

Decision 096/2006 Mr George Waddell and South Lanarkshire Council

Liability loss adjuster's report

**Applicant: Mr George Waddell
Authority: South Lanarkshire Council
Case No: 200503134
Decision Date: 05 June 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 096/2006 – Mr Waddell and South Lanarkshire Council

Request for information including loss adjuster's report – information withheld under regulations 10(5)(b), 10(5)(d) and 10(5)(e) of the Environmental Information (Scotland) Regulations 2004.

Facts

Mr Waddell requested a copy of reports relating to the drainage outside his house, including a loss adjuster's report prepared for South Lanarkshire Council (the Council) with a view to a possible small claims litigation by Mr Waddell. The Council refused this request, citing regulations 10(5)(b), 10(5)(d) and 10(5)(e) of the Environmental Information (Scotland) Regulations 2004 (the EIRs).

Outcome

The Commissioner found that the Council acted correctly in considering Mr Waddell's requests under the Environmental Information (Scotland) Regulations 2004 (EIRs) as opposed to the Freedom of Information (Scotland) Act 2002.

The Commissioner found that the Council had justified the withholding of part of the requested information under regulation 10(5)(b) of the EIRs.

The Commissioner found that the Council had not justified withholding the totality of the requested information under regulation 10(5)(b) of the EIRs and required the Council to supply Mr Waddell with a copy of those parts of the liability loss adjuster's report relating to matters of fact (subject to the redactions detailed in this Decision).

The Commissioner found that the Council did not conduct a review within the statutory timescale.



Appeal

Should either the Council or Mr Waddell 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 notice.

Background

1. On 19 July 2005, Mr Waddell wrote to Simpson & Marwick, Solicitors asking for information from the Council. Mr Waddell asked for the name of the person responsible for the Council's drain cleaning equipment on 9 August 2004 for a specific route, a copy of any report or findings of a named Council employee who had met with Mr Waddell, and a copy of the report of the Liability Loss Adjusters (Andrew Merchant Ltd) - to the Claims Handling Agents (Gallagher Bassett International Ltd) - appointed by the Council to investigate the matter of the damage caused by the failure of drains and gullies to deal with rainwater in the vicinity of Mr Waddell's property.
2. Having received no response from Simpson & Marwick, Mr Waddell then wrote (14 September 2005) to the Council seeking a review of his initial application (of 19 July 2005) to the Council via Simpson and Marwick. This request for review was acknowledged by the Council in a letter of 15 September 2005. The Council then wrote to Mr Waddell (3 October 2005) informing him that his request for review on 14 September 2005 would be treated as an initial request. This was following advice from my Office that Simpson & Marwick, whilst engaged by the Council to act in specific instances for the Council, were not to be regarded as being part of the Council for the purposes of the Freedom of Information (Scotland) Act 2002 (FOISA).
3. The Council responded in writing on 11 October 2005, enclosing a copy of the report on drain cleaning for the specific route (a 6 monthly cyclical gully cleaning record). The Council stated that it did not hold any findings or report from the named Council employee following a meeting with Mr Waddell. The Council confirmed that it held the Loss Adjuster's report, but refused to disclose it on the basis of section 36(1) of FOISA (confidentiality of legal communications).
4. On 13 October 2005 Mr Waddell asked the Council to review its decision.



5. On 16 November 2005, the Council wrote to Mr Waddell informing him that the loss adjuster's report would not be disclosed, not in terms of section 36(1) of FOISA, but on the grounds of regulation 10(5)(d) of the EIRs (disclosure would, or would be likely to, prejudice substantially the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law).
6. On 21 November 2005 Mr Waddell applied to me for a decision as to whether the Council had dealt with his information request in accordance with Part 1 of FOISA.
7. The case was allocated to an investigating officer.

The Investigation

8. Mr Waddell's appeal was validated by establishing that he had made a valid information request to a Scottish public authority and had appealed to me only after asking the public authority to review its response to his request.
9. My investigating officer then contacted the Council for its comments on the application and for further information in relation to this case, in particular the information requested by Mr Waddell. The Council responded on 4 January 2006, providing:
 - Copy of the Loss Adjuster's Report (Andrew Merchant Ltd)
 - Covering letter to the Loss Adjuster's Report
 - Two e-mails relating to the Council employee who had met with Mr Waddell
 - Letters from Simpson & Marwick, detailing the application for disclosure of the reports during the court case at Lanark Sheriff Court, including a copy of the Incidental Application by Mr Waddell
 - Comments on the reasoning behind the Council's application of the EIRs rather than FOISA
 - Further comments on the application of regulation 10(5)(d) of the EIRs
 - Comments on the application of regulations 10(5)(b) and 10(5)(e) of the EIRs.



