



Scottish Information
Commissioner

**Decision 112/2007 – MacRoberts Solicitors and
Glasgow City Council**

*33 separate requests seeking copies of notices or orders served
under various legislation*

Applicant: MacRoberts Solicitors

Authority: Glasgow City Council

Case No: 200501556

Decision Date: 16 July 2007

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 112/2007 – MacRoberts Solicitors and Glasgow City Council

33 separate requests for information – requests for either copies of Council registers or for copies of notices or orders served under various legislation – dispute over whether requests were received by the Council – applications withdrawn in relation to 5 requests during the investigation – information withheld under section 25(1) (Information otherwise accessible) and section 33(1)(b) (Commercial interests)

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 2(1) and (2)(a) (Effect of exemptions); 10(1)(a) (Time for compliance); 12(1) (Excessive cost of compliance); 21(1) (Review by Scottish public authority); 23(1) and (2) (Publication schemes); 25 (Information otherwise accessible); 33(1)(b) (Commercial interests and the economy) and 74(2)(b) (Giving of notice etc.)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

The relevant text of each of these provisions is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Facts

MacRoberts Solicitors (MacRoberts) submitted 33 separate requests for information to Glasgow City Council (the Council) and, when no response was received, 33 requests for review. The requests submitted were either for copies of Council registers, or copies of notices or orders served under specific legislation.

Both the requests and the requests for review were initially inappropriately quarantined by the Council's IT system, with the effect that the Council were unaware of their receipt. The Council subsequently responded to the requests, but withheld the information on the basis of the exemptions in sections 25(1) and 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA).

During the investigation, MacRoberts withdrew parts of their application, so the investigation was narrowed to looking at 28 of MacRoberts' requests and the question of technical breaches of FOISA.



The Commissioner found that the Council had incorrectly applied the exemptions under both sections 25(1) and 33(1)(b) of FOISA in relation to the 28 disputed requests where information was withheld. The Commissioner required the Council to provide MacRoberts with a full and accurate response in relation to each of those individual requests.

The Commissioner also found that the Council failed with regard to section 10(1) and section 21 of FOISA in its handling of 30 of MacRoberts' requests.

Background

1. On 17 February 2005, MacRoberts submitted 33 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 served under specific sections of the following legislation:
 - The Housing (Scotland) Act 1987
 - The Town & Country Planning (Scotland) Act 1997
 - The Planning (Listed Building & Conservation Area) (Scotland) Act 1997
 - The Civic Government (Scotland) Act 1982
 - The Environmental Protection Act 1990
 - The Building (Scotland) Acts 1959/70
 - The Building (Scotland) Act 2003

A full list of all 33 requests submitted by MacRoberts is set out in Appendix 2 to this Decision Notice.

2. When no response was received to these requests within the 20 working day timescale provided by FOISA, MacRoberts contacted the Council to request 33 separate reviews.
3. On 21 April 2005, when no response had again been received, MacRoberts submitted an application for decision to me in relation to these 33 requests.
4. MacRoberts' application was validated by establishing that they 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 their requests. The single application from MacRoberts specifically asked that separate decisions be issued in respect of each of their information requests to the Council. The case was allocated to an investigating officer.



