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

##### **36 Confidentiality**

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