



Scottish Information
Commissioner

**005/2007 Mr W. Hunter Watson and the Scottish
Executive**

Request for a copy of legal advice

**Applicant: Mr W. Hunter Watson
Authority: Scottish Executive
Case No: 200601283
Decision Date: 12 January 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 005/2007 Mr W. Hunter Watson and the Scottish Executive

Request for a copy of legal advice and associated questions regarding National Care Standards – the legal advice was withheld. The Commissioner was satisfied that the exemption relied on to withhold the legal advice had been used correctly by the Scottish Executive.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 36(1) (Confidentiality).

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

Facts

Mr Watson asked three questions of the Scottish Executive (the Executive) regarding National Care Standards for Care Homes for Older People (National Care Standards) in particular standard 15.11. The Executive initially refused to release the information regarding Mr Watson's request under section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA).

Mr Watson was not satisfied with the Executive's decision to withhold the information and asked it to review its decision. In his request for review letter, Mr Watson provided detailed public interest arguments as to why the information should be released. Upon review, the Executive responded to Mr Watson's first question, but refused to respond to questions 2 and 3 under sections 36(1) and 30(c) of FOISA respectively.

Mr Watson was dissatisfied with the response he received from the Executive and submitted an application for a decision by the Scottish Information Commissioner in order to obtain the information which had been withheld from him.

Following an investigation, the Commissioner found that the Executive had dealt with Mr Watson's request for information in line with Part 1 of FOISA.



Background

1. On 20 April 2006, Mr Watson made an information request to one of the Scottish Ministers. He raised three questions regarding National Care Standards. The three questions were:
 1. “Has the Scottish Executive sought legal advice as to whether care standard 15.11 in the national care standards for care homes for older people is compatible with the European Convention on Human Rights, i.e. whether legal advice has been sought regarding the ‘surreptitious’ administration of medication to residents in care homes for older people?”
 2. If legal advice has been sought on this point and advice provided, what was that advice?
 3. If legal advice has been offered on the matter what were the legal qualifications of the person’s providing the advice?”
2. The Executive subsequently confirmed that the information requested by Mr Watson was being withheld under section 36(1) of FOISA, although its response implied that legal advice had been provided.
3. Mr Watson wrote to the Executive on 1 June 2006 to ask it to review its decision to withhold the information. In his letter Mr Watson provided detailed public interest arguments as to why the information should be released.
4. On 4 July 2006 the Executive wrote to Mr Watson responding to his request for review. The Executive answered question 1 of Mr Watson’s request by confirming that legal advice had been provided, but refused to respond to questions 2 and 3, citing exemptions under sections 36(1) and 30(c) of FOISA respectively.
5. On 26 July 2006 Mr Watson wrote to my Office, stating that he was dissatisfied with the outcome of the Executive’s review and applying to me for a decision in relation to the Executive’s decision to withhold the information he had requested. In his letter, Mr Watson provided detailed arguments as to why the information should be released, including a petition he had presented to the Scottish Parliament.
6. Mr Watson’s application was subsequently validated and, on 19 September 2006, my Office wrote to the Executive, giving notice that an appeal had been received and that an investigation into the matter had begun and inviting comments from the Executive as required under section 49(3)(a) of FOISA. The Executive was asked to supply my Office with, amongst other items, a copy of the withheld information.



7. On 25 October 2006, the Executive wrote to the Validation Officer, providing copies of the withheld information and reasoning why the information was withheld.
8. The case was then allocated to an investigating officer.

The Investigation

9. On 10 November 2006, Mr Watson wrote to my Office providing an updated copy of his petition. The Public Petitions Committee had agreed to defer consideration of his petition until my decision on the application had been issued.
10. On 13 November 2006, the investigating officer emailed the Executive to ask it if it would be willing to release some further information to Mr Watson regarding question 3 (qualifications of the individuals providing legal advice).
11. On 14 November 2006, the investigating officer wrote to Mr Watson to ask him to supply my Office with copies of letters and documents referenced in his letters. The investigating officer also asked if Mr Watson considered that the Executive had responded to his first question in its review response, as it was not apparent from Mr Watson's application whether he was dissatisfied with the Executive's response to all three questions.
12. On 21 November 2006, the Executive emailed the investigating officer stating that Mr Watson could be informed that the legal advice was provided by the Office of the Solicitor to the Scottish Executive (OSSE).
13. On 21 November 2006, Mr Watson wrote to my Office stating he was not satisfied with the Executive's response to question 1 (whether legal advice was provided). Mr Watson wanted assurance that the legal advice had been provided about standard 15.11 solely and not the complete set of standards. In his letter Mr Watson also provided copies of the documents and letters the investigating officer had requested.
14. On 21 November 2006, the investigating officer wrote to Mr Watson to advise him that the legal advice had been provided by the Office of the Solicitor to the Scottish Executive (OSSE) and to ask him to confirm whether this response answered question 3.