The Investigation

5. Despite the request from MacRoberts, it was decided that these 33 separate cases would be dealt with as a single investigation in the first instance, with the cases only being 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.
6. My investigating officer wrote to the Council on 31 May 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 asked to present a substantive response in relation to each of MacRoberts' requests for information, providing details of whether the Council intended to release the requested information. If any information was to be withheld, the Council was asked to provide details of the specific exemptions applied, along with details of the reasoning behind the application of any such exemption.
7. The Council was also asked to provide details of why it had failed to comply with both MacRoberts' requests and its subsequent requests for review within the timescales provided for by FOISA, while also providing details of steps which had been proposed or put in place by the Council to prevent a reoccurrence in future.
8. On 3 June 2005, the Council contacted my Office to inform staff that correspondence in relation to this, and another, investigation had led the Council to interrogate its IT systems. This interrogation led to the discovery of 106 emails from MacRoberts, along with a number of emails from other individuals and organisations, all of which had been inappropriately quarantined by the Council's email gateway. As a result, the Council stated that the 66 emails sent in relation to this case had not been viewed by any Council staff, and that the Council had only just become aware of their existence.
9. The Council stated in its email of 3 June 2005 that it was taking measures in order to prevent a reoccurrence of the fault which had led to these emails being blocked. The Council also stated that it would undertake appropriate consideration of the requests submitted by MacRoberts, and would contact my Office shortly to confirm whether the information was being released.
10. The Council also requested that I consider whether an information request should, in fact, be considered to be received at the point at which it reaches an authority's email system. Indeed, the Council suggested that it would consider a more reasonable approach to be for requests to be viewed as received only at the time at which the authority becomes aware of them.



11. On 5 July 2005, my investigating officer wrote to the Council pointing out that, under section 74(2)(b) of FOISA, a thing –

“transmitted by electronic means is presumed to be received on the day of transmission.”

It was stressed to the Council that section 74(2)(b) is a rebuttable presumption, and that the Council would therefore be required to demonstrate that an email was not received on the day of transmission. It was also pointed out, however, that it was clear from previous correspondence in relation to the case that MacRoberts’ information requests reached the Council’s email system on 17 February 2005, and that it was therefore my initial view that MacRoberts’ emails should be considered to be received on that date.

12. My investigating officer therefore requested that the Council provide a full response to his letter of 31 May 2005.
13. The Council provided this full response on 22 July 2005. In this response, the Council presented 33 separate statements of case, in relation to each of MacRoberts’ 33 information requests.

The Council’s responses and MacRoberts’ subsequent actions

14. The following paragraphs provide a brief summary of the Council’s responses in relation to the 33 information requests submitted by MacRoberts, along with details of MacRoberts’ stated intentions in relation to those requests, following receipt of the Council’s responses.

Request 1

15. In relation to request 1, which sought a copy of the register of private water supplies held by the Council, the Council stated that the requested information was not held. The Council stated that this was because it maintains no such register, as there are no private water supplies in Glasgow.
16. As a result, MacRoberts contacted my Office on 7 July 2005 to inform the investigating officer that it wished to withdraw its application in relation to this request, insofar as it did not require me to consider whether the information should be released. MacRoberts also stated, however, that it wished to pursue this application with regard to the Council’s failure to respond within the appropriate timescales under FOISA.



Request 2

17. In relation to request 2, which sought a copy of the register of public roads, the Council stated that the information was exempt under section 25(1) of FOISA, in that the requested information was reasonably accessible elsewhere. The Council informed MacRoberts that the Statutory Register of Public Roads is published on the Council's website, and is also available from inspection on Council's premises. MacRoberts subsequently wrote to the Council expressing concern about the frequency at which information on the Council's website was updated. The Council then informed MacRoberts that the information was updated on a monthly basis, and that any outstanding information would therefore be considered by the Council to be exempt under section 27(1) of FOISA (Information intended for future publication), in that the information would be published by the Council within 12 weeks.
18. As a result of this correspondence, MacRoberts also informed my investigating officer in its letter of 7 July 2005, that they intended to withdraw their application in relation to this request, insofar as they did not require me to consider whether the information should be released. MacRoberts again stated, however, that they wished to pursue this application with regard to the Council's failure to respond within the appropriate timescales under FOISA.

Requests 31, 32 and 33

19. Requests 31, 32 and 33 sought copies of extant notices or orders served under sections 25, 27 and 29 of the Building (Scotland) Act 2003, as at 17 February 2005. In response to each of these requests, the Council stated that it did not hold the requested information. The Council stated that this was because the Building (Scotland) Act 2003, did not come into force until 1 May 2005, and that there would therefore be no extant notices under sections 25, 27 and 29 of that Act as at 17 February 2005.
20. On receipt of this information, MacRoberts informed my investigating officer that they wished to completely withdraw their application in relation to the handling of requests 31, 32, 33.

