

Decision Notice



Decision 092/2009 Mr Robert Wyllie and Scottish Borders Council

Legal advice on charging for food preparation in personal care

Reference No: 200801320
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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Mr Robert Wyllie requested from Scottish Borders Council (the Council) copies of correspondence and legal advice concerning the charging for food preparation in personal care. The Council refused his request, on the grounds that the information was exempt from disclosure under sections 30(b)(i), (b)(ii) and 36(1) of Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Wyllie remained dissatisfied and applied to the Commissioner for a decision regarding his request for the legal advice solely.

After investigation, the Commissioner found that the Council had partially failed to deal with Mr Wyllie's request for information in accordance with Part 1 of FOISA. The Commissioner upheld the Council's reliance on section 36(1) of FOISA to withhold the legal advice. However, the Commissioner commented critically on the Council's practice in dealing with Mr Wyllie's information request, noting that this fell short of expected good practice in relation to the handling of information requests under FOISA. He has noted that the matters raised here will inform a future assessment of the Council's practice.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions) and 36(1) (Confidentiality)

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

Background

1. On 4 June 2008, Mr Wyllie emailed the Council requesting the following information:
 - a. A copy of all legal advice the Council had received concerning the implementation of the Community Care and Health (Scotland) Act 2002 (CCH Act) as regards the legality of the charges the Council [then] imposed for aspects of food preparation in personal care.
 - b. Copies of relevant correspondence between officers and members of the Council as regards charges for food preparation by the Council.



2. Although Mr Wyllie was sent an acknowledgement of this request by the Council, he received no response. Mr Wyllie emailed the Council on 28 July 2008 requesting a review of his information request because no response had been supplied, and he believed that the public interest favoured the disclosure of the information.
3. The Council responded to Mr Wyllie's request on 1 August 2008. It apologised for its delayed response and released a copy of the judgement of Lord Macphail in respect of Argyll and Bute Council's Judicial Review of a Decision of the Scottish Public Services Ombudsman (referred to as the Macphail judgement hereafter) and an associated report to the Council's Executive. The Council stated that it was withholding advice to the Council concerning the implementation of the CCH Act and the legality of charges on the basis that it was exempt in terms of sections 30(b)(i) and (ii), 30(c) and section 36 of FOISA.
4. On 6 August 2008, Mr Wyllie emailed the Council requesting a review of the Council's response dated 1 August 2008. Mr Wyllie reiterated his view that the public interest favoured disclosure, even if exemption(s) applied.
5. The Council notified Mr Wyllie of the outcome of its review on 4 September 2008. It advised Mr Wyllie of the steps and searches undertaken during the review to identify relevant communications. These had identified some additional information, which was released to Mr Wyllie. With respect to Mr Wyllie's request for copies of legal advice, the Council reiterated part of its previous response that the information was being withheld under section 30(b)(i) and (ii) of FOISA. At this stage, no reference was made to the exemptions in sections 30(c) and 36, which had previously been cited.
6. On 4 September 2008, Mr Wyllie wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review in withholding the legal advice he had requested and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Wyllie's application made clear that he accepted that the cost of complying with his request for general correspondence concerning food preparation was likely to be excessive, and so he did not wish to pursue that part of his request. He indicated that his application was limited to consideration of the Council's decision to withhold legal advice as sought in the first part of his request.
7. The application was validated by establishing that Mr Wyllie had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

8. On 11 September 2008, the Council was notified in writing that an application had been received from Mr Wyllie and was asked to provide the Commissioner with any information withheld from Mr Wyllie. The Council provided copies of two series of emails, which it identified as the withheld information, to the Commissioner on 2 October 2008 and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information withheld.
10. The Council responded on 19 November 2008, confirming that it wished to apply the exemptions in sections 30(b), 36(1) and 36(2) to the information withheld. The Council was subsequently asked to provide further details of the basis upon which it was applying the exemptions in section 36. When responding to this request, the Council reconsidered its decision to withhold one of the withheld emails, and this was disclosed to Mr Wyllie. For the remaining information, the Council maintained its application of the exemptions in sections 30(b) and 36(1).
11. Following detailed consideration of the withheld information, the investigating officer wrote to the Council on 12 January 2009, noting that the information that the Council had withheld related solely to the Macphail Judgement and not to the subject of Mr Wyllie's request, i.e. the implementation of the CCH Act with respect to the legality of charges the Council imposed for food preparation. It was noted that the Macphail judgement did consider matters relating to a public authority's obligations under the CCH Act (in particular regarding the funding of personal care for individuals residing in private care homes), but that this judgment neither considered nor commented upon the legality of charges for food preparation. Therefore, the investigating officer indicated that the information withheld fell outwith the scope of Mr Wyllie's request.
12. In the light of these observations, the investigating officer requested that the Council undertake additional searches for legal advice held regarding the implementation of the CCH Act with respect to the legality of charges the Council imposes for food preparation.
13. On 5 February 2009, the Council provided the investigating officer with copies of emails identified following searches by staff who had been involved in the discussion of food preparation as it related to personal care.
14. Between 5 February 2009 and 23 March 2009, the investigating officer and the Council entered into further correspondence and discussion as to what specific information the Council held with regards to the legality of charges the Council imposes for food preparation in personal care, and the nature of the searches undertaken. Within this correspondence, the Council stated that it had not sought any legal advice on charging for food preparation and it therefore did not hold any such information.



