

# Decision Notice



Decision 006/2012 Councillor William Young and Aberdeen City Council

Legal advice regarding Council employees' increment payments

Reference No: 201100669

Decision Date: 6 January 2012

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Councillor Young asked Aberdeen City Council (the Council) for information as to legal advice obtained from the Council solicitor, her representative, or any external legal firm, regarding the legal opinion for withholding Council employees' increment payments for 2010/11. The Council responded by providing Councillor Young with some information, but it applied exemptions in sections 36(1) and 38(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) when withholding other relevant information. Following a review, Councillor Young remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that, in relation to the matters raised by Councillor Young in his application for decision, the Council complied with Part 1 of FOISA. In particular, he found that the Council correctly applied the exemption in section 36(1) of FOISA to the information under consideration.

Although Councillor Young did not raise concerns on these points in his application for decision, the Commissioner also commented on certain technical deficiencies in the Council's handling of his request and subsequent request for review.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1) (Effect of exemptions); 10(1) (Time for compliance); 21(1), (4) and (5) (Review by public authority) 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

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1. On 12 December 2010, Councillor Young wrote to the Council to request information which had been supplied to Council officers, but not to elected members, relating to the legal advice obtained from the City Solicitor, her representative or any external legal firm in relation to advice given regarding the legal opinion for withholding Council employees' increment payments for 2010/11.



2. The Council responded on 21 January 2011. It provided some information to Councillor Young, including a summary of legal advice that it had received from Brodies LLP, communications surrounding the provision of this advice, and proposals by the Council regarding employees' increment payments. However, it withheld certain personal data within the documents disclosed (on the grounds that this was exempt from disclosure under section 38(1)(b) of FOISA) and it withheld the full legal advice it had received on the grounds that it was exempt from disclosure under section 36(1) of FOISA.
3. On 27 January 2011, Councillor Young wrote to the Council requesting a review of its decision. In particular, Councillor Young commented that he did not believe that he had been provided with copies of all of the information that he had requested (as detailed in paragraph 1).
4. The Council wrote to Councillor Young on 17 February 2011, 25 February 2011 and 4 March 2011, with what purported to be responses to his request for review. However, none of these responses actually provided Councillor Young with an explanation of whether the Council was upholding its original decision or substituting a different decision for the original one, as required by section 21(4) of FOISA.
5. The Council did, however, provide a proper response to Councillor Young's request for review on 17 March 2011. Within this response, the Council notified Councillor Young that it recognised that he had not been provided with legal advice that it had received from Paull & Williamsons LLP, which was relevant to his request. It explained that it was withholding this information on the basis that it was exempt from disclosure under section 36(1) of FOISA. The Council did not mention in this response (or any other response to Councillor Young's request for review) whether it still considered the exemptions in sections 36(1) and 38(1)(b) of FOISA to be applicable to the information withheld in its initial response to Councillor Young's request.
6. On 4 April 2011, Councillor Young wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Councillor Young stated that he had not been provided with the information he had requested relating to the internal and external legal advice on increments. Councillor Young also asked the Commissioner to investigate the Council's reliance on section 36(1) of FOISA for information it was withholding from him.
7. The application was validated by establishing that Councillor Young 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

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8. On 21 June 2011, the Council was notified in writing that an application had been received from Councillor Young 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.