Requests 3-30

21. In relation to the remainder of the requests, requests 3-30, the Council presented an equivalent statement of case for each request. These statements of case asserted that the requested information should be withheld from release.



22. In withholding the requested information, the Council asserted, in each case, that both sections 25(1) (Information otherwise accessible) and 33(1)(b) (Commercial interests and the economy) of FOISA applied to the requested information. Section 25(1) was cited by the Council in that it was considered that the requested information was accessible through the Council's publication scheme, while in the application of section 33(1)(b) the Council stated that the release of the information would substantially prejudice its own commercial interests, and that the public interest in relation to this case did not favour the release of the information.

The Commissioner's Analysis and Findings

23. In assessing this case, I have fully considered the range of submissions made to me by MacRoberts and the Council.
24. In its application to me, MacRoberts indicated that it is dissatisfied with a number of aspects of the Council's handling of 30 of its information requests. In summary, MacRoberts' stated that it was dissatisfied with:
- The Council's failure to respond within the appropriate FOISA timescales, in relation to requests 1-30
 - The Council's application of the exemption under section 25(1) of FOISA to the information sought under requests 3-30
 - The Council's application of the exemption under section 33(1)(b) to the information sought under requests 3-30

I will discuss each of these issues in turn below.

Failure to respond within the appropriate timescales

25. As described above, the Council failed to respond to MacRoberts' information requests within the 20 working day timescale prescribed by FOISA. The Council has stated that this failure to respond arose from the fact that a number of emails, including 106 from MacRoberts, had been inappropriately quarantined by the Council's email gateway.



26. As discussed under paragraphs 8-11, the Council queried whether the 33 requests should be considered to be received under the terms of FOISA before such time as they had been viewed by a Council employee. My investigating officer pointed out to the Council, however, that section 74(2)(b) of FOISA contains a rebuttable presumption regarding the receipt of information transmitted electronically and, given the acknowledgement by the Council that the requests reached the Council's email system on 17 February 2005, it was my view that the requests had been received by the Council on that date. The Council subsequently issued responses in relation to MacRoberts' information requests, along with a response to my investigating officer's request for formal case submissions.
27. With regard to the Council's failure to respond to the requests within the FOISA timescale, it is clear that such failures arose directly as a result of the technical problems experienced by the Council's email system. On discovery of these problems, the Council conducted a detailed investigation to identify and rectify these problems, and a copy of the resulting investigation report has been passed to me.
28. The Council has advised my Office that the errors arose as a result of both technological issues, in that the Council's email system could not interpret emails sent in a particular format, and process issues, in that the email system was working as designed, but that the design was inconsistent with the Council's existing processes. The Council has also informed this Office that its systems have been updated following the identification of these problems, and that the relevant issues have now been addressed.
29. The Council also points out that its investigation was launched as soon as it was made aware of the problem, and that MacRoberts were immediately advised of the situation, and a solution put in place.
30. Nevertheless, despite the work undertaken by the Council, it is clear that it failed to comply with MacRoberts' requests for information in accordance with Part I of FOISA, in that it did not respond to those requests within 20 working days of receipt. As such, the Council failed in its duties under section 10(1) of FOISA in relation to those requests.
31. In addition, the Council also failed to respond to MacRoberts' requests for review within 20 working days, and therefore acted in breach of section 21(1) of FOISA in relation to these requests.
32. However, given that I am satisfied that the Council has conducted a full investigation into the technical problems which led to these failings, and has since taken appropriate steps to address these problems, I do not require the Council to take any remedial action in relation to these failures.



Section 25(1) – Information otherwise accessible

33. In its submissions to my Office, the Council stated that the requested information was obtainable from its publication scheme, and therefore should be considered to be reasonably obtainable under section 25(1) of FOISA.

