Scottish Information Commissioner
www.foi.scot

Decision Notice 193/2024

Legal Advice

Applicant: Mr Benjamin Harrop
Authority: Scottish Ministers
Case Ref: 202400275

Summary

The Applicant asked the Authority for the legal advice it had received in relation to it appealing Decision 004/2023 of the Commissioner to the Court of Session. The Authority withheld the information on the basis that it was legally privileged and that the public interest favoured withholding the information. The Commissioner investigated and found that the Authority had not been entitled to withhold the information requested. He required the Authority to disclose the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 36(1) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner); 50(5) (Information notices)

Background

1. On 17 December 2023, the Applicant made a request for information to the Authority. The Applicant asked for all legal advice given to the Authority relating to it appealing Decision 004/2023[1] of the Commissioner to the Court of Session (XA10/23[2]). This was to include

[1] https://www.foi.scot/decision-0042023

[2] court-of-session-judgement-the-scottish-ministers-against-the-scottish-information-commissioner-06-december-2023.pdf

legal advice given in relation to the decision to appeal, advice in preparation for the court hearing and all other advice provided in relation to the case.

2. The Authority responded on 15 January 2024. The Authority withheld the information requested on the basis that it was subject to legal professional privilege and, therefore, exempt under section 36(1) of FOISA and that the public interest did not favour disclosure.

3. On 17 January 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not agree with the Authority's position that the public interest favoured withholding the information requested.

4. The Authority notified the Applicant of the outcome of its review on 12 February 2024, upholding its original decision without modification.

5. On 20 February 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because the public interest favoured disclosure of the information requested for the following reasons:

    - section 36(1) of FOISA is not an absolute exemption and should not be treated as such
    - a significant amount of public money was spent on pursuing the appeal and so it follows that the public interest should favour disclosure
    - the Court of Session refused the appeal very quickly and without avizandum[3].

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

7. On 14 March 2024, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.

8. The Authority was also asked to send the Commissioner the information withheld from the Applicant. The Authority refused to provide the withheld information to the Commissioner as it did not consider it was legally required, under section 50(5) of FOISA, to do so.

9. The case was subsequently allocated to an investigating officer. The Authority was invited to comment on this application and answer specific questions.

Commissioner's analysis and findings

10. The Commissioner has considered the submissions made to him by the Applicant and the Authority.

Section 36(1) – Confidentiality

[3] https://www.lexisnexis.co.uk/legal/glossary/avizandum

11. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.

12. The Authority explained that it considered all the withheld information to be either:

    (a) communications subject to legal advice privilege between a lawyer and client about obligations under FOISA, or

    (b) communications created by legal advisers or officials in contemplation of litigation proceedings under FOISA.

13. Legal advice privilege applies to communications in which legal advice is sought or provided. For legal advice privilege to apply, certain conditions must be fulfilled:

    (i) The information must relate to communications with a professional legal adviser, such as a solicitor or advocate

    (ii) The legal adviser must be acting in their professional capacity, and

    (iii) The communications must occur in the context of the legal adviser's professional relationship with their client.

14. Litigation privilege is different and covers documents created in contemplation of litigation (also known as communications post litem motam).

15. Communications post litem motam are granted confidentiality to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent, or prospective opponent, will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation.

16. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.

17. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given (and sought) in relation to the potential litigation. However, the communication need not involve a lawyer and the litigation contemplated need never actually happen for the privilege to apply. It will continue to apply after any litigation has been concluded.

18. There is a further matter to be considered, however, before the Commissioner can determine whether, or the extent to which, the section 36(1) exemption in FOISA is applicable in the circumstances of this case.

19. The information cannot be privileged unless it is also confidential. For the section 36(1) exemption in FOISA to apply, the withheld information must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. In other words, the claim must have been capable of being sustained at the time the exemption is claimed.

20. A claim of confidentiality cannot be maintained where, prior to a public authority's consideration of an information request or conducting a review, information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where the confidentiality has been lost in respect of part or all of the information under consideration, any privilege associated with that information is also effectively lost.

The Applicant's submissions

21. The Applicant submitted that that it was for the Commissioner to decide whether the legal privilege exemption applied to the withheld information.

22. However, the Applicant noted that the legal privilege exemption is not absolute and pointed to the Scottish Ministerial Code[4], which recognises that there are exceptions to the convention of not disclosing legal advice.

The Authority's submissions

23. As rehearsed earlier (at paragraph 12), the Authority submitted that legal advice privilege applied to the withheld information as it was either communications subject to legal advice privilege between a lawyer and client about obligations under FOISA or created by legal advisers or officials in contemplation of litigation proceedings under FOISA.

