



Scottish Information  
Commissioner

**Decision 002/2008 Ms Diana Cairns and the  
City of Edinburgh Council**

*Legal advice held by the Council*

**Applicant: Ms Diana Cairns  
Authority: City of Edinburgh Council  
Case No: 200700376  
Decision Date: 10 January 2008**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
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## Decision 002/2008 Ms Diana Cairns and the City of Edinburgh Council

***Request for a copy of legal advice held by the Council – information withheld under section 36(1) of the Freedom of Information (Scotland) Act 2002 (confidentiality) – Commissioner concluded privilege waived and required release of the information***

### Relevant Statutory Provisions and Other Sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions) and 36(1) (Confidentiality)

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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Ms Cairns requested a copy of legal advice obtained by the City of Edinburgh Council (the Council) relating to the status of land under consideration for the relocation of two schools. The Council responded, withholding the advice under section 36(1) of FOISA. Following a review, which upheld the Council's original decision, Ms Cairns applied to the Commissioner for a decision.

Following an investigation, the Commissioner concluded that privilege in the legal advice had been waived and therefore that the exemption in section 36(1) of FOISA did not apply. He required the Council to release a copy of the advice.



## Background

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1. On 15 September 2006, Ms Cairns wrote to the Council requesting a copy of the legal advice given to the Council which stated that there was no legal impediment to building on Portobello Park and Golf Course, one of the options put forward by the Council for the relocation of St John's Primary School and Portobello High School.
2. On 2 October 2006, the Council wrote to Ms Cairns, asking that she clarify where the statement that there was no legal impediment to building on Portobello Park and Golf Course had been made.
3. Ms Cairns responded on 12 October 2006, stating that the statement had been made by a Councillor at a public meeting held on 22 April of that year, and had been reiterated on a number of further occasions.
4. Having received clarification, the Council responded to Ms Cairns' request for information on 26 October 2006. It withheld the information requested on the basis that it was protected by legal professional privilege and so was exempt from disclosure by virtue of section 36(1) of FOISA.
5. On 2 December 2006, Ms Cairns wrote to the Council requesting a review of its decision. In particular, Ms Cairns challenged the Council's view that the public interest did not favour release of the information.
6. The Council wrote to notify Ms Cairns of the outcome of its review on 8 January 2007. It upheld its initial findings and repeated that the information requested was exempt from disclosure under section 36(1) of FOISA.
7. On 14 March 2007, Ms Cairns wrote to my Office, stating that she was dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Ms Cairns 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 that request.



## The Investigation

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9. On 21 March 2007, the Council was notified in writing that an application had been received from Ms Cairns and was asked to provide my Office with specified items of information required for the purposes of the investigation. The Council responded with the information requested.
10. The case was then allocated to an investigating officer, who asked the Council to provide its comments on the application, as required by section 49(3)(a) of FOISA, and to respond to specific questions arising in the course of the investigation.
11. In the course of the investigation, the Council provided my Office with four documents which it claimed fell within the scope of Ms Cairns' request, and consequently were exempt from disclosure by virtue of section 36(1) of FOISA.
12. Towards the end of the investigation and after having been prompted to do so by the investigating officer, the Council carried out a further search for documents relating to Ms Cairns' request. Following this search, the Council produced a further two relevant emails.
13. The Council also provided my Office with comments on the case and background documents which informed my findings on this matter.

### *The Council's submissions*

14. In its submissions to me, the Council argued that any legal advice on the issue in question was exempt from disclosure under section 36(1), pointing out that it related to highly complex matters where the legal position was not entirely clear. It went on to assert that Scottish public authorities should be able to consider such advice in private, especially given that litigation could follow. While conceding that there was a public interest in the use to which the land in question might be put, the Council argued that this was not strong enough to outweigh the need for a local authority charged with the relevant functions to be able to consider legal advice in private. It cited my indication in previous decisions that the argument for disclosure of legal advice would apply in "highly compelling cases" only and suggested that this was not such a case.



### *Ms Cairns' submissions*

15. Ms Cairns believes that the issue of building on the land in question is one of considerable public interest, and that public debate on the matter would be informed by release of the legal opinion and general openness on the matter. She does not believe that the Council should have any difficulty with publication of the advice if it is confident in it. As the Council has used taxpayers' money to obtain legal advice, she believes that it is only fair that those taxpayers should have access to the advice received.

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

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16. 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 Ms Cairns and the Council and am satisfied that no matter of relevance has been overlooked.
17. Here, I must come to a decision on whether the Council correctly applied section 36(1) of FOISA to the information requested by Ms Cairns.
18. The documents withheld from Ms Cairns comprise four emails and one memo sent by the Council's in house legal advisors to councillors and officers of the Council. The Council has argued that the information in these documents is exempt from disclosure by virtue of section 36(1) of FOISA, as they constitute privileged communications between legal advisor and client.