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 application of the exemption in section 36(1) of FOISA, and the public interest test associated with it.
10. The only withheld information identified by the Council was a document containing legal advice from Paull and Williamsons LLP. The Council was also asked to carry out searches to determine whether it had identified all relevant legal advice, and in particular whether there was any internal legal advice that would be relevant to Councillor Young's request. It was also asked whether it was still seeking to withhold from Councillor Young the full legal advice from Brodies LLP.
11. A response was received from the Council on 29 July 2011, in which the Council provided arguments to justify its reliance on section 36(1) of FOISA for withholding the legal advice received from Paull & Williamsons LLP.
12. In its response, the Council explained that verbal legal advice was sought from the Council's own legal team (as had been indicated in a letter to Councillor Young in March 2010), but that it did not hold any further internal legal advice that it could supply in order to satisfy Mr Young's request. The Council acknowledged that it could have been more explicit in indicating this to Councillor Young at an earlier stage.
13. The Council also advised that the information provided to Councillor Young in response to his request formed part of a legal advice note that Brodies LLP had provided to it. The Council went on to explain that this full legal advice note had been the subject of previous a request under FOISA, and had resulted in an application to the Commissioner and subsequently *Decision 184/2010 Mr Alasdair Ross and Aberdeen City Council*.
14. The Council noted that, during the investigation of that application, it had determined that it had waived legal advice privilege in relation to parts of the advice note which had been referred to in a report which was submitted to a Council meeting. However, the Council had continued to withhold the remainder of the advice note under section 36(1), and in *Decision 184/2010* the Commissioner had upheld its application of that exemption.
15. The Council maintained that the non-disclosed parts of the legal advice from Brodies LLP continued to be exempt under section 36(1) and provided submissions to justify this position.
16. During the course of the current investigation, further submissions were sought and received from the Council regarding the legal advice received from Brodies LLP and Paull & Williamsons LLP. The Council was also asked to provide the Commissioner with a copy of the full legal advice that it had received from Brodies LLP that it was withholding from Councillor Young.
17. The investigating officer also contacted Councillor Young during the investigation seeking his submissions on the matters raised by this case, in particular why he considered that the public interest lay in disclosure of the information that has been withheld. His submissions were received on 4 August 2011.



18. Councillor Young's submissions, along with those of the Council are summarised and considered (where relevant) in the Commissioner's analysis and findings section below

## Commissioner's analysis and findings

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19. 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 Councillor Young and the Council and is satisfied that no matter of relevance has been overlooked.

### Information under consideration

20. The Council has provided copies of all documentation that had been identified as relevant to Councillor Young's information request. The Commissioner is satisfied that the Council has identified all relevant information, and considered all of the types of legal advice mentioned in Mr Young's request for information.
21. The Commissioner has noted that a number of these documents do not relate to the legal advice sought from Paull and Williamsons LLP or Brodies LLP and, as such, he considers them to fall outwith the scope of Councillor Young's information request. Those documents have been considered no further.
22. The Commissioner has also considered no further the documents that were supplied to Councillor Young, subject only to the redaction of information considered to be exempt from disclosure under section 38(1)(b) of FOISA (which applies to personal data, disclosure of which would breach any of the data protection principles). Councillor Young has expressed no objection to these redactions, and he did not ask the Commissioner to determine whether the Council was entitled to withhold this information.
23. The remaining information that the Council has withheld from Councillor Young and which will be considered in what follows comprises the non disclosed parts of the legal advice it received from Brodies LLP and two associated emails, and the whole of the legal advice it received from Paull & Williamsons LLP.

### Section 36(1) Confidentiality

24. The Council has applied the exemption in section 36(1) of FOISA to all of the withheld information that is under consideration in this decision.
25. The exemption in 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.



26. 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 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.
27. In this case, the Council asked both Brodies LLP and Paull & Williamsons LLP to provide it with legal advice in relation to whether it was entitled to withhold employees' salary increment payments for the period 2010/11. The Commissioner is satisfied that the withheld information comprises legal advice within a relationship where the legal advisers (solicitors from Brodies LLP and Paull & Williamsons LLP) have been asked to provide that advice in their professional capacity to a client (the Council). The Commissioner is therefore satisfied that these are communications between a legal advisor and client, provided in circumstances in which legal advice privilege could apply.
28. 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.
29. Information cannot be privileged unless it is also confidential. For the exemption to apply, the withheld information must be information in respect to 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.
30. A claim of confidentiality cannot be maintained where, prior to a public authority's consideration of an information request or conducting a review, 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 part or all of the information under consideration, any privilege associated with that information is also effectively lost.

*Was the information confidential?*

31. With regard to the legal advice obtained from Brodies LLP, the Council acknowledged during the investigation which led to *Decision 184/2010*, that legal advice privilege could not be maintained in relation to all of the advice provided, and as a consequence it disclosed some of this advice to the applicant in that case. The Council disclosed this same summary of legal advice which had been included in a Council committee report to Councillor Young. However, it maintained that the remaining parts of that advice, and the other information under consideration, remained confidential.



