

Decision Notice



Decision 030/2010 William Forbes and Transport Scotland

Alternative Dispute Resolution

Reference No: 200901590

Decision Date: 24 February 2010

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Forbes requested from Transport Scotland a copy of an assessment and correspondence as to whether an ongoing dispute was suitable for Alternative Dispute Resolution (ADR). Transport Scotland responded by stating that the legal advice involved in the assessment was withheld under of section 36(1) of FOISA. Following a review, Mr Forbes remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that by not providing a response to part of Mr Forbes' request involving information not held, Transport Scotland had partially failed to comply with Part 1 (and in particular section 17(1)) of FOISA. The Commissioner also found, however, that Transport Scotland correctly withheld the information it did hold under section 36(1) of FOISA. He did not require Transport Scotland to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Information not held) 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 24 July 2009, Mr Forbes wrote to Transport Scotland in relation to an ongoing dispute and contended that Transport Scotland must have carried out an assessment as to whether the dispute was suitable for a process called Alternative Dispute Resolution (ADR). In his email Mr Forbes requested the following information:
 - a) a copy of an assessment carried out by Transport Scotland to ascertain whether the ongoing dispute was suitable for ADR;
 - b) copies of any communications between Transport Scotland and Fergus Ewing (the Minister whose portfolio covered ADR matters) in that respect.



2. Transport Scotland responded on 18 August 2009, explaining that the assessment carried out had involved Transport Scotland obtaining legal advice which was exempt from disclosure (and therefore withheld) in terms of section 36(1) of FOISA. While referring to both parts of Mr Forbes' request, the response did not refer specifically to any information which might be covered by the second part of the request.
3. On 18 August 2009, Mr Forbes wrote to Transport Scotland requesting a review of its decision. In particular, Mr Forbes informed Transport Scotland he failed to see how all parts of the assessment, or any of the communications with Mr Ewing, could be exempt under section 36(1) of FOISA.
4. Transport Scotland notified Mr Forbes of the outcome of its review on 4 September 2009. Transport Scotland, referring to both parts of his request, upheld the decision that the information he had requested was exempt and properly withheld in terms of section 36(1) of FOISA.
5. On 7 September 2009, Mr Forbes wrote to the Commissioner's Office, stating that he was dissatisfied with the outcome of Transport Scotland's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Forbes 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

7. Transport Scotland is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing on 10 September 2009 that an application had been received from Mr Forbes and asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) on behalf of Transport Scotland and asking them to respond to specific questions. In particular, they were asked to clarify what information was held in relation to both parts of Mr Forbes' request and to justify its reliance on any provisions of FOISA considered relevant to the withheld information.
9. The Ministers responded on Transport Scotland's behalf and subsequent references to submissions from Transport Scotland are therefore references to submissions made by the Ministers on behalf of Transport Scotland.



10. In relation to the first part of Mr Forbes' request, Transport Scotland confirmed that it was relying upon section 36(1) of FOISA in withholding the legal advice which was the only relevant information it held. In relation to the second part of the request, Transport Scotland stated that no relevant information was held. These submissions will be considered more fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Forbes and Transport Scotland and is satisfied that no matter of relevance has been overlooked.

Section 17 (Notice that information is not held)

12. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give an applicant notice in writing to that effect.
13. In this case, while both the response to the request for information and the response to the request for review referred to both parts of Mr Forbes' request, neither response appeared to address that second part specifically. In responding to the investigating officer, Transport Scotland apologised for any lack of clarity in this connection and confirmed that it did not hold any information in this respect.
14. Having considered Transport Scotland's submissions, the Commissioner accepts that Transport Scotland carried out adequate searches and enquiries during the investigation to establish that no recorded information was held relating to the second part of Mr Forbes' request. While noting Mr Forbes' belief that information of this kind *should* be held (and indeed the correspondence he has copied from the relevant policy Minister confirming that the Scottish Government supports ADR in general terms), the Commissioner does not consider there to be a reasonable expectation that such correspondence would ordinarily be entered into between a Government agency and the Minister responsible for general policy in this area whenever a party to a dispute raised ADR (or any other particular mode of resolution) as an option.
15. The Commissioner also finds, however, that in failing to notify Mr Forbes that this information was not held in responding to his information request or his request for review, Transport Scotland failed to comply with section 17(1) of FOISA.



