

Decision Notice



Decision 017/2011 Sidlaw Executive Travel Scotland Ltd and Dundee City Council

Legal advice

Reference No: 201001746
Decision Date: 31 January 2011

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Sidlaw Executive Travel Scotland Ltd (SETS) requested from Dundee City Council (the Council) a copy of the legal advice setting out how the annual contract price increase for School transport contracts is calculated. The Council responded by indicating that SETS had not made a valid information request in terms of Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, during which the Council applied the exemption contained in section 36(1) of FOISA to the information requested, while maintaining that the request was not valid, SETS remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner concluded that SETS had made a valid information request for the purposes of FOISA. However, following an investigation, he found that the Council was entitled to withhold the legal advice in terms of section 36(1) of FOISA, on the basis that it was subject to legal professional privilege and the public interest in disclosing the advice was outweighed by that in withholding it.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections (1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 8(1) (Requesting information) 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 6 July 2010, Sidlaw Executive Travel (Scotland) Ltd (SETS) wrote to Dundee City Council (the Council) requesting the following information:

The opinion from the Council's legal department which underpinned a point made by the Council in previous correspondence regarding how the annual contract price increase is calculated for school transport contracts.



2. The Council responded on 22 July 2010. It advised SETS that FOISA only entitles enquirers to request recorded information not opinions from its legal department. The Commissioner understands this response to mean that the Council did not consider SETS' request to constitute a valid information request for the purposes of FOISA, because it did not seek recorded information.
3. On 31 July 2010, SETS wrote to the Council requesting a review of its decision. In particular, SETS submitted that it would have expected opinions from the Council's legal department to be in writing (whether by email or memo).
4. The Council notified SETS of the outcome of its review on 24 August 2010. The Council indicated that the relevant information had been identified, but advised that this was exempt from disclosure in terms of section 36(1) of FOISA. The notice specifying the outcome of the review suggested that in reaching this conclusion, the Council's initial decision had been upheld in full.
5. At this stage, the Council indicated that SETS' request was not a valid information request for the purposes of FOISA because it had sought documents as opposed to information. The Council made reference to the Court of Session ruling in the case of *Glasgow City Council v Scottish Information Commissioner* (issued on 30 September 2009) (the Opinion¹), which confirmed that FOISA provides the right to access information, rather than documents.
6. On 3 September 2010, SETS wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. The case was allocated to an investigating officer for consideration as to whether the request made by SETS was valid for the purposes of FOISA, and so whether a valid application had been made.

Investigation

7. On 13 September 2010, the Council was notified in writing that an application had been received from SETS and was invited to comment on the question of whether its information request (and consequently its application for decision) was valid for the purposes of FOISA.
8. The investigating officer drew the Council's attention to the Commissioner's guidance on the validity of information requests in the light of the Opinion, which was published on 27 January 2010², and previous decisions issued in cases where the public authority had considered that a request was not valid in terms of section 8(1) of FOISA. The Council was asked to confirm whether it still considered SETS' request to be invalid and to provide any submissions it may wish to make in support of its position.

¹ <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>

² <http://www.itspublicknowledge.info/uploadedfiles/CourtofSessionGuidanceonValidity.pdf>



9. In its response, the Council maintained that, in the light of the Opinion the request made by SETS was not a valid information request for the purposes of FOISA.
10. Following the Commissioner's consideration of these comments, the Council was notified in a letter dated 8 October 2010 that the Commissioner had reached the view that SETS' information request was valid for the purposes of FOISA. As a consequence, its application for a decision was validated. The Council was asked to provide the Commissioner with the information withheld from SETS.
11. On receipt of this letter, the Council responded with the information requested and the case was then allocated to another investigating officer for full investigation.
12. 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 requested.
13. The investigating officer also contacted SETS during the investigation, seeking its submissions on the matters to be considered in the case. The relevant submissions made by both SETS and the Council are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

14. 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 SETS and the Council and is satisfied that no matter of relevance has been overlooked.

Validity of the request

15. Since the Council has maintained that SETS' information request was not valid for the purposes of FOISA, the Commissioner has first considered whether this request met the requirements of section 8(1) of FOISA.
16. Section 8(1) of FOISA specifies that a request for information for the purposes of FOISA is one which:
 - (a) is made in writing or another permanent form capable of subsequent reference,
 - (b) states the name of the applicant and an address for correspondence and
 - (c) describes the information requested.
17. As noted above, following its review of SETS' information request, the Council referred to the terms of the Opinion, and in particular comments therein that highlighted that FOISA provides a right to information rather than documents.