32. In his submissions to the Commissioner, Councillor Young commented on the findings of the Commissioner in *Decision 002/2008: Ms Diana Cairns and the City of Edinburgh Council*, where the Commissioner indicated that a party cannot “cherry pick” or put part of a privileged document or series of documents into the public domain without waiving the privilege in the remainder. Councillor Young considered that this decision was significant in respect of his own case, as the Council had intimated its position with regard to the legal advice it had obtained in publicly available committee meeting reports dated 17 June 2010, 30 June 2010 and 18 August 2010. Councillor Young also provided the Commissioner with a newspaper article dated 11 June 2010 which included the same information regarding the legal advice obtained by the Council.
33. Having considered the information contained in the legal advice from Brodies LLP and Paull & Williamsons LLP, the Commissioner is satisfied that some information contained in the legal advice from Brodies LLP is that referred to in the three committee meeting reports and the newspaper article provided by Councillor Young.
34. In *Decision 002/2008*, the Commissioner found that part of the legal advice under consideration in that case had been publicly summarised. He went on to find that the effect of this disclosure was to waive privilege in the legal advice as a whole. In that case, the Commissioner said:
- “...a party cannot “cherry pick” or put part of a privileged document or series of documents [where these relate to the same issue] into the public domain without waiving the privilege in the remainder.”
35. In line with the views expressed in *Decision 056/2010: Mr William Lonsdale and the Scottish Further and Higher Education Funding Council*, the Commissioner acknowledges that consideration of *Decision 002/2008* might lead Councillor Young to expect that the Council’s publication of parts of the content of the legal advice received from Brodies LLP which is under consideration here would lead the Commissioner to find that privilege had been lost in relation to the whole of that legal advice.
36. However the Commissioner has reviewed his position in relation to the issue of waiver or loss of privilege since the issue of *Decision 002/2008*. In particular, he has noted that the rule against “cherry picking” has only been established in Scots law in the context of court proceedings.
37. In this case, the Commissioner notes that the disclosure of part of the legal advice received from Brodies LLP did not take place in the context of court proceedings. As a result, the Commissioner (following his reconsideration of this matter) does not consider the rule against “cherry picking” to apply in this case.



38. As a result, the Commissioner considers that confidentiality and the associated privilege in the information under consideration has only been lost in relation to those parts of the legal advice from Brodies LLP which had been reported in the Council committee meeting reports and the newspaper article. The parts that have been summarised have been disclosed among the information that the Council provided to Councillor Young. The Commissioner is satisfied that the parts of the legal advice which were not disclosed in these reports or the newspaper article retain their confidential (and, so, privileged) nature.
39. The Commissioner is also satisfied that no part of the legal advice from Paull and Williamsons LLP has been made public, and so this advice remains confidential in its entirety.
40. The Commissioner therefore finds that legal advice privilege does remain in relation to the information that is under consideration in this decision, and as such he is satisfied that the Council was correct to apply the exemption in section 36(1) of FOISA to that information.
41. The exemption in section 36(1) of FOISA 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 under consideration is exempt from disclosure under this exemption, the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

#### **Public interest test**

42. 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* (the Three Rivers case), and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
43. In its submissions, the Council has echoed the above comments made by the Commissioner, and has also noted the following comment from the Three Rivers case in support for its conclusion that the public interest lies in favour of maintaining the exemption in this case.

*“There is a strong public interest in the claimant succeeding if he is entitled to do so and should fail if he is not, that every trial should be a fair trial and that to provide the best chance of these desiderata being achieved all relevant material should be available to take into account”.*





