

# Decision Notice



Decision 023/2011 Mr George B Anderson and Fife Council

Freedom of Fife award

Reference No: 201001895  
Decision Date: 4 February 2011

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## Summary

Mr Anderson requested from Fife Council (the Council) information held relative to the proposal to award the Freedom of Fife to Gordon Brown. Fife Council responded by providing some background information while withholding any other relevant information it held under section 30(b)(ii) of FOISA. Following a review, Mr Anderson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Council released some information, the Commissioner found that while the Council had correctly withheld certain information in terms of section 30(b)(ii) of FOISA, it had not been entitled to withhold all of the information under that exemption. He reached this conclusion because he was not satisfied that disclosure of the information would, or would be likely to, substantially inhibit the free and frank exchange of views for the purposes of deliberation.

The Commissioner also found that certain information could not (as the Council had argued during the investigation) be withheld under section 36(2) of FOISA, not accepting the Council's arguments that disclosure would breach confidentiality. He therefore required the Council to provide the information incorrectly withheld to Mr Anderson.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b)(ii) (Prejudice to effective conduct of public affairs) and 36(2) (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 9 July 2010, Mr Anderson wrote to the Council in connection with a press article regarding the proposal to award the Freedom of Fife to Mr Gordon Brown and requested all information held on the matter. He also asked what the award meant in practical terms.



2. The Council responded on 20 August 2010. Whilst explaining what the award meant in practical terms and providing some background information, the Council informed Mr Anderson that the information it held on this particular proposal was exempt from release in terms of section 30(b)(ii) of FOISA as its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
3. On 30 August 2010, Mr Anderson wrote to the Council requesting a review of its decision. In particular, Mr Anderson believed that section 30(b)(ii) of FOISA was being misinterpreted by the Council.
4. The Council notified Mr Anderson of the outcome of its review on 27 September 2010, upholding the original decision and providing details of its consideration of the public interest.
5. On 1 October 2010 Mr Anderson 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 Anderson 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 6 October 2010, the Council was notified in writing that an application had been received from Mr Anderson and asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested, which consisted of 19 documents, 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 was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. The Council responded with submissions in support of its reliance on the exemption in section 30(b)(ii) of FOISA in relation to documents 1 to 4 inclusive and 10 to 14 inclusive. It further relied upon the exemption in section 36(2) of FOISA in relation to documents 1 to 5 inclusive, 7 and 9 to 12 inclusive.
10. The Council described documents 5, 7 and 9 as private correspondence between Mr Anderson and the Council. It was happy to provide him with copies if required, but maintained that the information was exempt in terms of section 36(2) of FOISA.



11. In the course of the investigation, the Council withdrew its reliance on any exemption in relation to documents 6, 8 and 15 to 19 inclusive. It released all of this information to Mr Anderson during the investigation and in the circumstances the Commissioner does not find it necessary to consider this information further.
12. The relevant submissions obtained from Mr Anderson and the Council will be considered fully in the Commissioner's analysis and findings below.

### **Commissioner's analysis and findings**

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13. 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 Anderson and the Council and is satisfied that no matter of relevance has been overlooked.
14. The Commissioner will first of all consider whether, as the Council has claimed, the information contained in documents 1 to 4 inclusive and 10 to 14 inclusive was correctly withheld in terms of section 30(b)(ii) of FOISA. Only where he is not satisfied that this exemption was applicable will he go on to consider section 36(2) in relation to that information.

#### **Section 30(b)(ii) (Prejudice to effective conduct of public affairs)**

15. In order for the Council to rely on the exemption laid down in section 30(b)(ii) of FOISA, it must show that the disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.
16. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the tests contained in the exemptions in section 30(b) of FOISA is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of the information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.
17. In applying these exemptions, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression, and also whether the timing of disclosure would have any bearing: releasing advice or views whilst a decision was being considered, and for which further views were still being sought, for example, could be more substantially inhibiting than disclosure once advice had been taken.



18. The Council maintained that in order to ensure nominations and appointments in respect of the Freedom of Fife, it was essential that individuals were free to provide views to the Council on nominees. This in turn enabled the Council to deliberate on the appointment of the nominees.
19. The Council believed that if the information were released under FOISA, individuals would be deterred from providing views on nominees in future. If people were not free to provide their views, then it would be impossible for the Council to determine any nominations in respect of the Freedom of Fife. The Council considered that this would cause significant harm to the way in which it carried out the process, it being essential to the non- partisan civic consideration of such awards that any interested parties were able to express their opinion freely without any restraint that might come from knowing their views would be made public.
20. In his application to the Commissioner, Mr Anderson stressed his own view that engaging the public would not inhibit a free exchange of views amongst the Councillors, and that the release of the information would not devalue the Freedom of Fife award.
21. Having considered the content of the information withheld under section 30(b)(ii), the context of the relevant communications and the submissions received from the Council, the Commissioner is satisfied that disclosure of the information contained in documents 1, 3, 4, 10, 11 and 12 would have inhibited substantially (or would have been likely to inhibit substantially) officials and individuals from engaging in future discussions of this kind with the requisite degree of frankness and candour. The Commissioner is not satisfied, however, that disclosure of the information contained in documents 2, 13 and 14 would have had such an inhibitive effect, taking all of the above considerations into account.
22. The Commissioner therefore finds that the Council incorrectly applied the exemption in section 30(b)(ii) of FOISA to the information contained in documents 2, 13 and 14 and requires the Council to provide Mr Anderson with the information in documents 13 and 14. He will consider whether the information in document 2 was correctly withheld in terms of section 36(2) of FOISA later in this decision.
23. As the Commissioner finds that the information contained in documents 1, 3, 4, 10, 11 and 12 is exempt from disclosure in terms of section 30(b)(ii) of FOISA he is required to consider the public interest in relation to that information.



