



Scottish Information
Commissioner

**160/2007 Mr Robert Patterson and the Keeper of
the Registers of Scotland**

Boundary dispute

**Applicant: Mr Robert Patterson
Authority: Keeper of the Registers of Scotland
Case No: 200600817
Decision Date: 6 September 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 160/2007 Mr Robert Patterson and The Keeper of the Registers of Scotland

Request for information relating to a boundary dispute – Documents withheld on basis of section 36(1) of the Freedom of Information (Scotland) Act 2002 – Commissioner upheld the Keeper’s decision

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions); 36(1) (Confidentiality); 37(1)(a) and (2) (Court records, etc)

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

Facts

Mr Patterson wrote to the Keeper of the Registers of Scotland (The Keeper) asking for all of the information which he held relating to a boundary dispute.

The Keeper released a large volume of documents in response to Mr Patterson’s request, withholding the remainder on the basis that they were exempt from disclosure under section 36(1) of FOISA. Some further documents were released to Mr Patterson on review, but generally that review upheld the Keeper’s original position. Mr Patterson applied to the Commissioner for a decision.

Generally the Commissioner upheld the application of section 36(1) of FOISA to the information requested, which on the whole comprised communications between solicitor and client. He did find that certain documents were incorrectly withheld under that section, but found that these were court records and therefore exempt from disclosure under section 37(1)(a) of FOISA.



Background

1. On 19 January 2006 Mr Patterson wrote to the Keeper to asking for information held in relation to a boundary dispute(title reference number LAN30749) which led to a Lands Tribunal hearing.
2. On 16 February 2006 the Keeper wrote to Mr Patterson, disclosing the majority of the relevant documents held within his files. He withheld the remainder, however, on the basis that they were exempt from disclosure under section 36(1) of FOISA.
3. Mr Patterson wrote to the Keeper to ask him to review his decision to withhold the documents. Mr Patterson argued that the Keeper had not applied section 36(1) of FOISA correctly, and had not provided details of all of the documentation withheld. He expressed surprise at the lack of records of telephone conversations and concern that he had not received all the information within the scope of his request that was held by the Keeper.
4. On 5 April 2006 the Keeper wrote to Mr Patterson, stating that upon review he had decided that some of the documents which were originally withheld did not fall under section 36(1) and disclosed these to him. However the Keeper upheld his original decision to withhold the remaining documents. He provided a list of the documents remaining withheld and asked Mr Patterson to let him know if he believed any further relevant documents to be missing. Finally, the Keeper advised that his staff were not expected to keep notes of telephone conversations.
5. On 24 April 2006 Mr Patterson wrote to me, stating that he was dissatisfied with the outcome of the Keeper's review and applying to me for a decision in relation to the decision to withhold the remaining documents under section 36(1) of FOISA. He also requested that I investigate whether the Keeper held any further documentation in relation to his request.
6. The case was then allocated to an investigating officer and the application validated by establishing that Mr Patterson had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to his request.



The Investigation

7. On 31 May 2006, the investigating officer wrote to the Keeper, giving notice that an appeal had been received and that an investigation into the matter had begun and inviting comments from the Keeper, all as required under section 49(3)(a) of FOISA. The Keeper was asked to supply my Office with, amongst other items, all of the information withheld from and disclosed to Mr Patterson and an explanation of the methods used to search for the information requested.
8. On 19 June 2006, the Keeper wrote to the investigating officer, providing information about the background to the case, details of the search carried out to locate the documents requested by Mr Patterson, and copies of the documents provided to and withheld from Mr Patterson.
9. The investigating officer also asked the Keeper for further comments on its recording and retention of information, and on its application of section 36(1) of FOISA to the information requested. The Keeper responded with the information requested.
10. In response to a request from the investigating officer, Mr Patterson provided information about the documents he believed were held by the Keeper but had not been released to him. This was taken up with the Keeper, who provided further comments.

The Commissioner's Analysis and Findings

11. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Patterson and the Keeper and I am satisfied that no matter of relevance has been overlooked.
12. In this application, I have considered whether the Keeper was correct in applying section 36(1) of FOISA to the documents which he withheld from Mr Patterson, and whether the Keeper holds any further information falling within the scope of Mr Patterson's request. I have also considered whether certain documents fall under the exemption contained in section 37(1)(a) of FOISA.



Information held by the Keeper

13. Mr Patterson requested all documents held by the Keeper in relation to a boundary dispute over title reference number LAN30749 which led to a Lands Tribunal hearing.
14. In his submissions to me, the Keeper advised that the information sought by Mr Patterson derived from two sources only:
 - The correspondence/document file maintained by the Keeper's Legal Services directorate on the dispute with Mr Patterson and the subsequent Lands Tribunal case (such an individual file being opened for any case that was passed to Legal Services in connection with a dispute with a member of the public); and
 - The Land Register archive relating to title number LAN30749.

Both records were being retained indefinitely. The Keeper explained that this would not necessarily mean permanent retention in the case of the Legal Services file, although it would mean retention to the end of the 20-year prescriptive period after which a claim could not be raised.