34. Under section 23 of FOISA, every public authority must adopt and maintain a publication scheme which sets out information which is published by the authority, along with details of how that information might be accessed.

35. The exemption under section 25(1) of FOISA states the following:

“Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.”

36. In this case, section 25(1) of FOISA requires to be read in conjunction with section 25(3), which creates the presumption that, where information is made available in accordance with an authority’s publication scheme, that information will be reasonable accessible, and therefore exempt under section 25(1). Instead of requiring the applicant to go through the formal request process under FOISA, the information is instead made available on the terms set out in the authority’s publication scheme.

37. The Council asserted that the information requested by MacRoberts was available from its Property Enquiry Certificates (PECs). In brief, a PEC is a document which collates various information about the status of an individual property, in order that the value and marketability of the property can be assessed and confirmed. PECs will generally provide a range of information, including whether the property is subject to any statutory orders or notices. The Council pointed out that PECs are available under Class B3 of its publication scheme.

38. PECs are described within the Council’s publication scheme as “Value Added”. The Council defines ‘Value Added’ information in section 10 of its scheme as follows:

“This generally denotes that the Council has had to devote professional time and effort in assembling, creating and/or analysing the data involved such that it has a specific commercial value. As such, the information is not routinely “published” as the expression is used in this Publication Scheme, but instead is made available to anyone who pays the applicable fees.”

39. The Council therefore indicated that PECs are available through its publication scheme as part of a dedicated additional service offered by the Council, which goes beyond its duty to respond to information requests under FOISA.



40. On receipt of a request for an individual PEC, the Council will interrogate its systems and extract relevant information, as required in relation to all standard requests received under FOISA. This information would, however, then subsequently be collated, analysed and presented in the PEC format. The Council then warrants the accuracy of the information contained within the PEC, and will indemnify someone who suffers financial loss as a direct result of an inaccuracy in that information. Further, additional value is added in terms of the timescales within which PEC requests are responded to, with the majority of PEC requests responded to within 24-48 hours. In its submissions, the Council indicated that the revenue generated from its PEC activity allows it to maintain dedicated staff with responsibility for fulfilling its PEC function.
41. The Council suggested that the information requested in relation to requests 3-30 is reasonably accessed under its publication scheme through the purchase of these individual PECs. It asserted that the information contained within these PECs could then be analysed in order to identify the individual properties which are subject to extant notices under the various pieces of legislation which formed the basis of MacRoberts' requests.
42. Having considered the submissions made by the Council, I am, however, not satisfied that the requested information should be considered to be available to MacRoberts in the manner suggested by the Council. There are a number of reasons for this.
43. Firstly, I note that the requests made in relation to requests 3-30 specifically sought **copies** of extant notices served under the relevant pieces of legislation. The methodology proposed by the Council may well identify individual properties which are the subject of relevant notices, but it would not provide MacRoberts with copies of those specific notices and, as such, would not accurately fulfil the various requests.
44. Regardless of this, however, even if MacRoberts considered that details of individual properties subject to such notices would indeed be a suitable response to the various requests, I am still of the opinion that the methodology proposed by the Council would not be appropriate. In order to access details of each property which is subject to an extant notice under the relevant legislation, the methodology proposed would require the purchase of a PEC for each and every property within the Council's geographic boundaries. These certificates would then have to be individually reviewed in order to determine whether that property was subject to one of the relevant extant notices. This methodology would, by its nature, require the purchase of a substantial amount of information in which MacRoberts had no interest, namely all PECs where the properties were not subject to any extant notices under the relevant legislation.