*Public interest test*

24. In its submissions to the Commissioner, the Council recognised it might be considered in the public interest for all views on the possible conferring of an honour to be made public. However, it contended that the release of views given in confidence would damage the value of conferring the honour itself and should be kept confidential so as not to devalue or distract from the honour. The Council further claimed that the disclosure of the information requested would almost certainly make the administration of the award unworkable and lead to it being abandoned.
25. The Council also contended that the release of this information would damage the non-partisan civic consideration of conferring the Freedom of Fife on individuals and organisations that had rendered eminent service to Fife as set out in the criteria. It contended that it was apparent from the material that the applicant (and indeed any member of the public) had the opportunity to make their own views known. It was essential to the process that any interested parties were able to express their opinion freely without any restraint that might come from knowing their views would be made public.
26. In the Council's view, the benefit of the frank expression of opinions outweighed any sense of added openness created by releasing all material. The Council contended that those who had expressed their views on the issue were always able to make them in public if they wished. It believed that the balance of the public interest lay firmly in the material not being made public.
27. Mr Anderson, on the other hand, expressed the view that the public interest would not be best served by withholding the information and that the release of the information would not be detrimental to the public interest, rather the opposite.
28. The Commissioner has considered the submissions made by both parties, and recognises that there is a strong public interest in ensuring that any actions taken by a Scottish public authority are open to effective oversight and scrutiny by members of the public, and that the disclosure of the information under consideration would serve the public interest by allowing scrutiny of the Council's actions in this particular case.
29. However, the Commissioner also accepts the Council's submission that the public interest would be served by non-disclosure in this case. In particular, having concluded that disclosure would be likely to inhibit future discussions and the free and frank exchange of views in relation to whether an individual or organisation should receive such an award from the Council, he accepts that disclosure could be detrimental to the effectiveness of the Council's processes, which would in turn be contrary to the public interest.
30. Having considered the information, and all the circumstances of the case, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information in this case. He considers there to be greater benefit to the public interest in avoiding harm to the effectiveness of the Council's procedures in considering awards of this nature than there would be in enabling complete scrutiny of the actions of the Council in any given case.



31. The Commissioner therefore considers that the Council correctly withheld the information in documents 1, 3, 4, 10, 11 and 12 in terms of section 30(b)(ii) of FOISA.
32. The Council also applied section 36(2) of FOISA to documents 1 to 5 inclusive, 7 and 9 to 12 inclusive. Given that the Commissioner has concluded the documents listed in the above paragraph were correctly withheld in terms of section 30(b)(ii) of FOISA, he will now only consider whether the Council was entitled to withhold the information in documents 2, 5, 7 and 9 under section 36(2) of FOISA.

### **Section 36(2) - Confidentiality**

33. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is necessary in the public interest (this is commonly known as "the public interest defence").
34. Section 36(2) therefore contains a two stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
35. In the circumstances, the Commissioner is satisfied that documents 2, 5 and 7 were obtained by the Council from another person and that the first part of the section 36(2) test has therefore been fulfilled in relation to the information in them. Document 9, however, cannot be construed as having been supplied to the Council by another person (having been created by the Council in the first place) and therefore section 36(2) of FOISA cannot apply to the information in it.
36. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
37. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
  - a. the information must have the necessary quality of confidence;
  - b. the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
  - c. unauthorised disclosure must be to the detriment of the person who communicated the information.



38. Having considered the information contained in document 2 and the submissions provided by the Council, and having taken account of its provenance and circulation, the Commissioner is not satisfied that it could be said to have the necessary quality of confidence.
39. Equally, documents 5 and 7 were provided to the Council by Mr Anderson, and given that they were marked as having been copied to the press, and the fact that Mr Anderson has requested and is content (confirmed by him during the investigation) that the information is released under FOISA, the Commissioner is not satisfied that these documents possessed the necessary quality of confidence for section 36(2) of FOISA to be engaged.
40. The Commissioner has therefore found that the information contained in document 2, 5, 7 and 9 is not exempt in terms of section 36(2) of FOISA. As he has not upheld the exemption claimed, he requires the Council to disclose the information to Mr Anderson, together with that in documents 13 and 14 as set out above.

## DECISION

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

The Commissioner finds that by withholding certain information in terms of section 30(b)(ii) of FOISA, the Council complied with Part 1.

However, by withholding other information in terms of section 30(b)(ii) of FOISA, the Council failed to comply with Part 1 (and in particular section 1(1)). The Commissioner also finds that the Council was not entitled to withhold information under section 36(2) of FOISA.

The Commissioner therefore requires the Council to provide Mr Anderson with the information in documents 2, 5, 7, 9, 13 and 14, by 22 March 2011.





## Appeal

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Should either Mr Anderson or Fife 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**  
**4 February 2011**



## 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.

##### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or

...

##### 36 Confidentiality

...

- (2) Information is exempt information if-



- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.