10. The Council explained that it does not self-insure, but instead has insurance coverage with insurance companies. It explained that when a claim is received by the Council, the details are processed by agents acting on behalf of the Council's insurers in defending the action. A commissioned report on a claim will look at the legal issues and advise on the liability and approaches in a potential court action. Mr Waddell submitted his insurance claim against the Council (by way of completed Incident Report Form) on 23 December 2004. The Loss Adjuster sent his report to the Council on 16 May 2005, following a meeting with Mr Waddell (on 19 April 2005). Mr Waddell initiated his small claims action against the Council on 7 June 2005. The Council stated that Mr Waddell's action against the Council for damages was settled in Mr Waddell's favour during the second day of Proof on 25 November 2005.

Submissions from the Council

11. In its response the Council contended that the Loss Adjuster's Report on the damage to Mr Waddell's property was legally privileged material. It stated that the report was prepared with litigation in mind (Mr Waddell's third party claim). The Council stated that in a small claims court action Mr Waddell had lodged an Incidental Application seeking information by way of Specification of Documents (including the Loss Adjuster's report). The procedure for one party to seek documents from another party to an action is called 'recovery' and is sought by application to the court. The party seeking recovery must lodge a "Specification of Documents" detailing the type of document sought and asks the court to grant authority for "commission and diligence" to enforce it. In this action the Sheriff had refused in entirety the call on the Loss Adjuster's report. A diligence to recover information from the Council failed and this indicated that disclosure would prejudice the Council's interests. The Council stated that all reports from specialist loss adjusters and insurers were commissioned with the possibility of litigation.



12. The Council explained that it regarded the most appropriate exception as regulation 10(5)(d) of the EIRs in that disclosure would, or would be likely to, prejudice substantially the confidentiality of the proceedings of the Council where such confidentiality is provided for by law. It stated that the small claims court had already ruled that the report was privileged and that the small claims action in the Sheriff Court was 'proceedings' in the sense of this regulation. The Council argued that the public interest in maintaining confidentiality of such privileged communications outweighed the public interest in public access to the report inasmuch as it was in the public interest that the Council could have a free and frank exchange of views with its insurers.
13. The Council said that if it were accepted that 'proceedings' in regulation 10(5)(d) applied only to internal proceedings, then it wished to contend that regulations 10(5)(b) and 10(5)(e) of the EIRs also applied to the information. The Council stated that disclosure would, or would be likely to, substantially prejudice the course of justice (regulation 10(5)(b) of the EIRs), since the Council would be unable to have a free and frank exchange with its loss adjusters over liability. Additionally, to release the information would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where the confidentiality is provided for by law to protect a legitimate economic interest (regulation 10(5)(e) of the EIRs).
14. The Council stated that were the view to be taken that Mr Waddell's request would have fallen under FOISA, the information would be covered by the exemption in section 36(1).

Submissions for the applicant

15. Mr Waddell argued that confidentiality of communications would not apply since the report was commissioned in response to his third party claim in December 2004 and legal action was only taken in July 2005.
16. Mr Waddell stated that it must be in the public interest for there to be access to information on the manner in which a council handles a reported blocked public drain. He stated that it was in the public interest for a person to be able to examine whether or not the Council was discharging its duty in terms of road drainage. Mr Waddell submitted a copy of the Council's standards for customer care which dealt with the recommended customer care requirements (in terms of answering calls and correspondence). This was submitted on the basis that it was in the public interest for a person to be able to verify that the customer care standards were being satisfied.



17. Mr Waddell was also dissatisfied that the Council had applied FOISA to his request and the EIRs to his request for review. He also questioned whether the loss adjuster's report was environmental information.

The Commissioner's Analysis and Findings

18. The Council supplied Mr Waddell with a 6 monthly gully cleaning record in response to his first request and stated that it did not hold information in response to his second request (a copy of findings or report relating to a meeting between Mr Waddell and an employee of the Council). Mr Waddell received further information (including work log records, time and plant sheets) from the Council in terms of the Specification of Documents for his small claims action against the Council.
19. I am satisfied that no report was prepared by the Council employee as a result of the visit to Mr Waddell (on 10 August 2005) and that the Council does not hold such a report. The communications from the Council employee (following his meeting with Mr Waddell on 10 August 2005) are emails, and not properly regarded as 'a report'. Mr Waddell received a copy of these communications during his small claims action and therefore I am of the view that I do not need to consider whether the emails are within the scope of Mr Waddell's information request.
20. I therefore have to consider whether the Council was entitled to withhold a copy of the Loss Adjuster's report for Mr Waddell's case. Since Mr Waddell did not request that I consider the withholding of the covering letter to the loss adjuster's report I shall not do so.