15. On 14 April 2009, a meeting was held with the Council to discuss Mr Wyllie's application and in particular the background to the Council's approach to charging for food preparation as it related to personal care. At this meeting, the Council provided details of the searches it had undertaken to locate the requested information both during its response to Mr Wyllie and the Commissioner's investigation. It was agreed during this meeting that emails relating to food preparation in relation to personal care created by two former members of Council staff should also be searched for,
16. Various emails were identified by the Council as potentially relevant to the subject of the legality of charging for free personal care. The Council disclosed a number of these to Mr Wyllie after deciding that it did not consider these to be exempt from disclosure under FOISA.
17. After reviewing all of emails that were identified during these additional searches, the investigating officer and the Council agreed that one email (identified by the Council during the investigation) was the only correspondence identified that contained legal advice on the implementation of the CCH Act in respect of the legality of the Council's charges for food preparation. It was agreed that this item, but none of the others identified during the investigation, fell within the scope of the first part of Mr Wyllie's information request (and, consequently, fell within the scope of his application to the Commissioner).
18. Having reached this stage, the Council was asked if it wished provided any further submissions with regard to the application of any exemption in addition to its previous submissions. No further submissions were received.
19. The investigating officer also contacted Mr Wylie during the investigation seeking his submissions on the matters to be considered in the case. Mr Wyllie's submissions are summarised and considered in the section below on the Commissioner's analysis and findings

Commissioner's analysis and findings

20. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions made to him by both Mr Wylie and the Council and is satisfied that no matter of relevance has been overlooked.
21. Before considering whether the exemptions apply to the withheld information, it may be helpful to provide some background to Mr Wyllie's request. The CCH Act came into force on 1 September 2002. The CCH Act made provision for free personal and nursing care for the elderly which came into effect from 1 July 2002. The CCH Act states that local authorities may not charge for food preparation, but, there was perceived to be a lack of clarity about the definition of the term "food preparation", leading different councils to interpret the phrase in different ways and leading some councils to charge for aspects of food preparation. The Scottish Government clarified the interpretation of the term food preparation by issuing a statement on 9 February 2009, stating that no aspect of food preparation should be charged for.



22. The Commissioner's decision in this case has been made based on his consideration of the circumstances of the case at the time of the Council's review of Mr Wyllie's request. The relevant date is therefore 4 September 2008. He has excluded from his consideration any events taking place after that date (including the Scottish Government's statement described above).

Information covered by Mr Wyllie's request

23. The Commissioner is satisfied, following the outcome of the meeting of 14 April 2009, and the additional searches undertaken during the investigation, that the Council has conducted reasonable searches and that these have established that it holds only one internal email that contains legal advice on the subject specified in Mr Wyllie's request.
24. Only this email, which the Council indicated that it wished to withhold under sections 30(b)(i) and (ii) and 36(1) of FOISA, will be considered in this decision.

Section 36(1) – Confidentiality of communications

25. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings.
26. Communications which are subject to legal professional privilege are among those which may be the subject of a claim of confidentiality of communications. Legal professional privilege can itself be split into two categories – legal advice privilege and litigation privilege. It is the first of these categories, legal advice privilege, which has been claimed by the Council in this particular case. This covers communications between lawyers and their clients, where legal advice is sought or given.
27. In its submissions, the Council asserted that the withheld email consisted of legal advice in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The Council did not consider that the public interest in disclosure was outweighed by that in maintaining the exemption.
28. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. For example, there must be a legal context to the advice given and it must be given by a professional legal adviser acting in that capacity. That may include an in-house legal adviser providing professional advice to another part of the organisation in which he or she is employed.
29. In this case, legal advice was provided in the form of an email by a Council Solicitor to another officer within the Council. Having considered the information which has been withheld under section 36(1) and the relevant submissions made by the Council, the Commissioner accepts that the email withheld by the Council constitutes legal advice given in circumstances which would attract legal professional privilege. In addition, the withheld email has not been disclosed to any person other than Officers or Members of the Council; therefore, the Commissioner is satisfied that legal professional privilege had not been waived.