24. The Authority considered that legal advice privilege applied to some of the withheld information because it related to communications with, or references to communications with, in-house legal advisers acting in their professional capacity and the Authority as their client in which it sought, and was provided with, legal advice.

25. The Authority submitted that all of this information was either made, or effected for, the principal or dominant purpose of seeking or giving legal advice. The Authority considered that disclosure of this information would breach legal professional privilege by divulging information about the points being considered by lawyers, the extent of their comments and the issues being flagged for further consideration. The Authority confirmed that all of the necessary conditions for legal advice privilege to apply were satisfied.

26. The Authority also explained that it did not consider it appropriate to confirm the source of its legal advice but confirmed that the individuals who provided advice were acting in their professional capacity as legal advisers when taking forward work for the Authority in relation to the appeal.

27. The Authority stated that it considered the relevant applicable period for contemplation of proceedings began when it received notification of Decision 004/2023 of the Commissioner on 31 January 2023 and lasted until it took a final decision on 20 December 2023 on whether to appeal the Court of Session's decision to the Supreme Court.

28. The Authority submitted that a claim to confidentiality in legal proceedings could be maintained because the withheld information was only shared between the Authority and its legal advisers. The information remained confidential at the time the Authority responded to the Applicant's request and requirement for review (and it remained so at the time of the submissions). Accordingly, legal professional privilege had not been waived.

The Commissioner's view

29. As rehearsed earlier (at paragraph 8), the Authority refused to provide the withheld information to the Commissioner as it did not consider it was legally required, under section 50(5) of FOISA, to do so.

30. Section 50(5) of FOISA provides that a Scottish public authority is not obliged, in response to receiving an information notice, to give the Commissioner information in respect of:

[4] https://www.gov.scot/publications/scottish-ministerial-code-2023-edition/

(a) a communication between professional legal adviser and client in connection with the giving of legal advice to the client with respect to that client's obligations under this Act; or

(b) a communication between professional legal adviser and client, or between such adviser or client and another person, made in connection with or in contemplation of proceedings under or arising out of this Act and for the purpose of such proceedings.

31. Not being provided the withheld information places obvious limitations on the Commissioner's ability to comment on it. However, the Commissioner accepts that, in view of the nature of the information requested and the circumstances in which it was created, the Authority would not have been *obliged* under section 50(5) of FOISA to provide the withheld information to him, had he issued an information notice (which, in this case, he did not do).

32. While the Authority was not obliged under section 50(5) of FOISA to provide the withheld information to him, the Commissioner does not consider that the Authority was legally *prevented* from providing the withheld information to him.

33. The Commissioner requested that, notwithstanding section 50(5) of FOISA, the Authority provide him with the withheld information. However, the Authority refused.

34. In view of the above, and having considered the Authority's submissions, the Commissioner accepts that the exemption in section 36(1) of FOISA applies to the withheld information.

35. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. The exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption (and withholding it).

The public interest test

The Applicant's submissions

36. The Applicant submitted that the public interest favoured disclosure of the withheld information for the following reasons:

- the novelty of the appeal to the Court of Session, pointing out the rarity of the Authority appealing a decision of its own independent Commissioner
- the speed at which the Court of Session reached its decision and that it did so without avizandum
- the significant cost to the public purse
- to understand what legal advice the Authority had received, particularly if the advice stated that the Authority's prospects of success were low.

The Authority's submissions

37. The Authority recognised a public interest in disclosing the withheld information to promote openness and transparency. The Authority also acknowledged that disclosure could enhance public understanding of its decision to appeal Decision 004/2023 of the Commissioner.

38. However, the Authority considered that there was a very strong interest in maintaining the exemption relating to legal professional privilege to ensure confidentiality of communications, for the following reasons:

- to ensure that any person or organisation involved in court action can take legal advice, consider options and prepare their case as fully as possible without the risk that their opponent will gain access to the material generated by their preparations.
- it remains important in all cases that lawyers can provide free and frank legal advice, which considers and discusses all issues and options, without fear that the advice may be disclosed and, as a result, potentially taken out of context.
- to ensure that the Authority's position on any issue is not undermined by the disclosure of legal advice, particularly where that advice is relevant to potential court proceedings. Legal advisers need to be able to present a full picture to their clients. It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view, weighing up their relative merits.
- to protect the confidentiality of the withheld information, to ensure that the Authority can discuss and take policy decisions in full possession of thorough and candid legal advice. This ensures that the Authority can take decisions in a fully informed legal context, having received legal advice in confidence as any other client would.

39. The Authority also noted the unusual circumstances of this case, notably that the opposing party in the appeal in question was the Commissioner. The Authority did not consider it appropriate, or envisaged by the legislation, that material relating to an appeal against the Commissioner's decision should be shared with the Commissioner in relation to an application for a decision made by a requester under section 47 of FOISA.

