

Decision Notice



Decision 064/2010 Mr Brian McKerrow and the Scottish Parliamentary
Corporate Body

Compliance of the Family Law (Scotland) Act 2006 with other legislation

Reference No: 200902023
Decision Date: 7 May 2010

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Kevin Dunion

Scottish Information Commissioner

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Summary

Mr Brian McKerrow (Mr McKerrow) requested from the Scottish Parliamentary Corporate Body (the SPCB) information regarding compliance of the Family Law (Scotland) Act 2006 with the body of legislation with which it forms part. The SPCB claimed that it did not hold the information requested.

During the investigation, the SPCB confirmed that it did hold information relating to the Presiding Officer's consideration of whether the Family Law (Scotland) Bill fell within the legislative competence of the Scottish Parliament, and this included consideration of whether it was compliant with the European Convention on Human Rights (ECHR). The Commissioner concluded that the SPCB had interpreted Mr McKerrow's request too narrowly, and this information fell within the scope of his request.

However, the Commissioner concluded that this information was exempt from disclosure because it was legal advice in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. He concluded that on balance the public interest favoured withholding the information. The Commissioner did not require the SPCB 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) Notice that information is not held; 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 16 April 2009, Mr McKerrow wrote to the SPCB requesting documents which demonstrate that the Family Law (Scotland) Act 2006 is compliant with the body of legislation within which it forms part. In particular, he indicated that he was interested in this Act's compliance with the European Convention on Human Rights (ECHR) and key tenets of Scots law.
2. The SPCB responded on 13 May 2009. The SPCB indicated that it had interpreted Mr McKerrow's request as seeking any documents that demonstrate that the Family Law (Scotland) Act 2006 is compliant with the body of legislation which it amends. It went on to advise Mr McKerrow in terms of section 17(1) of FOISA that the information requested was not held by it.



3. On 25 May 2009, Mr McKerrow wrote to the SPCB requesting a review of its decision.
4. The SPCB notified Mr McKerrow of the outcome of its review on 29 June 2009, upholding its previous decision, and reiterating that the information requested was not held by it. It went on to indicate that if Mr McKerrow considered that it had misunderstood what information he was looking for, or wished to identify in more detail what he sought, it would be happy to consider his request again.
5. On 16 November 2009, Mr McKerrow wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPCB'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 McKerrow 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. The case was then allocated to an investigating officer.

Investigation

7. On 2 December 2009, the SPCB was notified in writing that an application had been received from Mr McKerrow. The investigating officer gave the SPCB an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked it to respond to specific questions. In particular, the SPCB was asked what steps had been taken to establish whether the information requested by Mr McKerrow was held, and whether such information was expected to be held.
8. In response, the SPCB explained its interpretation of Mr McKerrow's request, and its reasons for concluding that no relevant information was held. However, it indicated that it did hold information relating to the Presiding Officer's consideration of the Family Law (Scotland) Bill's compliance with Convention rights (those provided under the ECHR), and explained that it took the view that this information was not what Mr McKerrow was seeking.
9. The SPCB was subsequently asked to provide this information to allow the Commissioner to consider whether it fell within the scope of Mr McKerrow's request. In response, the SPCB provided a copy of the Presiding Officer's statement to the Scottish Parliament with respect to the legislative competence of the Family Law (Scotland) Bill (a published document to which Mr McKerrow had already been directed), and legal advice that had informed the Presiding Officer's consideration of this matter.
10. The SPCB also provided submissions as to why it considered this information to fall outwith the terms of Mr McKerrow's request. It also advised that, in the event that the Commissioner disagreed with its interpretation of Mr McKerrow's request and concluded that this information fell within the scope of Mr McKerrow's request, it considered this information to be exempt from disclosure.



11. Further submissions were sought and obtained from both parties with respect to the scope of Mr McKerrow's request, the exemptions which the SPCB considered to apply to this information (those set out in sections 36(1) and 30(b)(i) of FOISA), and the associated public interest test.
12. These (and other) submissions received from Mr McKerrow and the SPCB are summarised where relevant below.

Commissioner's analysis and findings

13. 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 McKerrow and the SPCB and is satisfied that no matter of relevance has been overlooked.