45. While the Council is unable to estimate the proportion of properties which are not subject to any extant notices, they have stated that “*most [PECs] disclose no notices*”, suggesting that the majority of the PECs purchased through the methodology proposed would be of no interest to MacRoberts. As a result, this methodology would require an enormous financial resource to be expended, purchasing information in which there was no interest. Indeed, it should be noted that there are approximately 300,000 properties within the Council’s geographic boundaries, and the charge for an individual PEC is approximately £62. The total cost of accessing information through the methodology proposed by the Council would therefore be in the region of £18.6 million, of which most, it can be speculated, would have been spent on obtaining information which was of no relevance to MacRoberts’ initial information requests.
46. I am therefore of the opinion that the specific information requested by MacRoberts under requests 3-30 is not obtainable through the Council’s publication scheme.
47. On the basis of the above considerations, I therefore conclude that the Council acted incorrectly in applying the exemption under section 25(1) to the information requested by MacRoberts.

Section 33(1)(b) – Commercial Interests

48. The Council also argued in its submissions that the information requested by MacRoberts in relation to requests 3-30 was exempt under section 33(1)(b) of FOISA.
49. 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).*”
50. In summary, the Council stated in its submissions to my Office that the requested information was used to create PECs, and that the release of the information would substantially prejudice the Council’s commercial interests with regard to the sale of those PECs.
51. 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, thus allowing those rivals to significantly undercut the Council’s own PEC service.



52. The Council went on to assert that the release of the information would also allow individuals (or organisations) involved in the conveyancing process to access that information free of charge for their own purposes, bypassing the PEC services of both the Council and its commercial competitors. The Council argued that this eventuality would also substantially prejudice its commercial interests (as well as those of its commercial competitors).
53. The Council pointed out that it issues approximately 4,640 PECs each year, resulting in gross revenue for the Council of £287,680. It stated that this revenue stream was used to offset the costs involved in operating the PEC system and in maintaining searchable databases required to retrieve the information. The Council asserted that MacRoberts' requests were essentially for access to the raw data contained within these databases, and argued that, if relevant information was released, then this income stream may diminish or disappear completely, resulting in the Council having to fund the maintenance of searchable databases from its general revenues, to the detriment of the taxpayer.

Application of the exemption

54. 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 PEC's. In support of this, MacRoberts provided details of a number of Councils in Scotland who supply the information sought by its client, and suggested that this indicates that any financial repercussions faced by the Council would be substantially less harmful than that predicted by the Council.
55. When considering the application of the exemption under section 33(1)(b), however, 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?

56. Having considered the 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 concur that the Council's provision of the PEC service represents a commercial activity in relation to which the Council holds commercial interests.



57. While MacRoberts have not directly requested copies of PECs, it is clear that the information requested constitutes 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?

58. The next question which must be considered, therefore, relates to the impact of the potential release of information on those commercial interests.
59. As set out in paragraph 49 above, section 33(1)(b) of FOISA states that information is exempt if its disclosure under would, or would be likely to, prejudice substantially the relevant commercial interests.
60. 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* (usually known 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 concur that release would result in the required degree of impact on those interests.
61. In making its case to my Office, the Council presented two scenarios by which it considered that the release of the information would prejudice substantially its commercial interests.
62. In the first scenario, 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 little or no cost from the Council. This, the Council argued, would allow competitors to undercut the Council in the production of PECs, resulting in a detrimental impact on the Council's own commercial revenue from this activity.
63. In the second scenario, the Council argued that release of the information would allow individuals to bypass existing PEC services and obtain the raw data which informs a PEC themselves, at little or no direct cost to that individual. The Council asserted that this eventuality would again cause substantial harm to its commercial interests.