15. On 23 November 2006, Mr Watson wrote to my Office commenting that he was not completely satisfied with the additional information provided in response to question 3. However, he was most interested in the legal advice and was happy to proceed on the basis that his application was solely regarding question 2.

Submissions from Mr Watson

16. It may be of interest to note that, in relation to the issue of the covert administration of medication, the National Care Standard 15.11 states:
- “You may not understand that you need to take medication and what will happen if you do not do so. If so, there are legal powers that allow other people to give permission for you to receive treatment if it is necessary for your health and welfare. The staff will work in line with these legal powers and guidance. If you refuse to take the medication and your health is at risk if you do not take it, then and only then, will the staff consider giving you your medicine in a disguised form in line with recognised guidance. Staff must record this in your personal plan.”
17. Mr Watson submitted a large number of documents and letters in support of his argument that the legal advice provided to the Executive should be released. Mr Watson has argued that:
- The legal advice should be released in order to confirm that the Executive has taken account of all relevant issues and acted on the legal advice provided.
 - The National Care Standard 15.11 does not provide enough safeguards to ensure the appropriate conditions are met prior to the covert administration of medication. If covert medication is required then the people administering the medication should apply for powers under either the “2003 Mental Health Act” or Part 6 of the “Adults with Incapacity Act”.
 - An adult has a right to refuse medication and that by virtue of article 6 of the European Convention on Human Rights (ECHR), no adult should be deprived of this right without a fair hearing.
 - Mr Watson has also asserted that some care home residents have been given drugs concealed in their food or drink and many care home residents have been prescribed drugs which were not necessary, the wrong dose or meant for someone else.



- In a letter from the Executive to Mr Watson dated March 2001, it was stated “You will be reassured to know that we support wholeheartedly your opposition to covert medication of people who live in long term care.” Mr Watson is confused as to why the Executive seems to have changed its mind.
- In its letter dated 11 October 2005 to the Clerk to the Public Petitions Committee, BMA Scotland comments “that covert administration of medication is never justified for the convenience of those providing treatment.”

Submissions from the Executive

18. In its letter to my Office on 25 October 2006, the Executive asserted that:
- It had taken advice from the Office of the Solicitor to the Scottish Executive (OSSE) and it was satisfied that the National Care Standards are compatible with ECHR.
 - To disclose such legal advice would unreasonably expose legal positions to challenge and it may diminish the range and quality of that advice which would in turn damage the quality of the Executive’s decision making.
 - The public interest is outweighed in ensuring that the Executive, solicitors and their clients can discuss relevant issues and give and receive legal advice in confidence. Without such comprehensive advice, the quality of the Executive’s decision making would be restricted, which would not be in the public interest.
 - It does not see that there any compelling reasons for releasing the legal advice in this instance.

The Commissioner’s Analysis and Findings

19. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Watson and the Executive and I am satisfied that no matter of relevance has been overlooked.



Scope of Investigation

20. Mr Watson's application to the Commissioner was on the basis that the Executive did not respond to his three questions. Having considered all the information including the letters from Mr Watson and the letters and emails from the Executive, I consider that the only outstanding question to be considered in this decision is question 2 regarding the legal advice.
21. Mr Watson's question 1 asked if legal advice had been sought regarding National Care Standard 15.11. The Executive's review response of 4 July 2006 explicitly confirmed that legal advice had been given as to whether standard 15.11 was compatible with the ECHR. Consequently, I consider that the Executive has answered Mr Watson's first question that it had sought legal advice on standard 15.11.
22. In his letter to my Office of 23 November 2006, Mr Watson had commented that he wanted his application to proceed on the basis of the lack of the response to question 2 and not the Executive's response to question 3. Therefore I will solely consider in this decision whether the Executive was correct to withhold the legal advice from Mr Watson under section 36(1) of FOISA.

Section 36(1) - confidentiality of communications

23. Section 36(1) of FOISA states that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.
24. One type of communication covered by this exemption is communications between legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled.

For example:

- The information being withheld must relate to communications with a legal adviser.
- The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of his/her professional relationship with his/her client.
- The privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy.
- The privilege does not extend to communications which relate to fraud or the commission of an offence.