30. Consequently, the Commissioner is satisfied that the email identified by the Council comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, the Commissioner accepts that this information is exempt in terms of section 36(1) of FOISA.
31. The exemption under section 36(1) is subject to the public interest test contained within section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider the application of the public interest test and, in particular, whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption.

Public interest test

32. In his application to the Commissioner and correspondence with the investigating officer, Mr Wyllie put forward a number of reasons why disclosure of the legal advice would be in the public interest. His comments noted that free personal care for the elderly has been a contentious subject, in the public eye ever since the CCH Act came into effect. Areas of contention include the question of food preparation, the use of eligibility criteria and waiting lists, and variation in service provision between local authority areas. Mr Wyllie noted that the Council is one of the local authorities which continued (at that point) to charge for food preparation services, and that it did so in the belief that it was entitled to do so in law, while other local authorities had received legal opinions which suggested that this was not the case. He quoted the following motion passed by the Scottish Parliament in May 2008, which stated:
- ”That the Parliament...calls on the either Scottish councils which continue to charge for assisting with food preparation to cease to do so forthwith and all councils which have levied such charges to refund everyone who has been wrongly charged for this service”
33. The following summarises the main public interest arguments made by Mr Wyllie:
- a. The advice is important because the Council justifies its policy on it, and this policy impacts potentially adversely on some of the most vulnerable members of society. Although legal advice is subject to confidentiality, it is the fundamental information in this case because the policy of free personal care has been shrouded in controversy, much of it based in interpretation of the law.
 - b. Certain other authorities have disclosed their legal advice on the subject of the legality of charging for food preparation. Mr Wyllie argued that these authorities must have felt the balance in terms of public interest favours disclosure in relation to such information.
 - c. The Council, in relying on this legal advice [in support of its position on charging], is showing contempt for the will of the Scottish Parliament.
 - d. The Council’s policy is the subject of public debate. Disclosing the information would assist in scrutiny of public bodies and the decisions of elected representatives.



- e. While legal advice is, by its nature, a full appraisal of the client's situation, disclosure may be in the public interest by ensuring officials have a keen understanding of the importance of the potential weaknesses of the position to be taken.
 - f. In the case of certain other local authorities, the legal advice received appears to have resulted in a contrary decision by that authority [i.e. to decide to cease imposing charges]. Disclosure would be a good check to ensure that in this case, where an authority has taken a position against that of most others, that the legal advice is sufficiently full in content, therefore providing a check on the legal advisers themselves.
 - g. Local authorities have themselves disclosed legal advice about food preparation on their own initiative, without any intervention of freedom of information. Given the context of this case, Mr Wyllie suggested that the exemptions may be being relied upon for reasons of officials' embarrassment.
34. The Council argued that the public interest was best served by withholding the information. It maintained that the Council should be able to communicate with its advisers fully and frankly in order to obtain the most comprehensive legal advice to enable it to defend its position should that become necessary. The Council commented that there are real concerns if a relationship between a professional legal advisor and his/her client were to be put into the public domain as professional social work staff need to be satisfied that they can discuss these sensitive and professional issues in confidence with their legal advisers.
35. The Council also argued that this is an area where the Council might reasonably anticipate litigation in the future and a number of councils across Scotland have already faced litigation and have been taken to the higher courts. Should any litigation claims be forthcoming then the Council could not reasonably defend any actions if the legal advice were placed in the public domain. The Council reiterated that if the information were to be disclosed into the public domain, this would place the Council at considerable financial risk.
36. The Commissioner has always acknowledged that 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 are many judicial comments on the fundamental nature of this confidentiality in our legal system. Many of the arguments in favour of maintaining confidentiality of such communications were discussed in *Three Rivers District Council and Others v Governor and Company of the Bank of England* (2004) UK HL 48.
37. In Decision 023/2005, the Commissioner concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client and therefore, while he will consider each case on an individual basis, he is likely to order the release of such communications in highly compelling cases only. He has reiterated this in a number of subsequent decisions.