Interpretation and scope of the request

14. The Commissioner has first considered whether the SPCB interpreted Mr McKerrow's request appropriately, and whether it was correct to exclude from consideration the information relating to the Presiding Officer's consideration of the legislative competence of the Family Law (Scotland) Bill.
15. He has noted the wording of Mr McKerrow's request, which asked for documents which demonstrate that the Family Law (Scotland) Act 2006 is compliant with *the body of legislation within which it forms part*. Reference was made in particular to the ECHR and key tenets of Scots law. The SPCB's response to Mr McKerrow and its submissions to the Commissioner indicated that it had interpreted the request as relating to that Act's compliance with *the legislation which it amended*.
16. There is a subtle but significant difference between the wording of the request and the SPCB's interpretation. The body of legislation that was modified by the Family Law (Scotland) Act 2006 is significantly smaller than the overall body of law of which it forms part. The Commissioner has found nothing in the wording of Mr McKerrow's request that would suggest that he was interested only in the compliance of the Family Law (Scotland) Act 2006 with the legislation that it amended.
17. Furthermore, he notes that, since no Act of the Scottish Parliament could amend the ECHR, Mr McKerrow's reference to this should have alerted the SPCB that his request was not only intended to seek information on the Family Law (Scotland) Act 2006's compliance with the legislation that it had amended.
18. Therefore, the Commissioner has concluded that the SPCB wrongly construed the plain meaning of Mr McKerrow's request when first responding to it, and conducting its review.



19. The Commissioner recognises that the SPCB advised Mr McKerrow how it had interpreted his request, and that Mr McKerrow did not express dissatisfaction with this interpretation with the SPCB either in his request for review or after being invited to do so when the SPCB notified him of the outcome of its review.
20. However, he considers it reasonable that a lay person may not have recognised the implications of the shift in emphasis contained in the SPCB's interpretation of Mr McKerrow's request, nor its consequences for the scope of his request. He notes that the onus is upon a public authority to interpret an information request in line with the plain meaning of its terms, or to seek clarification from the applicant where its terms are unclear.
21. As noted above, the information supplied to the Commissioner during this case is the published statement made by the Presiding Officer on the introduction of the Family Law (Scotland) Bill with respect to its legislative competence (to which Mr McKerrow was directed), and legal advice that informed the Presiding Officer's consideration of this matter.
22. Such a statement is made by the Presiding Officer in relation to each Bill put before the Scottish Parliament. The Commissioner considers that the matter of the competence of a Bill put before the Scottish Parliament could reasonably be considered to be one of the key tenets of Scots law. Also, one of the matters to be addressed when determining whether a Bill falls within the competence of the Scottish Parliament (as defined within the Scotland Act 1998), is whether it is compliant with the ECHR.
23. Reading the plain words of Mr McKerrow's request, the Commissioner considers that the information contained within the legal advice supplied to the Commissioner regarding the Presiding Officer's consideration of the competence of the Family Law (Scotland) Bill falls within the scope of Mr McKerrow's information request.
24. In reaching this conclusion, the Commissioner has noted that Mr McKerrow's request referred to the *Family Law (Scotland) Act 2006*, which is the end product of the legislative process, rather than the *Family Law (Scotland) Bill*, to which the legal advice and the Presiding Officer's statement relates.
25. In its initial response to Mr McKerrow, the SPCB indicated that this wording had the effect of excluding the advice on the Bill from the scope of his request. It stated:

"The Presiding Officer makes a statement that a Bill is within the legislative competence of the Scottish Parliament (as set out in the Scotland Act 1998) before any Bill is introduced. He made such a statement in relation to the Family Law (Scotland) Bill and we hold certain papers in relation to that statement. However, we do not consider that they fall within the terms of your request as the papers relate only to the Bill at the time that it was introduced. Your request concerns the Family Law (Scotland) Act 2006 as passed and it is different from the Bill as introduced given the amendments which were made during the passage of the Bill through Parliament."



26. The Commissioner has considered this point carefully. However, he concluded that to maintain such a distinction would involve an unreasonably narrow interpretation of Mr McKerrow's request. The Commissioner has determined that consideration of the Act in question, being the finished product at the end of the whole legislative process, must in the circumstances of this case include information relating to its introduction and progress as a Bill through the Scottish Parliament.

Section 17 (Notice that information is not held)

27. 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.
28. As noted above, the Commissioner has concluded that the SPCB does hold information that falls within the scope of Mr McKerrow's request.
29. Therefore, the Commissioner finds that, arising from its interpretation of the scope of Mr McKerrow's request as discussed above, the SPCB incorrectly advised Mr McKerrow in terms of section 17(1) of FOISA that it did not hold the information he had requested. In so doing, the SPCB breached Part 1 of FOISA.