18. When invited by the investigating officer to comment on the question of validity of SETS' information request, the Council highlighted that this had referred to "the opinion of" the Council's legal department on the relevant topic. It maintained that it was clear that what was sought was not the information contained in the opinion, but the documentation containing the opinion.
19. The Commissioner notes that, in the Opinion, the Court of Session emphasised that FOISA gives a right to information, not documents. However, the Court also said, in paragraph 45, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant.
20. In the Commissioner's guidance (as noted at paragraph 8 above), he states (at paragraphs 3.1, 3.4 and 3.5):

"FOISA provides a right to obtain information and not a right to obtain copies of specific documents. However, this does not mean that a request for a copy of a document is automatically invalid, as long as it is reasonably clear from the request that it is the information recorded in the document that the applicant wants. If it is not reasonably clear, the public authority can contact the applicant to obtain clarification.

[...]

Therefore where an applicant has asked for a copy of a document and it is reasonably clear in the circumstances that it is the information recorded in the document which the applicant wants, the public authority should respond to the request as a request properly made under FOISA. A reference to a specific document is a commonplace way of describing the information sought and can be of assistance to an authority in identifying and locating the information. Such a reference can also benefit the authority by limiting the scope of the information request, e.g. to that contained in a minute of a certain date.

If it is not reasonably clear to a public authority what information the applicant wants, and the public authority reasonably needs further detail to identify and locate the information, the public authority must tell the applicant what other information it needs."

21. The Commissioner notes that the statutory requirement, under section 8(1)(c) of FOISA, is confined to a description of the information requested. He takes the view that the purpose of the description is to allow the public authority to identify and locate the information, and that the purpose of the reference in FOISA to "information" is to relieve the applicant from specifying particular documents, since he or she cannot be expected to know in what form information is held. The principal objective of the whole FOISA regime is to make information accessible, provided it can be identified and located at a cost that is not excessive, and provided it does not fall within one of the statutory provisions (such as that in section 14) or statutory exemptions.



22. Where an applicant has made a request for a copy of a document, and it is reasonably clear in the circumstances that it is the information recorded in the document which the applicant wants, the public authority should respond to the request as a request properly made under FOISA.
23. In this case, the Commissioner has noted that SETS' request made no mention of documents within which the requested opinion might be held. Indeed, the Council's initial interpretation of this request appears to have assumed that SETS' was seeking unrecorded opinions held by its legal department.
24. After receiving SETS' review request, which highlighted that it would have expected the relevant opinion to be held in recorded form, such as a memo or email, the Council appears to have reinterpreted the request to be specifying the particular document rather than the opinions therein.
25. In this case, the Commissioner considers the Council's response to what appears to be a very simple and clearly expressed request to be dogmatic, and even perverse. The Commissioner is at a loss to understand how the Council would expect a person to request the information under consideration without describing it in terms such as "advice" or "opinion". If the indication that a person would expect the information to be recorded in some kind of document is sufficient to invalidate a request, it appears to the Commissioner that it would be virtually impossible for a person to make a competent request for the purposes of FOISA.
26. The Commissioner is satisfied that within its request SETS clearly described the information it wished to access, and that this request was not expressed in a manner which either implied that unrecorded opinions were being sought, or suggested that the applicant was seeking only copies of particular documents. The fact that the Council was able to identify the withheld information when conducting its review makes clear that it understood what information was being sought by SETS and was able to locate it.
27. The Commissioner would note that had SETS' request had been expressed in terms such as "any documents containing the opinion/advice of the legal department on the relevant topic", he would also have considered this to be valid for the purposes of FOISA, since it would have specified the information being sought, albeit via reference to the documents concerned.
28. The Commissioner has therefore concluded that SETS' request to the Council adequately described the information it was seeking, and it is a valid information request, which fulfilled all of the requirements of section 8(1) of FOISA.
29. The Commissioner has therefore gone on to consider whether the withheld information should be disclosed to SETS.

Section 36(1) Confidentiality

30. The Council has applied the exemption in section 36(1) of FOISA to withhold the legal opinion it had obtained from its in-house solicitor, stating that the information attracted both legal advice privilege and litigation privilege.