38. In this case, the Commissioner recognises that Mr Wyllie has strong reasons for believing that disclosure of the legal advice in question would be in the public interest. Indeed, the Commissioner finds these arguments would have carried significant weight had the information under consideration contained a full or detailed consideration of the legality of the Council's policy on charging for food preparation. However, the information under consideration does not include the type of analysis or assessment of the Council's policy that the Mr Wyllie had envisaged. Rather, it is a short email from a legal adviser which comments on the subject of both food preparation and the charges the Council imposes.
39. As noted above, the conclusion into the investigation of this case was that the Council had never formally sought or received legal advice from internal or external advisors on the subject of the legality of its charges for food preparation. The Commissioner considers it quite reasonable, given the level of controversy surrounding the interpretation of aspects of the CCH Act, that Mr Wyllie might have expected that any legal advice falling within the scope of his request would be of the type that had been sought and then disclosed by certain other local authorities. However, following a thorough investigation, he has concluded that no such advice was ever sought or received by the Council
40. While, the Commissioner accepts that disclosure of the information under consideration would add something to public understanding of the basis for the Council's approach to the preparation of food in personal care, the contribution it would make to such understanding is minimal. In the circumstances, this observation means that the Commissioner, while finding Mr Wyllie's arguments both compelling and persuasively expressed, finds that they have very limited weight in relation to the particular legal advice under consideration.
41. Against the public interest in disclosure, the Commissioner has weighed the public interest in maintaining confidentiality of communications between legal adviser and client, as recognised by the courts. He has also taken into account the possibility that the Council may be challenged over its charges for food preparation in Court and that disclosure of the legal advice has the potential (albeit limited given the content of the email) prejudice the Council's position in relation to such proceedings.
42. On balance, the Commissioner finds that the public interest in maintaining the exemption in section 36(1) of FOISA outweighs the public interest in disclosure in this case. Accordingly, the Commissioner finds that the Council was justified in withholding the information under section 36(1) of FOISA.
43. The Council has also relied on the exemption in section 30(b)(i) and (ii) to withhold the legal advice from Mr Wyllie. Having decided that section 36(1) applies to the legal advice, the Commissioner will not go on to consider the exemption in section 30(b)(i) and (ii) in respect of the advice.

Commentary on the Council's handling of this case

44. Although the Commissioner has found that the Council acted in accordance with Part 1 of FOISA by withholding the legal advice identified during his investigation, he wishes to add some observations about the Council's handling of Mr Wyllie's information request.



45. He has noted that the Council's initial response and review of Mr Wyllie's information request sought to withhold information which fell outside the scope of the request. That request sought legal advice on (a) the implementation of the CCH Act and (b) the legality of its charges for food preparation. The Council's response appeared to focus on correspondence concerning a recent judgement which related to the interpretation of the CCH Act, but had no relevance to the question of charging for food preparation.
46. Although the Council maintained that it was withholding legal advice, fuller consideration of the information that the Council identified confirmed that it was not actually legal advice, but simply exchanges between Council officers and others on legal topics. During the investigation, it became clear that the Council had not undertaken appropriate searches to identify relevant information.
47. By implying that it was considering legal advice on the subject specified by Mr Wyllie, the Council gave him a false impression of the nature of the information it held. He notes that the Council's refusal notice and subsequent notice specifying the outcome of the Council's review both failed to clearly specify which exemptions the Council considered to apply, and failed to provide details of its reasons for concluding that the public interest in disclosing the information being considered outweighed the public interest in maintaining the exemptions that had been applied.
48. The investigation of this case was then prolonged by the need for the investigating officer to prompt searches that properly addressed Mr Wyllie's request, and which covered all relevant periods (i.e. since the Council began its work to implement the CCH Act). During this process, the Commissioner found it necessary to issue a formal Information Notice under section 50 of FOISA to the Council in order to receive proper responses to the questions asked in order to establish that reasonable searches had been undertaken by the end of the investigation and to understand the process of implementing the CCH Act by the Council to establish whether and where any legal advice might be expected to be found.
49. The Commissioner takes the view that the practice of the Council in responding to Mr Wyllie's request fell well short of good practice in relation to the handling of information requests under FOISA, and led to delays in the completion of this case. An assessment of the Council's practice (in terms of section 43(3) of FOISA) is scheduled to take place over the course of the current financial year, and the Commissioner trusts that this will identify and address with the Council areas where its practice might be improved.



DECISION

The Commissioner finds that Scottish Borders Council was entitled to withhold the legal advice falling within the scope of Mr Wyllie's request in terms of section 36(1) of the Freedom of Information (Scotland) Act 2002.

Appeal

Should either Mr Wyllie or the Scottish Borders Council wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
30 July 2009



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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (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.

...

36 Confidentiality

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

...