EIRs or FOISA?

21. If the information sought by an applicant is within the definition of 'environmental information' the request should be processed in accordance with the EIRs, regardless of whether the applicant refers directly to them in the request. Under section 21(4)(a) of FOISA, a public authority may confirm a decision complained of, with or without such modifications as it considers appropriate. In this respect, the Council was entitled to state that the information was exempt under the EIRs rather than FOISA.
22. 'Environmental information' is defined in regulation 2(1) of the EIRs. 'Environmental information' includes information on:



(a) “The state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas...and the interaction among these elements”

and

(f) “The state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment...”

23. Mr Waddell's initial request sought copies of a report on drainage cleaning and a loss adjuster's report on damage caused by the failure of drains and gullies to deal satisfactorily with rainwater (i.e. flooding). The Council argued that definition (a) of environmental information in the EIRs includes surface water and consequently rain water; that definition (f) includes built structures, which, in accordance with paragraph 18 of the Scottish Executive's 'Environmental Information – Guidance for Scottish Public Authorities and Interested Parties' (which can be viewed at www.scotland.gov.uk/library5/environment/aeig-00.asp) includes roads and other infrastructures. The Council claimed that this definition would extend to a drain or gully at the roadside. The fact that the report related to the interaction of water (as rainwater) with an infrastructure (the drain or gully) potentially causing damage (flood and erosion) to further built structures (Mr Waddell's property) would bring the contents of the report within the definition of environmental information.
24. This guidance also states at paragraph 18:
- ‘Water includes underground as well as surface waters irrespective of whether they are natural or man-made in design. It also includes sewage and foul water, inland waters, rivers, canals, lakes, estuaries and seas.’
25. Having considered the information in question, it is my opinion that it was not unreasonable to regard the information as environmental information and therefore to process Mr Waddell's request under the EIRs as opposed to FOISA. I accept that the loss adjuster's report contains environmental information: it considers the mechanics and topography of the road, and factors in surface water drainage and the chronology of the Council's maintenance of that particular public road's drainage in the vicinity of a private property. It considers the interaction of water (as rainwater and consequent surface water) with the built structure of the road and its drainage. Consequently, I am satisfied that it comprises environmental information. In any event, I do not consider that Mr Waddell's rights were prejudiced by considering his request under the EIRs rather than under FOISA.



Regulation 10(5)(b)

26. Regulation 10(5)(b) of the EIRs states:

“A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.”

27. The Council argued that disclosure of the report would, or would be likely to, prejudice substantially the course of justice since it would prejudice substantially the Council’s ability to raise or defend court actions.

28. The question I must consider is whether documents attracting legal privilege fall within this exception (i.e. Regulation 10(5)(b) of the EIRs).

29. The Aarhus Convention: An Implementation Guide explains the principles behind the exception in the following way (at page 59):

“The course of justice refers to active proceedings within the courts. The term ‘in the course of’ implies that an active judicial procedure capable of being prejudiced must be under way. This exception does not apply to material simply because at one time it was part of a court case. Public authorities can also refuse to release information if it would adversely affect the ability of a person to receive a fair trial. This provision should be interpreted in the context of the law pertaining to the rights of the accused. Public authorities also can refuse to release information if it would adversely affect the ability of a public authority to conduct a criminal or disciplinary investigation....The Convention clearly does not include all investigations in this exception, but limits it to criminal or disciplinary ones only. Thus, information about a civil or administrative investigation would not necessarily be covered.”

30. Neither the wording of regulation 10(5)(b), nor the definition in the Implementation Guide to the Aarhus Convention explicitly excepts documents to which a claim to confidentiality of communications in legal proceedings could be maintained (subject to the public interest test) unlike section 36(1) of FOISA. However, I take the view that this particular exception will cover information which is covered by legal professional privilege, particularly where a public authority is or is likely to be involved in litigation. The course of justice requires that the Council be able fully to prepare a case. The small claims court refused to grant Mr Waddell recovery of the loss adjuster’s report because the information came within a class of information regarded as privileged (communications prepared in contemplation of litigation, otherwise known as legal privilege post litem motam). The principle is that no party can recover material which another party has made in preparing its own case and this principle is derived from the adversary nature of litigation.



