

# Decision Notice



Decision 131/2009 Mr R Manson and North Lanarkshire Council

Report from contractor in relation to a claim

Reference No: 200900867

Decision Date: 13 November 2009

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Manson requested from North Lanarkshire Council (the Council) a copy of a contractor's report relating to a claim for compensation. The Council responded by withholding the information on the basis of the exemption in section 36(1) of FOISA. Following a review, Mr Manson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Manson's request for information in accordance with Part 1 of FOISA, as the information requested was subject to litigation privilege and had been correctly withheld under section 36(1). Consequently, he did not require the Council to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections (1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions), 15(1) (Duty to provide advice and assistance) and 36(1) (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. On 20 October 2008, Mr Manson wrote to the Council requesting a copy of a report prepared by a private contractor and provided to the Council in relation to a compensation claim he had made to the Council.
2. The Council responded on 5 March 2009, advising Mr Manson that the report requested was exempt in terms of section 36(1) of FOISA, because in its view the report was information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The Council went on to conclude that the public interest lay in favour of withholding the report in question.
3. On 18 March 2009, Mr Manson wrote to the Council requesting a review of its decision. In particular, Mr Manson referred to the time the Council had taken to respond to his request of 20 October 2008 (although it was also clear that he still wished a copy of the report).



4. The Council notified Mr Manson of the outcome of its review on 24 March 2009, confirming that it was upholding its decision to withhold the information under section 36(1) of FOISA.
5. On 4 May 2009 Mr Manson wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Manson 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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7. On 11 May 2009, the Council was notified in writing that an application had been received from Mr Manson and asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, 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, the Council were asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested (with particular reference to section 36(1)).
9. The Council's submissions will be considered in the Commissioner's analysis and findings section below.

## Commissioner's analysis and findings

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10. 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 Manson and the Council and is satisfied that no matter of relevance has been overlooked.

### Section 36(1) - (Confidentiality)

11. In withholding the information requested by Mr Manson, the Council relied on the exemption in section 36(1) of FOISA, on the basis that the report in question was prepared in contemplation of litigation.



12. To provide some background, the Council stated that on receipt of a claim from Mr Manson in respect of alleged damage to his property, its Insurance Section had instigated an investigation. The investigation revealed that the work in question had been undertaken by a private contractor to the Council. The contractor subsequently produced a report setting out its position on the matter, which was then passed to the Council for consideration.
13. The exemption in section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. Among the types of communication which fall into this category are those which are subject to legal professional privilege. As the Council has submitted, one aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation.
14. Communications in contemplation of litigation are granted confidentiality in order to ensure that any party or prospective party to court proceedings can prepare their case as fully as possible, without the risk that their opponent(s) or prospective opponent(s) will gain access to the material generated by their preparations. The privilege covers communications from the stage when litigation is pending or in contemplation. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.
15. Litigation privilege will apply to documents created by the parties to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation: the communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded. If litigation privilege applies to a document, the information in it will be exempt under section 36(1).
16. In this case, therefore, the Commissioner must consider whether the contractor's report was prepared in contemplation of litigation. The Council asked the contractor to provide a report following a claim for compensation made by Mr Manson. The Council received the claim following correspondence from Mr Manson in which he made it clear that he intended to pursue the matter. In the circumstances, the Commissioner accepts the Council's contention that its actions in response to the claim were taken in contemplation of future litigation.
17. Having considered the context and timing of the report, the Commissioner is satisfied that it was created by the contractor following (and as a consequence of) the Council's receipt of Mr Manson's claim. In light of these facts, and having considered the information in the report, the Commissioner is satisfied that the report was prepared in contemplation of litigation. Given the contractor's involvement in the matter, he accepts the Council's contention that both it and the Council were potential defenders in any litigation raised. Both, therefore, were able to claim privilege in the report. In the circumstances, he accepts that neither party had waived that privilege and accordingly that the information in the report was exempt under section 36(1) of FOISA.



18. The exemption in section 36(1) is, however, a qualified exemption, which means that its application is subject to the public interest test as set out in section 2(1)(b) of FOISA. Therefore, having accepted the application of the exemption in this particular case, the Commissioner must go on to consider whether, in all circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption (and therefore withholding the information).

*Public interest test*

19. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications 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) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally, including cases such as this which concerns litigation privilege. Consequently, while he will consider each case on an individual basis, he is likely to order the release of such communications in highly compelling cases only.
20. The Council submitted that the public interest could not require the Council or a contractor of the Council in any potential litigation to be in a position worse than any other litigant, adding that it was in the public interest that public bodies such as the Council should be able to defend legal actions with all the protections available to other litigants, including the protection with regard to reports prepared in contemplation of litigation.
21. Mr Manson argued that although the report itself related only to the alleged damage to his own property, he had noted after inspecting other properties in his area that similar damage appeared to be evident. Although Mr Manson did not expand on this, the Commissioner understands that he is suggesting a common cause of this damage.
22. In this case, while accepting a general public interest in authorities being open to scrutiny and accountable for their actions, the Commissioner can identify no particularly strong argument that there is a more specific public interest in the disclosure of the information in the contractor's report. On the other hand, as indicated above, there is a clear and compelling public interest in allowing the Council (along with any other party to contemplated legal proceedings, which in this case might include the contractor) to prepare fully for such litigation without these preparations being open to examination by the other party.
23. On balance, therefore, the Commissioner is satisfied, in all the circumstances of this case, that any public interest in disclosure is outweighed by the public interest in maintaining the exemption in section 36(1).



## Recent Court of Session Opinion

24. The Commissioner notes that the information request by Mr Manson was for a copy of a document. In the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73, the Court of Session emphasised that FOISA gives a right to information, not documents. However, the Court also said, in paragraph 45 of its Opinion, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. The Court also said that if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
25. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between Mr Manson and the Council that the Council questioned the validity of the information request. In addition, there is nothing to suggest from correspondence which the council has subsequently had with the Commissioner that the Council was unclear as to what the information request sought.
26. The Commissioner is satisfied that the request is reasonably clear and that the information request is therefore valid.

## DECISION

The Commissioner finds that North Lanarkshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Manson.



## Appeal

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Should either Mr Manson or North Lanarkshire 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 after the date of intimation of this decision notice.

**Margaret Keyse**  
**Head of Enforcement**  
**13 November 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.

...

- (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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

##### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

##### 36 Confidentiality

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

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