



Scottish Information  
Commissioner

**Decision 139/2007 MacRoberts Solicitors and  
Dundee City Council**

***28 separate requests for information, seeking copies of  
notices or orders served under various pieces of legislation.***

**Applicant: MacRoberts Solicitors  
Authority: Dundee City Council  
Case No: 200502330  
Decision Date: 15 August 2007**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
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## **Decision 139/2007 MacRoberts Solicitors and Dundee City Council**

**28 separate requests for information – requests for either copies of Council registers or for copies of notices or orders served under various pieces of legislation – Information withheld under section 33(1)(b) (Commercial interests and the economy)**

### **Relevant Statutory Provisions and Other Sources**

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 25 (Information otherwise accessible) and 33(1)(b) (Commercial interests and the economy).

The full text of each of these provisions is reproduced in Appendix 1 to this decision. Appendices 1 and 2 (Appendix 2 is referred to below) form part of this decision.

### **Facts**

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MacRoberts Solicitors (MacRoberts) made 28 separate requests for information, relating to copies of various registers, notices and orders under specific legislation from Dundee City Council (the Council). The Council responded by withholding the information requested, relying on the exemption in section 33(1)(b) (Commercial interests and the economy) of FOISA. MacRoberts were not satisfied with this response and asked the Council to review its decision. The Council carried out a review and, as a result, notified MacRoberts that it was maintaining its position to withhold the information under section 33(1)(b) of FOISA. MacRoberts remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with MacRoberts' request for information in accordance with Part 1 of FOISA. He required the Council to provide MacRoberts with full details of the information requested.



## Background

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1. On 10 May 2005, MacRoberts made 28 separate requests for information to the Council. These requests were either for copies of registers held by the Council, or for copies of extant notices or orders either made, served, discharged or released, since 1 March 2005, under or pursuant to the following legislation:
  - The Roads (Scotland) Act 1984
  - The Housing (Scotland) Act 1987 (sections 90, 108, 114, 115, 116, 162, 166)
  - The Civic Government (Scotland) Act 1982 (sections 87, 90, 92)
  - The Building (Scotland) Acts 1959/70 (sections 10, 11, 13)
  - The Town & Country Planning (Scotland) Act 1997 (sections 127, 140, 145, 168, 179, 189, 207)
  - The Planning (Listed Building & Conservation Area) (Scotland) Act 1997 (sections 3, 34, 42, 43, 49)
  - The Environmental Protection Act 1990 (section 80)

A full list of all 28 requests for information submitted by MacRoberts is set out in Appendix 2 of this Decision Notice.
2. On 10 June 2005, the Council wrote to MacRoberts in response to their request for information. The Council confirmed that they were withholding the information requested, utilising the exemption in section 33(1)(b) of FOISA, on the basis that disclosure of the information would or would be likely to prejudice substantially the commercial interests of the Council. The Council also put forward their views surrounding the issue of public interest, concluding that it would not be in the public interest to provide the information requested.
3. On 15 June 2005, MacRoberts wrote to the Council requesting a review of its decision to withhold the information. MacRoberts disagreed that the release of the information would prejudice substantially the Council's commercial interests.



4. On 15 July 2005, the Council notified MacRoberts of the outcome of its review and advised them that it had maintained its position on section 33(1)(b) of FOISA. The Council provided additional background in support of its views and also addressed points raised by MacRoberts in their request for review.
5. MacRoberts remained dissatisfied with the way in which their requests had been dealt with and, on 19 July 2005, applied to me for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that MacRoberts had made requests for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to their requests.
7. The case was then allocated to an investigating officer.

## **The Investigation**

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8. In conducting the investigation, the Council and MacRoberts were advised that the 28 separate requests for information would be dealt with as a single investigation in the first instance. The cases would only be divided into separate and distinct investigations if it became clear that the differing circumstances of the individual cases required this to be done. This has not proved to be necessary.
9. The investigating officer wrote to the Council on 29 July 2005, notifying it of the application made and providing it with an opportunity to provide comments in terms of section 49(3)(a) of FOISA. In doing so, the Council was invited to provide a substantive response in relation to each of MacRoberts' requests for information and on the application as a whole. The Council was also asked to comment on a number of specific questions raised by the investigating officer.
10. On 26 August 2005, the Council issued a response to the investigating officer stating that the previous submissions from the Council set out the reasons for the Council not disclosing the information requested and as such it had nothing further to add to these submissions. The Council did however provide a response to the specific questions raised by the investigation officer.