31. Mr Waddell made the point that the Report was produced before he initiated his small claims action and that it could not be said to be prepared in contemplation of litigation. However, the Sheriff dealing with his small claims action case refused recovery of the report on the ground that it was a communication prepared in the contemplation of litigation. I therefore accept that this document (the loss adjuster's report) has privilege.
32. My Office asked the Council if it still regarded the report as privileged inasmuch as the litigation was complete. The Council contended that the report was still legally a privileged document and that disclosure, even after completed litigation, would make the Council reluctant to receive such reports, which in turn would make it less prepared to defend liability cases, and consequently would, or would be likely to, prejudice substantially the course of justice or the ability of a person to receive a fair trial.
33. I accept the argument of the Council that the loss adjuster's report is still privileged, even although the court case has now ended. This view is evidenced in case law (see *Hunter v Douglas Reyburn & Co Ltd* (1993) S.L.T. 637). The justification for this principle is that were confidentiality to be limited to a case for which a report was prepared, it would not avail the party instructing the report against another opponent carrying on a parallel case or against a later opponent.
34. It might be argued, in favour of Mr Waddell's contentions, that the fact that his small claims action is now complete and disclosure of the report means that it can no longer be said that disclosure would, or would be likely to, prejudice substantially the course of justice in the sense of his particular action and the Council's defence of it. I also note that paragraph 82 of the Scottish Executive guidance referred to above states:

'Every effort should however be made to make information available once the proceedings have been completed.'



35. I note that in Scots law this particular type of report is considered to have legal professional privilege, even though the case in contemplation of which it was prepared has now ended. I accept that the privileged status of communications made in contemplation of litigation applies to ensure the course of justice and that disclosure would be likely to prejudice substantially the course of justice in the sense that the Council would be unable fully to defend litigation. I therefore accept that the loss adjuster's report is information which is exempt in terms of regulation 10(5)(b) of the EIRs. I am now required to decide whether the public interest lies in the report being disclosed or withheld in terms of regulation 10(1)(b) of the EIRs. In doing this, however, I note that there is case law where the court has considered whether it is possible in such privileged communication to separate the factual information from the information which is concerned with contesting a pending or projected litigation. Having looked at the report, I believe that it is possible to separate this report into factual information and information on potential legal liability.
36. In my decisions on section 36(1) of FOISA, I have 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. I apply the same reasoning to the EIRs and to communications attracting legal privilege in general. In this instance, disclosure of the legal liability considerations of the report would make public an assessment of the liabilities in a situation which has been subject to litigation. I cannot regard this as a disclosure which would make a significant contribution to debate on a matter of public interest.
37. 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 (from a legal advisor) or prepare for a court case in relation to its liability in litigation and 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. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications on administration of justice grounds.
38. However, I appreciate the reasons which Mr Waddell gave to justify disclosing the information – such as increased scrutiny of the Council's actions in relation to drainage responsibility. Whilst I do not accept his arguments in relation to the legal liability aspect of the report, I accept his arguments that the public interest in disclosure of the factual aspects outweighs the public interest in non-disclosure. I should stress that I shall decide each case on its facts. In this case I believe that the report lends itself to division into that which deals purely with factual aspects and that which deals with a basis for



contesting potential litigation. I also find that the circumstances have changed from the time of Mr Waddell's litigation (inasmuch as the action has finished) and find it possible to view the situation, and my remit, as materially different from the situation and remit of the Sheriff when refusing to allow Mr Waddell access to the report during his court case.

39. I also find the Guidance on both the EIRs and Aarhus compelling, in particular paragraph 82 of the Scottish Executive's 'Guidance. There is also the requirement in regulation 10(2) of the EIRs that the interpretation of the exception is in a restrictive way and in favour of disclosure. Therefore, I am not satisfied that on this occasion the Council correctly applied the public interest test in withholding in totality the loss adjuster's report under the exception in regulation 10(5)(b) of the EIRs.
40. I require the Council to supply Mr Waddell with a copy of the liability loss adjuster's report subject to the following redactions:
- From section of Report entitled 'Investigations' – redaction of the complete seventh sentence from start of section entitled 'Investigations' (from (and including) "There is clear..." to end);
 - Section of Report entitled 'Legal Liability' – complete redaction of content of this section (from and including "It" (first word) to end);
 - Section of Report entitled 'Policy Considerations' – complete redaction of content of this section (from and including "The" (first word) to end).

These redactions preserve the privileged nature of considerations of legal liability within the report.

Application of regulation 10(5)(d)

41. The Council also argued that the information was exempt in terms of regulation 10(5)(d) of the EIRs. This regulation states:

"A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law."

In interpreting this regulation I have again taken account of the Scottish Executive Guidance referred to above.



