

Decision Notice



Decision 005/2012 Mr James Graham and West Dunbartonshire Council

Legal opinions on ownership issues

Reference No: 201101518
Decision Date: 6 January 2012

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Scottish Information Commissioner

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Summary

Mr Graham requested from West Dunbartonshire Council (the Council) information pertaining to ownership and use of the River Leven Basin. The Council withheld information it considered to be the subject of legal professional privilege under section 36(1) of FOISA. Following a review, Mr Graham remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Graham's request for information in accordance with Part 1 of FOISA, by correctly applying the exemption contained in section 36(1) of FOISA to the withheld information. He did not require the Council 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) 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 10 December 2010, Mr Graham wrote to the Council requesting certain information relating to the ownership and use of the River Leven. This included a request for legal opinions obtained from senior counsel and a professor of conveyancing, which had informed a report to the meeting of the Council's Housing, Environment and Economic Development Committee held on 5 September 2007.
2. The Council responded on 5 January 2011, addressing all three parts of Mr Graham's request. In respect of the request for the legal opinions, the information was withheld under section 36(1) of FOISA on the grounds that it constituted confidential legal advice.
3. On 24 January 2011, Mr Graham wrote to the Council requesting a review of its refusal to provide the legal opinions. He did not consider the confidentiality of the legal advice had been maintained by the Council in its Committee reports, submitting also that there was a considerable public interest in the issues covered by the opinions.



4. The Council notified Mr Graham of the outcome of its review on 22 February 2011, explaining in further detail why it was upholding its original decision not to release the information.
5. On 16 August 2011, Mr Graham wrote to the Commissioner, stating that he 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. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
6. The application was validated by establishing that Mr Graham 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. On 24 August 2011, the Council was notified in writing that an application had been received from Mr Graham and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. 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 relating to the confidentiality of the legal opinions.
9. The Council responded with its submissions on the 28 September 2011, explaining in more detail why it was withholding the information on grounds of confidentiality under section 36(1) of FOISA. Insofar as relevant, these submissions will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

10. 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 Graham and the Council and is satisfied that no matter of relevance has been overlooked.

Section 36(1) of FOISA - Confidentiality

11. 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.



12. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. The information must relate to communications with a professional legal adviser, such as a solicitor or an advocate. 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.
13. In this case, the Council submitted that the exemption under section 36(1) applied to the information falling within the scope of Mr Graham's request, by virtue of it constituting legal advice provided to the Council (as client) by its external legal advisers, acting in their respective professional capacities.
14. Having considered the Council's submissions and the withheld information, the Commissioner is satisfied that the information comprises communications between legal advisers and client, provided in circumstances in which legal advice privilege could apply.
15. Information cannot be privileged, however, unless it is also confidential. For the section 36(1) 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 advice 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: for this to be the case, the information must possess the quality of confidence at that time (i.e. at least up to the point at which the authority carries out its review and communicates the outcome to the applicant).
16. A claim of confidentiality will not be capable of being maintained where information has 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 all or part of the information under consideration, any privilege associated with that information (or the relevant part) is also effectively lost.
17. Mr Graham has not disputed that the information he is seeking is legal advice, but he does contest whether the information in question remained confidential by the time he made his request. In particular, Mr Graham has argued that parts of the information were published in the committee report considered by a meeting held on 5 September 2007). He also commented that, on 7 October 2010, a councillor had confirmed the Council's conclusions, having received the legal advice in question, communicating the import of the legal advice in the process. In short, Mr Graham considered that sufficient information was public knowledge for the legal opinions to have lost their quality of confidence.
18. In its submissions, the Council maintained that the legal advice remained confidential, having been circulated only to certain specified officers within the Council who had been closely involved with the matters addressed. Its existence had been mentioned in the minutes of the 5 September 2007 committee meeting, but its content had not been made known to anyone else. The Council also argued that the committee report had not included information from the opinions, although it had contained conclusions arising from the opinions. The Council refuted Mr Graham's contention that confidentiality in respect of the information had been lost.



19. The Commissioner has considered carefully the submissions received from both Mr Graham and the Council. He has also given consideration to the content of the withheld information and to whether, particularly in the context of the consideration of the issues by a committee of the Council, any of that information had lost the quality of confidence at the time the Council considered Mr Graham's information request and his request for review. While, no doubt informed by the advice received, the Commissioner is satisfied that the options considered in the report and at the subsequent meeting do not themselves include information from the opinions. He acknowledges that historical and other factual information which appears to have informed the opinions is also contained in the report, but he is not persuaded that this could be said to be information deriving from those opinions (as opposed to from the Council's own sources). He has also taken account of communications between the councillor referred to in the applicant's submissions and Mr Graham, relating to the outcome of the Council's consideration of the report, and also to subsequent press reports on the matter. In all the circumstances, he is unable to conclude that any information of substance from the legal opinions had entered the public domain.
20. The Commissioner therefore accepts that the legal advice under consideration in this case retained the quality of confidence at the time the Council responded to Mr Graham's information request and his subsequent request for review.
21. Consequently, the Commissioner is satisfied that the withheld information comprised 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 was covered by the exemption under section 36(1) of FOISA.

Public interest test

22. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.
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.
24. The Council identified a clear public interest in allowing the fullest possible consideration of the legal position in respect of this (or any other) question, without the fear that an issue which might be prejudicial to the Council could be put into the public domain. Disclosure could, it submitted, encourage action contrary to its own interests. The consequent inhibition from discussing all relevant legal issues (and as a result pursuing previously established views) would potentially be harmful to the public interest.



25. Mr Graham contended that the public interest lay in being able to debate how best to protect the River Leven area (in terms of its management and use) as a natural resource available to the wider community, and that the information under consideration here would better inform this public debate.
26. As he has indicated in previous decisions, the Commissioner accepts that it might on occasion be in the public interest to require the disclosure of confidential legal advice where it would make a significant contribution to debate on a matter of public interest or the scrutiny of decision making processes. In this context, he has taken into account the submissions received from Mr Graham on the issues regarding title of the River Leven basin and the importance of defending what he considers to be public rights.
27. Against this, however, there is clearly the very strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds, as described above. On balance, the Commissioner has determined, in all the circumstances of this case, that the public interest in making this information available is outweighed by the public interest in maintaining the exemption under section 36(1) of FOISA.
28. The Commissioner is therefore satisfied that the Council was entitled to withhold the information under the exemption in section 36(1) of FOISA.

DECISION

The Commissioner finds that West Dunbartonshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Graham.

Appeal

Should either Mr Graham 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
6 January 2012



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.

...

36 Confidentiality

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

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