11. On 4 July 2006 the Council was asked to provide a further submission setting out the precise manner in which it considered that the release of the requested information would “substantially prejudice” its commercial interests. The Council was also asked to comment on whether the information requested is available from the Council through any other means and to comment on whether the Council considered that the requested information would attract copyright.
12. The Council responded on 28 July 2006 and provided additional arguments to support its decision to withhold the information requested. The Council also provided a set of sample documents intended to assist the investigating officer.
13. The Council noted that the Council has offered the applicant the same facility as they do to all members of the public, i.e. to visit the Council to search the public records for the information they have requested. The investigating officer contacted the Council to seek clarification regarding this matter with particular reference to the accessibility of the information pertinent to MacRoberts’ requests and the Council confirmed that the information requested is publicly available where any exists.
14. The Council has not cited section 25 (Information otherwise accessible) at any point in their submissions and so I have not specifically addressed this exemption in this decision. However, I note that the information sought by MacRoberts is not available from the Council’s publication scheme and that the information, even if the Council is under an obligation by or under any enactment to communicate it, is only made available for inspection at the Council’s premises. As such I do not consider that the information would be exempt in terms of section 25(1) read in conjunction with section 25(3) or section 25(2)(b)(i) respectively.

## **The Commissioner’s Analysis and Findings**

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15. In coming to a decision on this matter, I have taken into consideration the submissions provided by both MacRoberts and the Council and I am satisfied that no matter of relevance has been overlooked.
16. I must decide whether the Council acted in accordance with Part 1 of FOISA in refusing to supply the information on the basis that it was exempt in terms of section 33(1)(b) of FOISA.



### **Section 33 (1)(b) – Commercial Interests**

17. The Council argued in its submissions that the information requested by MacRoberts was exempt under section 33(1)(b) of FOISA.
18. Section 33(1)(b) states that information is exempt if its disclosure under FOISA:  
  
*‘would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority)’*
19. In summary, the Council stated in its submissions to my office that the requested information was used to create Property Enquiry Certificates (PECs) and that the release of the information requested would substantially prejudice the Council’s commercial interests with regard to the sale of those PECs.
20. The Council suggested that the disclosure of such information would allow commercial rivals to prepare their own PECs at little or no cost, using information generated by the Council, which would give rivals a competitive edge against the Councils own PEC service.
21. The Council pointed out that in 2005, the Council earned around £250,000 from the sale of PECs. It went on to explain that it had calculated that for every £50,000 of income the Council does not receive, £1 requires to be added to the Band D Council Tax. It went on to say that if income from this source was reduced to zero because of competition, that would require the Council (all things being equal) to increase its Band D Council Tax by £5, which it feels would not be in the public interest.

### **Application of the exemption**

22. As stated, the Council has argued that release of the information requested by MacRoberts would prejudice substantially its commercial interests. MacRoberts, on the other hand, have argued that release would have little or no impact on the Council’s ability to participate successfully in the commercial activity of supplying PECs.
23. When considering the application of the exemption under section 33(1)(b), the first issue which must be addressed is whether the Council holds commercial interests in relation to the information in question.



*Do commercial interests exist with regard to the requested information?*

24. Having considered this matter, I am of the view that the Council's activity in this area does indeed constitute a commercial activity, and that the Council holds commercial interests in relation to that activity. This service is provided by the Council in response to an existing demand, and is provided with the purpose of both meeting that demand, and generating revenue from it. As such, I agree that the Council's provision of the PEC service represents a commercial activity in relation to which the Council holds commercial interests.
25. While MacRoberts have not directly requested copies of PECs, it is clear that the information requested constitutes the raw data which is used in the production of these certificates. As a result, I am also satisfied that there will be a relationship between the release of the information requested and the commercial interests described above.

*Would release of the information substantially prejudice those interests?*

26. The next question which must be considered, therefore, relates to the impact of the potential release of information on those commercial interests.
27. As set out in paragraph 18 above, section 33(1)(b) of FOISA states that information is exempt if its disclosure would, or would be likely to, prejudice substantially the relevant commercial interests.
28. Paragraph 72 of the *Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002* (commonly referred to as the Section 60 Code) notes that the term 'substantial prejudice' refers to prejudice which should be considered to be '*real, actual and of significant substance*'. In order to assess the application of this exemption, therefore, I am obliged to consider the impact that release of information would have on the interests in question, and only uphold an authority's decision to withhold information if I accept that release would result in the required degree of impact on those interests.
29. In making its case to my Office, the Council presented the following scenario by which it considered that the release of the information would prejudice substantially its commercial interests.