42. The Council contended that ‘proceedings’ included legal proceedings raised by or against the Council. However, the Guidance explains that the proceedings of a Scottish public authority will include meetings of its formal board members and council meetings including in some cases the formal or statutory communications with another public body or with other external organisations. It states that Scottish public authorities must be allowed to function and deliberate on communications in any form leading up to a decision i.e. policy statements may be confidential and therefore may not be released until after decisions have been concluded.
43. I have also considered “The Aarhus Convention: An Implementation Guide” (at page 59) which states that:
- “The Convention does not define “proceedings of public authorities” but one interpretation is that these may be proceedings concerning the internal operations of a public authority and not substantive proceedings conducted by the public authority in its area of competence. The confidentiality must be provided for under national law. This means that public authorities may not unilaterally declare a particular proceeding confidential and stamp documents “confidential” in order to withhold them from the public. National law must provide the basis for the confidentiality.”
- . From reading the Implementation Guide and the Guidance I do not regard the loss adjuster’s report as coming within the type of information to which regulation 10(5)(d) applies. I do not consider that the type of “proceeding” envisaged in regulation 10(5)(d) includes court proceedings.
44. I therefore do not accept that the information contained in the Loss Adjuster’s Report is information which falls within regulation 10(5)(d) or can be said to be information the release of which would, or would be likely to, prejudice substantially the confidentiality of the proceedings of the Council. As such I do not need to go on to consider the public interest in relation to this exception.

Regulation 10(e)

45. The Council also submitted that regulation 10(5)(e) applied to the information. Regulation 10(5)(e) states:
- “A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.”
46. Paragraph 90 of the Scottish Executive Guidance states:



‘Confidentiality of commercial or industrial information must safeguard a legitimate economic interest. ... The Courts have held that ‘legitimate economic interest’ also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors. It can also cover requests for information such as cost benefit or other financial analysis, if disclosure would, or would be likely to, substantially prejudice the confidentiality of matters to which any commercial or industrial confidentiality attaches.’

Additionally, legitimate economic interest implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors. In this case I cannot see how the Council can be said to have competitors or can be said to have a legitimate economic interest.

47. This provision is similar, but not identical to, the provisions in sections 33 and 36 of FOISA for ‘commercial interests and the economy’ and ‘confidentiality’. “Commercial confidentiality” (although no such phrase exists in FOISA) is distinct from privileged communications. The information provided to the Council is not commercial or industrial information which is confidential to the loss adjuster who created the report.
48. The loss adjuster’s report relates to the damage to property caused by drainage, the Council’s system of road and drainage maintenance and an assessment of any potential liability. It is not commercial or industrial information; rather it is a factual analysis and assessment of a situation with advice as to liability. I see no duty of confidence on the Council in respect of a report commissioned by it and I do not regard the information as commercial or industrial.
49. I do not regard the information withheld as properly falling within regulation 10(5)(e) of the EIRs. As such I do not need to consider the public interest in relation to the use of this particular exception.

Requirement for review

50. Mr Waddell required the Council to review its decision under section 20(1) of FOISA. On review, the Council withheld the requested information, but under the EIRs rather than FOISA. It did not comply within the 20 working days required by FOISA, or the EIRs. The Council therefore failed to conduct a review within the statutory timescale.



Decision

I find that the Council acted correctly in considering Mr Waddell's requests under the Environmental Information (Scotland) Regulations 2004 (EIRs) as opposed to the Freedom of Information (Scotland) Act 2002.

I find that in withholding information about the issues of legal liability and policy considerations within the report South Lanarkshire Council has dealt with the request from Mr Waddell in accordance with the Environmental Information (Scotland) Regulations 2004 (the EIRs), in that it applied the exception in regulation 10(5)(b) of the EIRs correctly to those parts of the information requested.

However, I find that, in withholding the factual remainder of the report the Council did not deal with Mr Waddell's request for information in accordance with the Environmental Information (Scotland) Regulations 2004 (the EIRs). I find that the exception in regulation 10(5)(b) of the EIRs was not relied upon correctly by South Lanarkshire Council in withholding this information.

I require the Council to supply Mr Waddell with a copy of the liability loss adjuster's report (subject to the redactions detailed in this Decision).

I find that South Lanarkshire Council incorrectly applied regulations 10(5)(d) and 10(5)(e) of the EIRs to the information requested.

I find that South Lanarkshire Council did not conduct a requirement of review within the statutory timescale.

I require the Council to disclose this information to Mr Waddell within 42 days of the date of this decision notice.

Kevin Dunion
Scottish Information Commissioner
05 June 2006