25. The information which the Executive withheld from Mr Watson consisted of three emails written by three solicitors from OSSE. The emails discuss whether National Care Standard 15.11 is compatible with ECHR.
26. A plea of confidentiality is most commonly claimed in respect of communications between a lawyer and client with the justification for this being that there should be a safeguard to ensure that clients can be candid with their legal advisers.
27. An important factor in this particular case was the nature of the relationship between the legal adviser and the Executive. The experts who had been consulted in this case were legally qualified and provided legal advice in the form of a legal opinion to the Executive. The legal opinion comprises professional legal advice within a relationship where the legal adviser has been asked to provide an opinion in his professional capacity to a client (the Executive). I am satisfied that it is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, the legal opinion would be covered by the exemption contained in section 36(1) of FOISA.
28. However, the exemption in section 36(1) is subject to the public interest test required by section 2(1)(b) of FOISA, and I must now go on to consider whether, in all the circumstances of the case, the public interest in the release of the information is outweighed by the public interest in maintaining the exemption.

The Public Interest test

29. The Courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal advisor and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and Others v Governor and Company of the Bank of England* (2004) UK HL 48 (<http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>).
30. In Decision 023/2005 (*Mr David Emslie and Communities Scotland*) I concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, while I will consider each case on an individual basis, I am likely only to order the release of such communications in highly compelling cases.
31. The public interest issues in favour of releasing the information might include enhancing scrutiny of the legality of the actions of a public body and, by extension, effective oversight of expenditure of public funds and obtaining value for money.



32. It might also be in the public interest to order disclosure where it would make a significant contribution to debate on a matter of public interest.
33. Against any public interest arguments for disclosure, however, must be weighed any consequent harm to the public interest. It is in the public interest that an authority can communicate its position to its advisers fully and frankly in confidence, in order to obtain the most comprehensive legal advice to defend its position adequately should that become necessary. It is also in the public interest that a public authority can receive the most comprehensive legal advice about its proposed actions.
34. There is an established means of scrutinising the legality of the decisions of public bodies, through judicial review in the courts. As noted above, 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 and there would require to be compelling countervailing arguments for disclosure to outweigh that public interest.
35. I take the view that for the disclosure of information to be in the public interest that it needs to be in the interest of the public for it to be released. This does not mean that there needs to be national interest in the matter. Rather it could be in the interest of the public to establish whether certain standards are being upheld or maintained by an authority, even though the circumstances of a particular case are exercising the concern of only a sectional part of the population. In this case, the information relates to National Care Standards, although I accept that there may be a degree of wider public interest in the legality of the Executive's actions in this as in any other sphere.
36. Mr Watson has provided detailed and relevant arguments why he considers that the legal advice should be released. I have studied these submissions with interest and understand his concerns that people in care homes should know what is being given to them. However, in studying these submissions in detail, Mr Watson seems to be concerned with the interpretation and implementation of National Care Standard 15.11.
37. Having read both the National Care Standard 15.11 and the legal advice, I do not feel the public interest is served in releasing such legal advice as I do not believe the legal advice would add anything further to the debate. The Executive has obtained confirmation that the standard 15.11 does comply with ECHR, so I do not see how the public interest would be served by releasing such advice. I consider that the issue of covert medication is of public interest but the question of whether legal advice in relation to standard 15.11 should be disclosed is a different matter.



38. The Executive argued in its letter of 25 October 2006, “to disclose such legal advice would unreasonably expose legal positions to challenge and it may diminish the range and quality of that advice which would in turn damage the quality of the Executive’s decision making.” I agree with the Executive that releasing the legal advice would expose the legal advice offered and would inhibit others from offering such advice in the future. It is important for officials to be able to obtain such legal advice in confidence.
39. Having carried out a balancing exercise, in my opinion, the public interest in the release of the information is outweighed by the public interest maintaining the exemption, i.e. in ensuring that the Executive and its solicitors can discuss relevant issues and give and receive legal advice in confidence. Without such comprehensive advice, the quality of the Executive’s decision making would be restricted, which would not be in the public interest.
40. In this case I recognise that there are reasons which might justify disclosing the legal advice to the applicant, but in this instance I do not consider that they are so highly compelling as to outweigh the public interest in the confidentiality of legal communications. Therefore, I am satisfied that on this occasion the Executive correctly applied the public interest test in withholding the three emails that contained the legal advice.

Decision

I find that the Executive acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Watson and was correct to withhold the legal advice under section 36(1) of FOISA.



Appeal

Should either Mr Watson or the Executive wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
12 January 2007



Appendix

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.

36 Confidentiality

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