30. The Council stated that its commercial interests would be prejudiced substantially in that release would allow its competitors to produce their own PECs using information which had been obtained at no cost to themselves from the Council. This, the Council argued, would allow competitors to add this information to their databases, where they would fix a price for PECs and then advertise the service to the marketplace. This would, as a consequence, have a detrimental impact on the Council's own commercial revenue from this activity.
31. The arguments put forward by the Council must however be assessed alongside the counter-arguments put forward by MacRoberts. In trying to assess the potential impact of disclosure on the Council to its commercial activities, I made reference to a previous decision (112/2007 MacRoberts Solicitors and Glasgow City Council) in formulating my views on this particular case.
32. As part of the investigation process applicable to decision 112/2007, my staff conducted a survey of authorities who had disclosed similar information to that requested in this case. This was with a view to gauging whether any had subsequently experienced damage to their own commercial interests. Representatives from eleven local authorities were contacted by my staff and discussions were held in relation to the relevant issues.
33. The evidence gathered as a result of these discussions indicated that the concerns held by the Council, in relation to the predicted harm to their own commercial interests were not generally borne out in practice. Indeed, it was found that none of the local authorities questioned could demonstrate that their own commercial revenues had fallen substantially as a direct result of the release of equivalent information in response to FOISA requests.
34. While some authorities did report that their own revenues from the issue of PECs had indeed fallen, it was generally acknowledged that this decline in revenue could not be solely and primarily attributed to FOISA. Instead, relevant authorities commonly acknowledged that such revenues had been falling steadily in recent years as part of a trend that predated the implementation of FOISA. Where such a trend was reported, it was commonly considered that this had its origins in the rise in the number of commercial competitors offering PEC services, and that such services were being offered prior to the implementation of FOISA. It was acknowledged that commercial competitors were currently producing PECs from information available through publicly accessible local authority registers, or through published minutes of authority meetings.





35. Equally, a number of authorities reported that they had seen little or no impact on their own commercial revenues as a result of the release of this type of information. Several authorities also expressed the view that, regardless of the release of relevant information in response to FOISA requests, the PEC product offered by a local authority maintained a distinct commercial advantage over rival products, and that this had minimised or eliminated any corresponding impact on revenues. This was seen to be the case because it is only local authorities which are able to provide PECs that are fully up to date and accurate; by contrast, the information which informed rival PECs would often be several months out of date. In addition (and for the same reason) local authorities were claimed to be the only bodies which could offer a fully warranted and indemnified product to the market. It should also be noted that none of the authorities interviewed reported any evidence of substantial harm occurring to their PECs revenues as a result of individual homeowners seeking access to underlying PEC information.
36. Having considered at length the issues raised by this case, I conclude that I cannot accept the Council's assertion that the release of the information in question would prejudice substantially their commercial interests. As set out above, I have found no compelling evidence to suggest that such substantial prejudice has occurred as a direct result of release of this type of information under FOISA by other local authorities, and the Council has not presented sufficiently compelling evidence to demonstrate that their own circumstances would differ significantly in this respect.
37. As mentioned above at paragraph 28, the Section 60 Code notes that the term 'substantial prejudice' refers to prejudice which should be considered to be '*real, actual and of significant substance*'. While I accept that it is possible (although by no means proven) that there may be some limited impact on the Council's revenues as a result of the release of this information under FOISA, I have found no evidence to support the view that this impact will be '*real, actual and of significant substance*'. I am not, therefore, satisfied that release of information will, as proposed by the Council, cause the requisite degree of harm to support the application of section 33(1)(b).
38. Where a Council has acknowledged that their own PECs are warranted for accuracy and that they will indemnify anyone who suffers a financial loss as a direct result of any inaccuracy, it is my view that this factor, combined with the fact that the PEC information available from the Council will be current at the time the certificate is issued, will continue to provide the Council with a distinct commercial advantage in the PEC marketplace. Indeed, as noted above, this is a view that is shared by a number of other local authorities offering similar services. I consider that the fact that this advantage exists will serve to ensure that any adverse effects on its own revenues can be minimised.