Section 36(1) Confidentiality

16. The exemption in 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. Among the types of communication which fall into this category are those covered by legal advice privilege, which covers communications between lawyer and client in which legal advice is sought or given, and litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*).
17. Transport Scotland indicated that it was relying upon the exemption contained in section 36(1) of FOISA to withhold the legal advice it had obtained. In doing so, Transport Scotland stated that it considered the legal advice to be subject to both legal advice privilege and to litigation privilege.
18. Communications *post litem motam* are granted confidentiality in order to ensure that any party to a potential court action can prepare their case as fully as possible without the risk that their 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. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question often being whether litigation was actually in contemplation at a particular time.
19. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation: the communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded.
20. In this particular case, Transport Scotland referred to the background to the ongoing dispute and in particular to a letter it had received from Mr Forbes in October 2007. This letter intimated that Mr Forbes reserved the right to initiate legal proceedings against Transport Scotland should the agency “use or claim ownership of [his] designs, plans, reports and other work” relating to a specified project. From this letter, it does appear to the Commissioner that Mr Forbes was at the time contemplating court action. The withheld information, consists of legal advice sought and received by Transport Scotland from its legal advisors after the receipt of Mr Forbes’ letter and considers aspects of any potential claim against Transport Scotland. Having considered Transport Scotland’s submissions and all other relevant circumstances, the Commissioner is satisfied that this is the only information held by the Ministers which could be considered to fall within the scope of the first part of Mr Forbes’ request.



21. The Commissioner has considered the timing and content of the legal advice and is satisfied that it was obtained in contemplation of litigation, which appeared at the time to be under serious consideration by a third party. Accordingly, litigation privilege applied to the information. It was also legal advice between lawyer and client, provided in confidence in the context of a professional relationship, and therefore met the requirements for legal advice privilege. Both aspects of privilege continued to apply at the time Transport Scotland dealt with Mr Forbes' information request and his request for review – and indeed continue to apply now. In the circumstances, therefore, the Commissioner is satisfied that the withheld information is exempt by virtue of section 36(1) of FOISA.
22. The exemption in section 36(1) is, however, a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that the information is exempt under this exemption, the Commissioner must go on to consider whether, in all circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Public interest test

23. As the Commissioner has noted in a number of 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. 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) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. Consequently, 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.
24. In considering the public interest in terms of section 2(1)(b) of FOISA, Transport Scotland acknowledged a general public interest in information being made available to inform public debate and understanding and conceded that the release of the advice could be used to demonstrate that decisions were taken on the basis of sound legal opinion.
25. On the other hand, Transport Scotland considered there to be a public interest in public authorities being able to consult lawyers in confidence with a view to defending their legal interests. It took the view that if either client or legal adviser considered there was a strong likelihood that legal advice would be made public at an early or premature stage – especially when legal proceedings were likely – that the advice would be far less likely to express clear opinion, would be anodyne in nature and likely to result in decisions being taken on the basis of lesser quality legal advice.
26. Transport Scotland went on to argue that release of the legal advice could have a detrimental impact upon Transport Scotland's ability to defend itself and could expose the public purse to unnecessary risk, which would not be in the public interest. On balance, Transport Scotland considered the strong public interest in the administration of fair and balanced justice (which favoured withholding of the information, for the reasons stated above) to outweigh any public interest in disclosure.



27. Mr Forbes contended that even if the legal advice was treated as confidential the public interest would outweigh any exemption. In this respect, he stated that the UK Government had made public its procedure and policy on mediation with UK Government departments and had also published examples of cases where mediation would not be appropriate. He advocated that there was public interest in establishing whether a Scottish citizen of the UK was at a disadvantage when making similar requests or whether the citizen was forced to face the high cost of court action as an alternative.
28. Having considered the public interest arguments on both sides, whilst accepting that Mr Forbes has a personal interest in receiving the information in question and recognising that in certain circumstances there might be reasons justifying disclosing legal advice of this kind in the public interest, in this instance the Commissioner does not consider that the public interest in disclosure of this particular legal advice is sufficiently compelling to outweigh the strong public interest in maintaining confidentiality of communications between legal advisor and client. Consequently, he accepts that Transport Scotland correctly withheld the legal advice in terms of section 36(1) of FOISA.

DECISION

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

The Commissioner finds that by correctly withholding information in terms of section 36(1) of FOISA, the Ministers complied with Part 1.

However, by failing to provide Mr Forbes with a notice meeting the requirements of section 17 of FOISA in relation to the second part of Mr Forbes' request, Transport Scotland failed to comply with Part 1. In this case, having accepted that Transport Scotland did not hold the information in question, the Commissioner does not require any further action in relation to this particular failure in response to Mr Forbes' application.



Appeal

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

Kevin Dunion
Scottish Information Commissioner
24 February 2010



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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.



...

36 Confidentiality

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

...