15. The Keeper also confirmed that he did not at that time have any written policies regarding retention of correspondence from the public, and that staff members were not expected to record telephone conversations with members of the public.
16. Mr Patterson presented me with a number of examples from the Lands Tribunal's decision in his case which appeared to suggest to him, sometimes in conjunction with the information he had received from the Keeper, that not every document which fell within the scope of his request had been accounted for. The Keeper, on the other hand, argued that most of Mr Patterson's assertions related to the conduct of the Lands Tribunal case rather than the question of whether any further information was held. He identified one instance where Mr Patterson appeared to be arguing that a document identified in the Lands Tribunal decision had not been released to him and admitted that this document could not be traced in the relevant file. He suggested, however, that otherwise the relevant sequence of correspondence appeared to be complete and invited me to verify this.
17. Having looked at the information released to and withheld from Mr Patterson, and at both Mr Patterson's and the Keeper's submissions to me, I am satisfied with the Keeper's arguments as to what it holds and the places in which that information might be found. In the circumstances, I can find no evidence to suggest that further documentation is (or was at the time of the request) held by the Keeper in relation to Mr Patterson's request.



The application of section 36(1) of FOISA to the withheld documents

18. Section 36(1) of FOISA states that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.
19. One type of communication covered by this exemption is communications between legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled.

For example:

- a) The information being withheld must relate to communications with a legal adviser;
 - b) 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; and
 - c) The privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy.
20. The exemption also applies to documents created in contemplation of litigation, whether or not a lawyer is involved. Whatever the nature of the communication, however, the exemption will not apply unless the information is confidential in character: it will not attract the exemption if it has been shared with third parties, for example.
 21. In this case the majority of the information withheld is correspondence between the Keeper and his own in-house solicitors or the solicitors representing him at the Lands Tribunal hearing involving Mr Patterson.
 22. Having considered the information withheld and its context, it is clear to me that the majority of it constitutes communications with a solicitor offering advice and opinion in relation to a Lands Tribunal hearing. The advice and opinion has been given in a professional context and in a professional capacity. In all the circumstances, I am satisfied that all of the documents withheld by the Keeper fall under section 36(1) of FOISA, with the exception of the attachments to documents 8, 12, 19 and 20. These are all documents created for the Lands Tribunal hearing and they would have been lodged with the Tribunal and available to other parties to the hearing. I cannot, therefore, accept that they could be the subject of a claim of confidentiality of communications. I will consider them further below, at paragraph 23 onwards.
 23. The exemption in section 36(1) is subject to the public interest test laid down by section 2(1)(b) of FOISA, and I must now go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.



The Public Interest Test

24. The Courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal advisor and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and Others v Governor and Company of the Bank of England* (2004) UK HL 48.
25. In Decision 023/2005 (*Mr David Emslie and Communities Scotland*) 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.
26. The public interest issues in favour of releasing the 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.
27. 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.
28. 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 to defend its position adequately should that become necessary. It is also in the public interest that a public authority can receive the most comprehensive legal advice about its proposed actions.
29. There is an established means of scrutinising the legality of the decisions of public bodies, through judicial review in the courts. As noted above, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds and there would require to be compelling countervailing arguments for disclosure to outweigh that public interest.



30. In this case, I have considered the arguments presented to me by Mr Patterson along with all of the information available to me in relation to the application and its background. On balance, I have concluded that the public interest in the release of the information is outweighed by the public interest in maintaining the exemption, i.e. in ensuring that the Keeper and his legal representatives can give and receive legal advice in confidence. I have not identified any reasons for disclosure of the documents that 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 Keeper applied the public interest test correctly in withholding the documents from Mr Patterson.

The remaining documents

31. As I have set out above, there are certain documents which fall outwith the exemption contained in section 36(1) of FOISA. It appears to me, however, that these constitute court records and are therefore exempt under section 37(1)(a) of FOISA.
32. Section 37(1)(a) provides for an absolute exemption (i.e. one that is not subject to the public interest test) in respect of all information lodged, or otherwise placed in the custody of, a court for the purposes of court proceedings. Section 37(2) defines “court” as including “a tribunal or body exercising the judicial power of the State” and I am satisfied that the Lands Tribunal for Scotland falls within this definition.
33. The term “lodged” refers to the formal depositing of documents with a court. During the Justice 1 Committee’s consideration of this exemption, the then Justice Minister (Jim Wallace) suggested that documents not lodged with the court but held by it pending an appeal could fall under the term “otherwise placed in the custody of a court”.
34. Having considered the remaining withheld documents, their evident purpose and the submissions made to me by the Keeper, I am satisfied that they are court records and therefore exempt by virtue of section 37(1)(a) of FOISA. As section 37 is an absolute exemption I am not required to go on to consider the public interest. I must point out, however, that Mr Patterson will in any event have had access to these documents as a party to the Tribunal proceedings.



Decision

I find that the Keeper of the Registers of Scotland (the Keeper) generally acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Patterson. In particular, I find that he correctly applied section 36(1) of FOISA to the majority of the documents withheld from Mr Patterson.

I have found that the remaining documents withheld by the Keeper are exempt from disclosure under section 37(1)(a) of FOISA. I do not require the Keeper to take any action as a result of my decision.

Appeal

Should either party 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 notice.

Kevin Dunion
Scottish Information Commissioner
06 September 2007



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.

37 Court records, etc.

- (1) Information is exempt information if it is contained in-
 - (a) a document-
 - (i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter
 - (ii) served on, or by, a Scottish public authority for the purposes of such proceedings; or



- (iii) created by a court or a member of its administrative staff for the purposes of, or in the course of, such proceedings; or
- (b) a document-
 - (i) lodged with, or otherwise placed in the custody of, a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration; or
 - (ii) created by such a person for such purposes,

and a Scottish public authority holds the information solely because it is contained in such a document.

(2) In this section-

"court" includes a tribunal or body exercising the judicial power of the State; and

"inquiry" means an inquiry or hearing held under a provision contained in, or made under, an enactment.