Withheld information

30. The SPCB indicated that it considered the information relating to the Presiding Officer's consideration of the competence of the Family Law (Scotland) Bill to be exempt from disclosure in terms of sections 30(b)(i) and 36(1) of FOISA.

Section 36(1) Confidentiality

31. In relation to the exemption in section 36(1), the SPCB stated that the information attracted legal professional privilege, and so a claim of confidentiality of communications could be maintained in legal proceedings in relation to this information.
32. Section 36(1) of FOISA provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
33. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. The information being withheld must relate to communications with a legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser. The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of the legal adviser's professional relationship with his/her client.
34. The Commissioner notes that the information found to fall within the scope of Mr McKerrow's request for information was contained in a document containing legal advice from a solicitor to the Presiding Officer in relation to the competence of the Family Law (Scotland) Bill. The Commissioner is satisfied that this information attracts legal advice privilege.



35. Furthermore, he is satisfied that the information under consideration remains confidential and that a claim of confidentiality could still be maintained in legal proceedings at the time of the SPCB's consideration of Mr McKerrow's request and subsequent review.
36. The Commissioner therefore accepts that the SPCB correctly applied the exemption in section 36(1) of FOISA to the withheld information.
37. 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 section 36(1), 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

38. Mr McKerrow put forward a number of arguments as to why disclosure of the withheld information would, in his view, be in the public interest. The Commissioner has taken all these points into account where relevant, although they are not summarised in full in this decision.
39. In particular, Mr McKerrow highlighted his concerns about the Family Law (Scotland) Act 2006, which he considered to be discriminatory, inconsistent with previous legislation, and to contravene ECHR. He maintained that disclosure would provide accountability and enable scrutiny of the processes leading to the passing of this law. He argued that the public should not be prevented from seeing legal advice for which it has paid, and highlighted that the founding principles of the Scottish Parliament include openness and accountability.
40. The SPCB acknowledged some public interest in knowing the content of legal advice if this would enhance the scrutiny of legislation. However, it argued that the public interest would be best served by withholding the information under consideration. In so doing, it highlighted that previous decisions by the Commissioner have accepted that there is a significant public interest in maintaining the exemption in section 36(1) of FOISA.
41. The SPCB also noted that the statement of the Presiding Officer with respect to the competence of the Family Law (Scotland) Bill was already in the public domain. It argued that there is a need for the Presiding Officer to receive legal advice in confidence and to conduct discussions with lawyers in confidence, which practices disclosure would harm. If the information were disclosed, the SPCB claimed that the Presiding Officer's neutral, non-political role would be undermined, which would adversely affect the quality of exercise of his function, which would not be in the public interest.
42. The Commissioner accepts there is some identifiable public interest in disclosure of the information requested in terms of accountability and transparency with respect to the Presiding Officer's consideration of the Family Law (Scotland) Bill's competence and compliance with the ECHR, and demonstrating that his statement regarding this was made in the light of legal advice.



43. However, having reviewed the actual information under consideration in this case, the Commissioner does not believe that disclosure would contribute significantly to public understanding or scrutiny of the activities of the Scottish Parliament. The Commissioner considers that statement made by the Presiding Officer in large part satisfies the public interest issues raised by Mr McKerrow.
44. 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.
45. In this case, the Commissioner accepts that Mr McKerrow has identified some general public interest in disclosure of the information under consideration to allow detailed scrutiny of the actions of the Scottish Parliament.
46. Against this, however, the Commissioner has identified a much stronger public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. On balance, the Commissioner is therefore satisfied, in all the circumstances of this case, that the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemption in section 36(1). The Commissioner has concluded that the SPCB was entitled to withhold the information under section 36(1) of FOISA.
47. Having drawn this conclusion, it is not necessary for the Commissioner to go on to consider the exemption in section 30(b)(i).



DECISION

The Commissioner finds that the Scottish Parliament Corporate Body (SPCB) failed to comply fully with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr McKerrow.

The Commissioner finds that the SPCB failed to comply with Part 1 of FOISA by wrongly advising Mr McKerrow in terms of section 17(1) that the information he requested was not held by it.

However, the Commissioner has found that the SPCB was entitled to withhold the information identified as falling within the scope of Mr McKerrow's request under the terms of section 36(1) of FOISA.

Therefore, the Commissioner does not require the SPCB to take any action in response to this decision.

Appeal

Should either Mr McKerrow or the Scottish Parliamentary Corporate Body 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
7 May 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.

...