64. The arguments put forward by the Council, must, however, be assessed alongside the counter-arguments put forward by MacRoberts. In their submissions to this Office, MacRoberts have argued that the information sought is currently provided to a client of theirs under FOISA at no charge by 15 of the 26 local authorities from whom the information had been requested. MacRoberts added that a further 2 local authorities supplied the information under FOISA while charging a fee, while an additional 5 local authorities provided the information by means outwith FOISA, such as through direct email correspondence, or by access through Council offices or websites. MacRoberts therefore asserted that only 4 local authorities out of the 26 approached refused to supply their client with equivalent information, one of which was Glasgow City Council.
65. On receipt of MacRoberts' submission, my staff subsequently conducted a survey of relevant authorities in order to assess the submissions made by MacRoberts and to gauge whether any of the relevant authorities had subsequently experienced damage to their own commercial interests as a result of responding to requests from MacRoberts' client. Representatives from eleven local authorities were subsequently contacted by my staff and discussions were held in relation to relevant issues.
66. The evidence gathered as a result of these discussions indicated that the concerns held by Glasgow City 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.
67. While some authorities did report that their own revenues from the issue of PEC's 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 PEC's from information available through publicly accessible local authority registers, or through published minutes of authority meetings.



68. 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 was only the local authority which was able to provide PEC's that were fully up to date and accurate; by contrast the information which informed rival PEC's 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 PEC's revenues as a result of individual homeowners seeking access to underlying PEC information.
69. Having considered at length the issues raised by this case, I must 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 Glasgow City Council has presented no information which demonstrates that their own circumstances would differ significantly in this respect.
70. As mentioned above at paragraph 60, 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).
71. In their submissions to this Office, Glasgow City Council have acknowledged that their own PEC's are warranted for accuracy and that the Council 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.



72. 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 PEC's 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.
73. 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.
74. 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.

Cost of responding to the request

75. During the course of the investigation, the Council made a submission which indicated that the cost of responding to the request may exceed the upper limit of £600. (Under section 12(1) of FOISA, a public authority is not required to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers. In terms of regulation 5 of the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations), the prescribed amount is £600.) In this submission, the Council indicated that it would be required to undertake development work on its databases in order to respond to the information request. The Council stated that the specialist skills required to undertake such work were limited within its own department, and that external contractors would therefore be required.
76. The Council estimate that it would take 133 hours to design, develop, test and implement programs in relation to each of the remaining 28 requests and that the charge for employing external contractors to undertake this work would be £35 per hour. The total charge was therefore estimated at £4,655.00.



77. The Council was asked to provide a breakdown of the cost of responding in relation to each of the separate information requests submitted by MacRoberts. In addition, the Council was asked to confirm whether external contractors would be required because the skills to undertake the work did not exist within the Council, or because the workload within the relevant Council ensured that additional support was required.
78. The Council's response stated that the provision of a response in relation to any single request would require 28 hours of work, with a second request requiring 14 hours, and all subsequent requests 3.5 hours each.
79. The Council also set out that the work could be carried out by staff within its own department, and that relevant staff were available who could undertake this work.
80. The Fees Regulations state under regulation 3(2)(b), that any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff. As a result, I am of the view that the information requested by MacRoberts in relation to each request could be provided by the Council within the upper cost limit of £600 prescribed in relation to each request by the Fees Regulations. Indeed, it should be noted that the cost to the Council of responding to any single request would, according to the Council's estimates, be £420.00, with a second request costing £210.00, and all subsequent requests costing £52.50 each.
81. I am not, therefore, of the view that the information requested by MacRoberts can be refused on the grounds of section 12 of FOISA (Excessive cost of compliance).

Decision

I find that Glasgow City Council (the Council) failed to act in accordance with the Freedom of Information (Scotland) Act 2002 (FOISA), in its decision to withhold information in response to Requests 3-30 submitted by MacRoberts Solicitors (MacRoberts), on the grounds of the following sections of FOISA:

- Section 25(1) – Information otherwise accessible
- Section 33(1)(b) – Commercial interests and the economy

I therefore require the Council to provide MacRoberts with a full and accurate response in relation to each of the individual requests contained under Requests 3-30.



I am obliged to give the Council at least 42 days in which to supply MacRoberts with this information. In this case, I require the Council to supply the information to MacRoberts within 2 months of receipt of this notice.

I also find that the Council failed with regards to the following sections of FOISA in its handling of Requests 1-30:

- Section 10(1) – Failure to respond to MacRoberts' initial information request within 20 working days;
- Section 21 – Failure to comply with MacRoberts' requirement for review.