40. The Authority explained that it did not consider it is in the public interest that a public authority subject to FOISA should be required to share information with the Commissioner where the information in question related to legal advice about litigation in which the Commissioner was the opposing party.

41. The Authority also stated that it did not consider it is in the public interest for the Commissioner to order disclosure of such material, as the effect of that order would be to enable access to the information not only to the requester but to the Commissioner. The Authority submitted that this would be at odds with the intention of section 50(5) of FOISA.

42. The Authority noted that the substantive arguments in support of its appeal were part of the oral submissions made by Counsel in the public hearing in the Court of Session on 6 December 2023, which were further outlined as part of the publicly available written judgment of the Court of Session.

43. The Authority explained that it considered its reasons for pursuing the appeal were made public via the court action, the hearing and the written judgment. With the Authority's position having been publicly debated and the matter conclusively resolved in the Commissioner's favour, the Authority submitted that there was no strong public interest in now disclosing information containing legal advice about the decision to appeal.

44. On balance, therefore, the Authority concluded that the public interest in maintaining the exemption outweighed that in disclosing the withheld information, given the overriding public interest in maintaining the confidentiality of communications between lawyers and their clients and the public interest in allowing for full and detailed internal consideration of the Commissioner's decision and, in particular, the Authority's right to appeal a decision where it considered it appropriate to do so.

The Commissioner's view

45. As the Commissioner has noted in several previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, on administration of justice grounds.

46. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC164 (QB)[5]. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.

47. The Commissioner accepts that there is a considerable, in-built, public interest in maintaining the ability of the Authority to receive full, unhindered legal advice.

48. However, the Commissioner acknowledges that there will be occasions where the significant in-built public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where (the list is not exhaustive):

- the privileged material discloses wrongdoing by/within an authority
- the material discloses a misrepresentation to the public of advice received
- the material discloses an apparently irresponsible and wilful disregard of advice
- a large number of people are affected by the advice
- the passage of time is so great that disclosure cannot cause harm.

49. As rehearsed earlier, the Authority has refused to provide the Commissioner with the withheld information. This places the Commissioner in the unusual position of being required determine whether the public interest lies in withholding or disclosing information he has not seen. The Commissioner doubts whether section 50(5) of FOISA was ever intended to place him in that position.

50. As a starting point, it is important to note that the exemption in section 36(1) of FOISA is a qualified exemption. While the Commissioner accepts that the public interest in maintaining confidentiality of communications is strong and likely to prevail in the majority of cases, it must be fully considered in each case.

51. In this case, the Commissioner notes that the appeal to the Court of Session involved significant expenditure of public funds and that three senior members of Scotland's highest civil court refused the appeal very quickly and without avizandum.

52. The Commissioner therefore considers that there is a strong public interest in understanding whether the Authority proceeded against legal advice (or whether the prospects of success were a prominent consideration in the Authority's decision to appeal the Commissioner's decision).

53. On this point, the Commissioner notes the circumstances under which the Authority conceded its defence of a petition for judicial review raised by the former First Minister, Alex

[5] Department for Business Enterprise & Regulatory Reform v O'Brien & Anor [2009] EWHC 164 (QB) (10 February 2009) (bailii.org)

Salmond[6]. In that case, the Authority received legal advice, prior to it ultimately conceding the case, that its prospects of success were poor.

54. The Commissioner considers that it would be of significant public interest to know if lessons had been learned from that case, particularly given that this case involved the Authority unsuccessfully appealing (with significant expenditure of public funds) a decision of the independent body established to enforce and promote FOI law.

55. In the judicial review case, the Authority also took the "exceptional step" of releasing key legal advice[7] as it recognised the "overwhelming public interest" in rebutting false allegations made about the advice informing decision-making in the judicial review.

56. The Authority's decision to disclose legal advice in the judicial review case clearly shows that it recognises legal advice can be disclosed where the balance of public interest favours disclosing it.

57. This is also recognised in the Scottish Ministerial Code which (at paragraph 2.40) acknowledges that there are exceptions to the convention of not disclosing legal advice:

Where, in exceptional circumstances, Ministers come to the view that the balance of public interest lies in disclosing either the source or the contents of legal advice on a particular matter, the Law Officers must then be consulted and their prior consent obtained before any disclosure takes place. Such consent will only be granted where there are compelling reasons for disclosure in the particular circumstances.

58. The Commissioner accepts that the public interest in the reasons why the Authority appealed Decision 004/2023 has been met, to some extent, by information already in the public domain.