44. The Council also cited comments made by the Commissioner in *Decision 209/2007 Mr Adam Ingram MSP and the Scottish Parliamentary Corporate Body*, where he noted that the purpose of legal professional privilege is to allow a client to make full disclosure to a solicitor without fear that disclosure of their communications might subsequently be made against his/her/its will. The Council also contended that the law requires the public interest in the preservation of confidences and the private interests of the parties in maintaining the confidentiality of their communications to be balanced against the administration of justice reasons for requiring disclosure of the confidential material.
45. The Council maintained that it is essential for it to be able to seek external legal advice where it requires to do so, and that by doing so, it is able to explore freely with its legal adviser(s) potential issues that may arise from a policy decision which may have an impact on its workforce. The Council also maintained as a fundamental principle that any communications where legal advice is sought and provided should be afforded the requisite privilege bestowed by the solicitor/client relationship. As such, the Council submitted that the public interest in maintaining the exemption outweighed that in disclosure.
46. In his application, Councillor Young commented that he did not consider that the Council had applied the public interest test properly and that it is reasonable to expect elected members and the public to have sight of the requested legal advice, especially when the reports mention the legal advice. Councillor Young considered that the only reason that the Council was not sharing the information with the public is because the legal advice may be detrimental to the position it has held in relation to this matter of employee increment payments. Councillor Young believed that it was detrimental to the public not to disclose the information, and that any detriment to the Council would not outweigh the benefits of releasing the information to the public.
47. Councillor Young stated his suspicion that the Council was trying to hide something because the withheld information had not even been provided to elected members, who are the decision makers of the corporate body. Councillor Young advised that he believed this to be the case given the significant change in the Council's position over employee increment payments.
48. The Commissioner has considered the public interest arguments submitted by Councillor Young and accepts that there is a general public interest in authorities being transparent in their decision making, being open to scrutiny and being accountable for their actions. He also considers that in this case the public interest would extend to knowing the advice given, and the influence it had on the Council's decision making regarding whether to withhold employee increment payments for 2010/11.
49. However, the Commissioner also recognises that there is a very significant public interest in the effective administration of justice, and he accordingly accepts that it is in the public interest that all organisations, including public authorities, are able to obtain and consider legal advice on a confidential basis. In this case, the Commissioner does not consider there to be any public interest in the disclosure of information under consideration in this decision of equal or greater weight.



50. On balance, therefore the Commissioner is satisfied, in all the circumstances of the case, that the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemption in section 36(1).

### **Comment on the Council's handling of Councillor Young's request**

51. Although Councillor Young did not raise this matter in his application for decision, the Commissioner considers it appropriate to comment on certain technical matters regarding the Council's handling of his request and subsequent request for review in this case.
52. Section 10(1) of FOISA allows Scottish public authorities a maximum of 20 working days after receipt of a request to comply with a request for information, subject to certain exceptions which are not relevant in this case.
53. Councillor Young made his information request by email on 12 December 2010, but the Council did not respond until 21 January 2011. It therefore failed to comply with the timescale required by section 10(1).
54. Section 21(1) of FOISA gives public authorities a maximum 20 working days following the date of receipt of the requirement to comply with the requirement for review, subject to exceptions which are not relevant to this case.
55. Section 21(4) of FOISA states that, on receipt of a requirement for review, an authority may do the following in respect of the information request to which it relates:
- a. confirm a decision complained of, with or without such modifications as it considers appropriate;
  - b. substitute for any such decision a different decision; or
  - c. reach a decision, where the complaint is that no decision has been reached.
56. Section 21(5) then requires the public authority to give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.
57. Councillor Young requested a review of the Council's handling of his information request on 27 January 2011. The Commissioner notes that the Council provided what purported to be a response to Councillor Young's requirement for review within its communications of 17 February 2010, 25 February 2010 and 4 March 2011. However, it is clear from reading these responses that they did not comply with the terms of section 21(4) and 21(5) of FOISA.
58. Rather, these communications indicated that following a "review", staff had been tasked with undertaking searches and considering whether further information should be disclosed, and provided updates on progress with these tasks. As such, these communications did not provide a conclusion or clear outcome of the review, and what the Council had or intended to do.



59. While the Council did eventually provide a compliant response to Councillor Young's requirement for review on 17 March 2011, this was provided well out with the statutory 20 working day timescale.
60. Given these observations, the Commissioner would remind the Council that its review process must actually be completed in terms of sections 21(4) and (5) within the timescale allowed by 21(1). A review which does not do so will not be compliant with the requirements of FOISA.
61. Although the Commissioner has made no formal decision on these technical matters, he is concerned by the deficiencies in the Council's handling of Councillor Young's information request. He would encourage it to ensure that its request handling processes enable it to meet the requirements of FOISA when dealing with future requests.

## DECISION

In respect of the matters raised in Councillor Young's application for decision, the Commissioner finds that Aberdeen City Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Councillor Young.

The Commissioner finds that the exemption in section 36(1) of FOISA applied to the information under consideration in this decision, and so the Council in complied with Part 1 when withholding this information.

## Appeal

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Should either Councillor Young 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

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### 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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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.
- ...

##### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.



...

## 21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (4) The authority may, as respects the request for information to which the requirement relates-
  - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
  - (b) substitute for any such decision a different decision; or
  - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

## 36 Confidentiality

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

...