31. The exemption in 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. Among the types of communication which fall into this category are those which are subject to legal professional privilege. One aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*). Another aspect of legal professional privilege is legal advice privilege. The Council has argued that both apply to the withheld document.
32. Communications *post litem motam* are granted confidentiality in order 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/s or prospective opponent/s 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 generally being whether litigation was actually in contemplation at a particular time.
33. 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.
34. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For legal advice privilege to apply, 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.
35. In this case, the requested information comprises an email exchange between a member of the Council's Sustainable Transport team and one of the Council's senior solicitors, in which advice is sought on the correct interpretation of the contract clause that relates to the annual contract price increases awarded to contractors who provide school transport services.
36. The Commissioner is satisfied that the withheld information in this context is a communication between legal adviser and client, provided in circumstances in which legal advice privilege could apply. Given the context in which the advice was provided, and the content of the emails, the Commissioner is also satisfied that the information is subject to litigation privilege, as the advice was clearly sought in the face of potential legal action.
37. 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 is applicable in the circumstances of this case.



38. Information cannot be privileged unless it is also confidential. For the exemption to apply, the withheld information must be information in respect of which a claim to confidentiality of communications (in this case in the form of legal professional privilege) could be maintained in legal proceedings. In other words, the claim must be capable of being sustained at the time the exemption is claimed.
39. A claim of confidentiality will not be capable of being maintained where information has (prior to a public authority's consideration of an information request or conducting a review) 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.
40. In the latter stages of the investigation, SETS provided the Commissioner with a letter it had obtained from the Council in June 2009, and which provided the Council's legal opinion (at that time) in relation to the contract price increase. The Commissioner considered this letter carefully in order to assess whether the confidentiality in the withheld information had been lost by the Council's disclosures in this earlier letter.
41. The letter provided by SETS pre-dated the communications under consideration by a year and the advice which is summarised appears to be of a different type from that contained in the information under consideration. Having reviewed the content of both documents, and having considered the facts in this case and the information available, the Commissioner accepts that the legal advice under consideration still retained its confidentiality at the time when the Council responded to SETS' request and subsequent request for review.
42. Consequently, the Commissioner is satisfied that the withheld information 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.
43. 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

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. The Council has highlighted this strong public interest and has argued that there is a very strong public interest in maintaining the right to confidentiality of communications between a legal adviser and their client. The Council also submitted that the public interest in disclosure of the information is outweighed by the public interest arguments for maintaining the exemption.
46. In submissions to the Commissioner, SETS argued that the information under consideration in this case will determine whether the Council has been miscalculating the interest payments for school bus contractors for the last two years. SETS submitted that the legal advice it requested access to was only obtained by the Council after SETS repeatedly asked the Council to get a view from its legal department as to whether it was calculating the interest payments correctly. SETS also submits that if the legal advice demonstrates that the Council has wrongly calculated the interest payments for its contractors over the last two years, then it is in the public interest for this to be exposed in order that the taxpayer can assess the probity of the Council.
47. The Commissioner has considered the public interest arguments submitted by SETS and he accepts that there is a general public interest in authorities being open to scrutiny and being accountable for their actions. He also considers that this extends to knowing whether the Council has been correctly discharging its duties on behalf of its taxpayers, and has behaved appropriately in relation to the payment of its contractors.
48. In this instance, however, the Commissioner finds that there is a greater public interest in allowing the Council to obtain confidential legal advice from its advisers, particularly in a context where litigation is threatened or ongoing. On balance, therefore, the Commissioner is 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).
49. Consequently, the Commissioner accepts that the Council was entitled to withhold the legal advice under the exemption in section 36(1) of FOISA.

DECISION

The Commissioner finds that Dundee City Council (the Council) were wrong to advise Sidlaw Executive Travel Scotland Ltd (SETS) that its information request was not a valid request for the purposes of the Freedom of Information (Scotland) Act 2002 (FOISA) and that, in failing to recognise the request as a valid request, the Council failed to comply with Part 1 (and, in particular, section 1(1)) of FOISA. However, he notes that, despite taking this view, the Council responded to SETS and also carried out a review when requested to do so. As a result, he does not require the Council to take any action in relation to this breach.

The Commissioner also finds that the Council was entitled to withhold the legal advice from SETS on the basis that it was exempt from disclosure under section 36(1) of FOISA.



Appeal

Should either SETS or the 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
31 January 2011



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.

...

8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which -

- (a) is in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) states the name of the applicant and an address for correspondence; and...
- (c) describes the information requested.



36 Confidentiality

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

...