39. In coming to this decision, I have also taken into account the fact that most, if not all, of the core information sought by MacRoberts' client is currently obtainable through access to publicly accessible registers and minutes of relevant Council meetings. Indeed, it is my understanding that it is this information which principally informs the PECs which are currently produced by the Council's commercial competitors. In this respect, I find it hard to accept that information which is freely and publicly available in this manner will have necessary qualities to attract the exemption under section 33(1)(b) of FOISA, and would require that, in order for such circumstances to be demonstrated satisfactorily, an authority provide clear and unequivocal evidence that the required level of prejudice would, or would be likely to, occur as a result of the release of information under FOISA. In this case, the Council has been unable to do so.
40. Finally, in drawing my conclusions I have also taken into account the comments made by the Council in paragraph 21. The Council details the level of income it receives from the sale of PECs and goes on to explain that if this income was to be reduced to "zero" the net result would be an increase in council tax bills. I am not persuaded by this argument for two reasons. Firstly, it is my view that the scenario provided by the Council of a reduction to "zero" income is an unrealistic one as there is no evidence to support this view from the research my office has carried out. Secondly, as demonstrated above there is no evidence to suggest that increased competition in the PEC market has led to a significant fall in local authority revenues, certainly not to the levels identified by Dundee City Council. On this basis, I am unable to accept the Council's assertion that the release of the information would in fact have the financial ramifications it outlines.
41. I therefore find that the Council failed to act in accordance with FOISA in applying the exemption under section 33(1)(b) of FOISA to the information requested by MacRoberts.
42. The exemption in section 33(1)(b) is subject to the public interest test required by section 2(1)(b) of FOISA. However, given that I have found that the exemption does not apply, I am not required to go on to consider whether the public interest in maintaining the exemption outweighs that in disclosure of the information.



## **Decision**

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I find that Dundee City Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request from MacRoberts on the basis of the exemption in section 33(1)(b). In doing so the Council failed to comply with section 1(1) of FOISA.

I therefore require Dundee City Council to provide MacRoberts with a full and accurate response to their request for information. I require that the Council supply this information to MacRoberts no later than 45 days after receipt of this notice.

## **Appeal**

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

**Kevin Dunion**  
**Scottish Information Commissioner**  
**15 August 2007**



## Appendix 1

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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.

##### 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.



### **33 Commercial interests and the economy**

- (1) Information is exempt information if-
  - (...)
  - (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).



## Appendix 2

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The following requests were made by MacRoberts to the Council on 10 May 2005:

1. A copy of any changes made since 1 March 2005 to the Register of Private Water Supplies held by the Council.
2. A copy of any changes made since 1 March 2005 to the Register of Public Roads maintained under or pursuant to the Roads (Scotland) Act 1984.
3. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 90 of the Housing (Scotland) Act 1987.
4. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 108 of the Housing (Scotland) Act 1987.
5. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 114 of the Housing (Scotland) Act 1987.
6. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 115 of the Housing (Scotland) Act 1987.
7. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 116 of the Housing (Scotland) Act 1987.
8. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 162 of the Housing (Scotland) Act 1987.
9. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 166 of the Housing (Scotland) Act 1987.
10. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 87 of the Civic Government (Scotland) Act 1982.
11. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 90 of the Civic Government (Scotland) Act 1982.
12. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 92 of the Civic Government (Scotland) Act 1982.
13. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 10 of the Building (Scotland) Acts 1959/70.



14. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 11 of the Building (Scotland) Acts 1959/70.
15. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 13 of the Building (Scotland) Acts 1959/70.
16. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 127 of the Town and Country Planning (Scotland) Act 1997.
17. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 140 of the Town and Country Planning (Scotland) Act 1997.
18. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 145 of the Town and Country Planning (Scotland) Act 1997.
19. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 168 of the Town and Country Planning (Scotland) Act 1997.
20. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 179 of the Town and Country Planning (Scotland) Act 1997.
21. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 189 of the Town and Country Planning (Scotland) Act 1997.
22. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 207 of the Town and Country Planning (Scotland) Act 1997.
23. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 3 of the Planning (Listed Building & Conservation Area) (Scotland) Act 1997.
24. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 34 of the Planning (Listed Building & Conservation Area) (Scotland) Act 1997.
25. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 42 of the Planning (Listed Building & Conservation Area) (Scotland) Act 1997.
26. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 43 of the Planning (Listed Building & Conservation Area) (Scotland) Act 1997.
27. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 49 of the Planning (Listed Building & Conservation Area) (Scotland) Act 1997.
28. A copy of all Notices or Orders made, served, discharged or released since 1 March 2005, under or pursuant to Section 80 of the Environmental Protection Act 1990.