59. However, the Applicant has expressed a specific interest in the legal advice the Authority received on the prospects of success of any appeal. This is information that is not in the public domain, in relation to which there is a clear public interest, (considering the public expense and judicial and other time involved) which can only be satisfied by disclosure of the withheld information.

60. The Commissioner also notes that the Authority recognised the appeal had been conclusively resolved in the Commissioner's favour. While the legal advice relates to a relatively recent matter, its sensitivity is vastly reduced by the fact that legal proceedings had been concluded with no prospect of further appeal. In the circumstances, the Commissioner cannot accept that the public is to be prevented from seeing such legal advice in perpetuity or until an arbitrary period of time has passed.

61. The Authority submitted that it would not be in the public interest to order disclosure of the withheld information, as the effect of that order would be to enable access to the information not only to the requester but to the Commissioner (which would be contrary to section 50(5) of FOISA).

62. In determining where the public interest lies, the Commissioner considers whether disclosure of the withheld information would be in the interest of the public. The Commissioner accepts that the circumstances of this case are unusual, but he is concerned with whether disclosure

[6] https://www.heraldscotland.com/news/19130366.hidden-legal-advice-showed-government-advised-concede-alex-salmond-case/

[7] https://www.gov.scot/news/judicial-review-advice-published-by-ministers/

of the withheld information would serve the interests of the public, not himself. In any case, while the Commissioner could understand this point having some potential relevance if the proceedings to which the advice related had remained live at the time, he cannot see what practical value the information would have offered him in the actual circumstances of this case. There would appear to have been no realistic prospect of the proceedings going further by the time the Applicant asked for the information (and certainly there was none by the time he sought a review).

63. The Commissioner has fully considered the Authority's submissions on the public interest, which are largely generic, with no real reference, beyond the point discussed in the last two paragraphs, to the specific circumstances of this case. In fact, the Authority appears quite dismissive of the public interest points, largely of some substance, made by the Applicant.

64. The Commissioner's assessment of the public interest has not, of course, been helped by his inability to consider the withheld information. This, it should be remembered, was a choice made by the Authority: the Authority was not compelled to withhold this information from the Commissioner and at no point has it argued that it was.

65. As indicated above, the exemption in section 36(1) is a qualified one, subject to the public interest test in the same way as any other qualified exemption. Whatever the vital public considerations enshrined in the exemption, therefore (and there are, no doubt, vital public considerations enshrined in all of FOISA's exemptions), it is not there to exclude a particular class of information entirely from the general right in section 1(1) of FOISA. There may be a strong public interest in maintaining this exemption, but the public interest test must still be applied with the same rigour as any other qualified exemption, in the particular circumstances of the case under consideration and not in the abstract. It is a real, practical test, not an academic exercise, and the content of the withheld information, even if it is privileged, should always factor in that process.

66. The onus is on the public authority to justify its conclusions on the public interest, with reference to evidence where appropriate, and the applicant should not be prejudiced (bearing in mind that what is under consideration is the qualification of a general statutory right, recognised by the courts as an important one) by any shortcomings in what the authority chooses to provide in this regard. As should be apparent from all his decisions, the Commissioner expects to be enabled to carry out a full investigation of the public authority's handling of the request, in all respects identified in the application to him: where he is only given the information to perform a more superficial evaluation, the actions of even an apparently reasonable authority are unlikely to prevail.

67. Having considered all relevant submissions and given that the Authority has refused to provide him with the withheld information, the Commissioner cannot conclude, in all the circumstances of this particular case, that the Authority has demonstrated that the public interest in maintaining the exemption in section 36(1) of FOISA outweighs that in disclosure of the withheld information.

68. For the reasons set out above, and having regard to the submissions of the parties, in this case, the Commissioner has concluded, on balance in all the circumstances, that the substantial public interest in disclosure of the information falling within the scope of the Applicant's request should be considered sufficiently compelling to outweigh the in-built public interest in maintaining the exemption in section 36(1) of FOISA.

69. That said, the Commissioner acknowledges that there may, within the withheld information, be elements which should not be disclosed, specifically personal data (where it can

legitimately be withheld under section 38 of FOISA) and (bearing in mind the subject matter of the original information request considered in Decision 004/2023) information the disclosure of which would constitute, or be punishable as, a contempt of court (and which could, therefore, be withheld under section 26(c) of FOISA). Information of both descriptions may be redacted from what is disclosed to the Applicant.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 (and, in particular, section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant. In all the circumstances, he is not satisfied that they were entitled to withhold the requested information under section 36(1) of FOISA.

The Commissioner therefore requires the Authority to disclose to the Applicant the information requested (subject to such redaction as is permitted by paragraph 69 of this Decision) by 26 October 2024.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to 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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

09 September 2024