I do not, however, require the Council to take any remedial action in relation to these technical failures.

Appeal

Should either MacRoberts or the Council wish to appeal against this decision, there is a right of 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.

Kevin Dunion
Scottish Information Commissioner
16 July 2007



APPENDIX 1

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 ... are to be regarded as conferring absolute exemption -
 - (a) section 25

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day –
 - (a) ... the receipt by the authority of the request

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must ... comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.



23 Publication schemes

- (1) A Scottish public authority must –
 - (a) adopt and maintain a scheme (in this Act referred to as a “publication scheme”) which relates to the publication of information by the authority and is approved by the Commissioner;
 - (b) publish information in accordance with that scheme; and
 - (c) from time to time review that scheme;
- (2) A publication scheme must specify –
 - (a) classes of information which the authority publishes or intends to publish;
 - (b) the manner in which information of each class is, or is intended to be, published; and
 - (c) whether the published information is, or is intended to be, available to the public free of charge or on payment.

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) ...
member 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 –
 - (a) ...
 - (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).



74 Giving of notice etc.

- (1) ...
- (2) For the purposes of any provision of this Act, a thing –
 - (a) ...
 - (b) transmitted by electronic means is presumed to be received on the day of transmission.

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, “projected costs” in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs –
 - (a) no account shall be taken of costs incurred in determining –
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost – prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.



APPENDIX 2

The 33 requests for information submitted by MacRoberts Solicitors to Glasgow City Council on 17 February 2005 sought the following:

1. Copy of the register of private water supplies held by the Council
2. Copy of the register of Public Roads as at 17 February 2005 maintained under or pursuant to the Roads (Scotland) Act 1984
3. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 108 of the Housing (Scotland) Act 1987
4. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 114 of the Housing (Scotland) Act 1987
5. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 115 of the Housing (Scotland) Act 1987
6. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 116 of the Housing (Scotland) Act 1987
7. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 162 of the Housing (Scotland) Act 1987
8. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 166 of the Housing (Scotland) Act 1987
9. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 90 of the Housing (Scotland) Act 1987
10. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 127 of the Town & Country Planning (Scotland) Act 1997
11. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 140 of the Town & Country Planning (Scotland) Act 1997



12. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 145 of the Town & Country Planning (Scotland) Act 1997
13. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 168 of the Town & Country Planning (Scotland) Act 1997
14. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 179 of the Town & Country Planning (Scotland) Act 1997
15. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 189 of the Town & Country Planning (Scotland) Act 1997
16. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 207 of the Town & Country Planning (Scotland) Act 1997
17. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 3 of the Planning (Listed Building & Conservation Area) (Scotland) Act 1997
18. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 34 of the Planning (Listed Building & Conservation Area) (Scotland) Act 1997
19. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 42 of the Planning (Listed Building & Conservation Area) (Scotland) Act 1997
20. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 43 of the Planning (Listed Building & Conservation Area) (Scotland) Act 1997
21. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 49 of the Planning (Listed Building & Conservation Area) (Scotland) Act 1997
22. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 95 of the Civic Government (Scotland) Act 1982



23. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 87 of the Civic Government (Scotland) Act 1982
24. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 90 of the Civic Government (Scotland) Act 1982
25. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 92 of the Civic Government (Scotland) Act 1982
26. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 80 of the Environmental Protection Act 1990
27. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 78 of the Environmental Protection Act 1990
28. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 10 of the Building (Scotland) Acts 1959/70
29. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 11 of the Building (Scotland) Acts 1959/70
30. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 13 of the Building (Scotland) Acts 1959/70
31. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 25 of the Building (Scotland) Act 2003
32. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 27 of the Building (Scotland) Act 2003
33. Copy of all Notices or Orders made or served prior to 17 February 2005, and which remain extant as at 17 February 2005, under or pursuant to Section 29 of the Building (Scotland) Act[s] 2003