### **Section 36(1) of FOISA**

19. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. One type of communications which falls into this category is communications which are subject to legal professional privilege. Legal professional privilege can itself be split into two categories – legal advice privilege and litigation privilege (also known as communications *post litem motam*).
20. Legal advice privilege covers communications between lawyers and their clients, where legal advice is sought or given.
21. The exemption in section 36(1) of FOISA is subject to the public interest test, as required by section 2(1)(b) of FOISA. This means that even if I find that the information to be exempt in terms of section 36(1) of FOISA, I must order release of the information unless I am satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure.



22. Having examined the six documents withheld by the Council in response to Ms Cairns' request, I am satisfied that they are communications between a legal advisor and client and so constitute documents to which the legal advice privilege could be attached.
23. I will now go on to consider whether the Council waived its legal professional privilege in relation to those documents.

*Waiver of legal professional privilege*

24. In certain circumstances, the holder (in this case, the Council) of privilege in particular advice sought or obtained from a legal advisor can be shown to have waived it. The general rule on waiver of privilege is that if a party (to legal proceedings) makes public the content of a privileged document, or makes public the terms of privileged advice, they will have waived the privilege in that document or advice. Essentially, where the content of privileged information has been disclosed in order to evidence, or provide authority for, the position that the party is advancing, then privilege will have been waived.
25. Additionally, a party cannot "cherry pick" or put part of a privileged document or series of documents into the public domain without waiving the privilege in the remainder. This will not be the case, however, where a party has released some, but not all, of the privileged information which they hold, as long as the disclosed information and the undisclosed information relate to separate issues, or are clearly severable from each other, so as not to create a misleading impression of the information disclosed. In these latter circumstances, the privilege in the undisclosed (separate or severable) information will remain intact.
26. In this case, Ms Cairns has requested a copy of the legal advice which she understood formed the basis of a councillor's statement that there was no legal impediment to building on Portobello Park and Golf Course.
27. In its response to Ms Cairns' request, the Council stated that the statements had been made following upon legal advice being received by the Children and Families Department of the Council.
28. Paragraph 2(f) of the committee minutes of the meeting of the Executive of the Council held on 12 September 2006 relating to the replacement of Portobello High School and St John's Primary School (available online at [http://cpol.edinburgh.gov.uk/getdoc\\_ext.asp?DocId=92390](http://cpol.edinburgh.gov.uk/getdoc_ext.asp?DocId=92390) ), states:  
  
" [The Director of Children and Families] advised that legal advice indicated that there was no legal impediment to the use of the golf course and park site for the purposes outlined."



29. I am satisfied, having examined the relevant section of the document referred to in paragraph 26 above, that the Council has to a significant extent disclosed the substance of the legal advice contained in the documents requested by Ms Cairns in support of its position on this matter. I am therefore satisfied that on this occasion the Council has waived its legal privilege attached to the advice sought by Ms Cairns. Having considered the advice in question fully, I am not satisfied that there is information remaining undisclosed which could reasonably be regarded as relating to a separate issue or as being severable from the advice disclosed. As section 36(1) of FOISA applies only to privileged information and in this case I have found that privilege to be waived, I cannot accept that the information requested falls under that exemption. Therefore, I find that the Council has incorrectly applied section 36(1) of FOISA to the information requested by Ms Cairns.
30. As I have found that the information requested does not fall under the exemption contained within section 36(1) of FOISA, I am not required to go on to consider whether, in all circumstances of the case, the public interest in disclosure of the information contained in the documents withheld is outweighed by the public interest in maintaining the exemption.

## Decision

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I find that the City of Edinburgh 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 Ms Diana Cairns. In refusing to disclose the information requested by Ms Cairns, the City of Edinburgh Council misapplied the exemption in section 36(1) of FOISA and thereby failed to deal with Ms Cairns' request in accordance with section 1(1) of FOISA.

I therefore require the Council to release the following information to Ms Cairns within 45 days after the date of intimation of this decision notice:

- Email Murray/Marshall 7 February 2006 16:23
- Email Strachan/Aitken April 07 2006 5:17 pm
- Email Strachan/Miller April 12 2006 4:24 pm
- Memo Strachan/Perry dated 13 April 2006
- Email Strachan/Perry 27 April 2006 17:06 (with attachment)



## **Appeal**

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Should either Ms Cairns or the City of Edinburgh 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.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**10 January 2008**





## 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.

(...)

##### 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.
- (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 –
- (a) section 25;
  - (b) section 26;
  - (c) section 36(2);
  - (d) section 37; and
  - (e) in subsection (1) of section 38 –
    - (i) paragraphs (a), (c) and (d); and
    - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.



## **36 Confidentiality**

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

(...)