

Decision Notice



Decision 219/2013 Ms Catherine Stihler MEP and the Scottish Ministers

Legal advice: Scotland's membership of the EU

Reference No: 201300879
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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

On 30 May 2011, Ms Stihler asked the Scottish Ministers (the Ministers) for any legal advice that they had been given on the position of Scotland within the EU in the event of Scotland becoming an independent country. The Ministers initially refused to confirm or deny whether they held any legal advice. Ms Stihler appealed to the Commissioner, who ordered the Ministers to confirm whether they held the advice. The Ministers appealed the Commissioner's decision to the Court of Session, but later abandoned the appeal. The Ministers subsequently told Ms Stihler that they did hold the legal advice she had asked for, but that it was exempt from disclosure in terms of section 36(1) of FOISA (legal professional privilege).

Following an investigation, the Commissioner was satisfied that the Ministers were entitled to withhold the information under section 36(1) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 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 30 May 2011, Ms Stihler wrote to the Ministers asking whether they had been given any legal advice on the status of Scotland within the EU should Scotland choose to break away from the United Kingdom. Ms Stihler asked for a copy of any legal advice that had been given to the Ministers on this subject.
2. The Ministers responded on 4 August 2011, giving notice under section 18(1) of FOISA. In doing so, the Ministers refused to confirm or deny whether the legal advice existed or was held by them. The Ministers considered that any such advice would be exempt information under sections 29(1)(a) (Formulation of Scottish Administration policy, etc.) and 30(c) (Prejudice to effective conduct of public affairs) of FOISA. The Ministers also considered that to reveal whether the information existed or was held would be contrary to the public interest.



3. Following a review, in which the Ministers upheld their original decision, Ms Stihler applied to the Commissioner for a decision. The Commissioner subsequently issued *Decision 111/2012 Ms Catherine Stihler MEP and the Scottish Ministers*¹ on 6 July 2012. This decision required the Ministers to respond to Ms Stihler's request otherwise than in terms of section 18(1) of FOISA, in other words to confirm whether or not they held the legal advice.
4. The Ministers appealed this decision to the Court of Session. However, on 23 October 2012, the Deputy First Minister made an announcement to the Scottish Parliament in which she stated that the Ministers had not sought specific legal advice on this topic. Thereafter, the Ministers abandoned their appeal against the Commissioner's decision.
5. On 23 November 2012, the Ministers provided a new response to Ms Stihler (in fulfilment of the requirements of *Decision 111/2012*). The Ministers stated that they had not sought specific legal advice and therefore did not hold the information that Ms Stihler was seeking.
6. On 21 December 2012, Ms Stihler wrote to the Ministers requesting a review of their decision. Ms Stihler pointed out that her request had been for "any" legal advice obtained by the Ministers rather than the "specific" legal advice to which they had referred in their response of 23 November 2012. Ms Stihler noted that three documents² published on the Scottish Government website all made reference to an independent Scotland's relationship with the EU. Ms Stihler pointed out that none of these documents should have been allowed to be published without the approval of the Scottish Government Legal Directorate (the SGLD).
7. The Ministers notified Ms Stihler of the outcome of their review on 19 March 2013. The Ministers now stated that they held "underpinning" legal advice from both the SGLD and the Law Officers which fell within the scope of Ms Stihler's request. The Ministers informed Ms Stihler that they considered the advice to be exempt from disclosure in terms of section 36(1) of FOISA on the basis that it comprised legal advice and its disclosure would breach legal professional privilege.
8. On 28 March 2013, Ms Stihler wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Ms Stihler 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.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201101968.aspx>

² <http://www.scotland.gov.uk/Publications/2007/08/13103747/0>
<http://www.scotland.gov.uk/Publications/2009/11/26155932/0>
<http://www.scotland.gov.uk/Publications/2012/01/1006>



Investigation

10. On 13 May 2013, the Ministers were notified in writing that an application had been received from Ms Stihler and were asked to provide the Commissioner with the information withheld from her. The Ministers were given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). The Ministers were asked to respond to specific questions justifying their reliance on any provisions of FOISA they considered applicable to the information requested. The Ministers were also asked to clarify the nature of the legal advice that they held and to explain their differentiation between “specific” and “underpinning” legal advice.
11. The Ministers responded with the information requested and provided submissions on why they considered the information to be exempt from disclosure in terms of section 36(1) of FOISA. The Ministers also explained the nature of the legal advice that they held.

Commissioner’s analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Ms Stihler and the Ministers. She is satisfied that no matter of relevance has been overlooked.

“Specific” and “underpinning” advice – the information under consideration

13. In their response to Ms Stihler of 23 November 2012, the Ministers stated that, at the date of her request (30 May 2011), they did not hold any **specific** [Commissioner’s emphasis] legal advice in relation to an independent Scotland’s membership of the EU. On review, the Ministers amended their position (as they are entitled to do under FOISA). They informed Ms Stihler that they had not received any “specific” advice regarding EU membership. However, the Ministers stated that they had received legal advice which “underpinned” the Scottish Government’s position on an independent Scotland’s membership of the EU as set out in the publications to which she had referred.
14. In their submissions to the Commissioner, the Ministers explained that they had been seeking to distinguish two types of advice:
 - 1) written opinions or advice from the Law Officers or the SGLD on a specific question, and
 - 2) the process where the SGLD and Law Officers review submissions and documents for publication to ensure they do not contain any incorrect statements of law.

The information under consideration here falls into category 2).



15. The Ministers explained that this process may involve the SGLD and Law Officers commenting on the material, flagging up points on which advice may be needed in future and suggesting amendments to avoid any difficulties, including on matters where legal advice has yet to be sought.
16. The Ministers referred to the investigation and report³ carried out by Sir David Bell into a complaint that the First Minister had breached the Scottish Ministerial Code. The report discusses (at paragraph 18) the different types of legal advice that may be provided to Ministers. The report classifies “a written opinion of the Law Officers ‘expressly sought’” as being the highest form of legal advice available to Ministers. The report also refers to “underpinning advice” from the Law Officers which arises “from them seeing submissions to Ministers and commenting or not on the content of such submissions.” The report states that “[t]he purpose of this advice is narrow in that it seeks to ensure only that submissions to Ministers, and Government documents for publication, do not contain any wrong statements of the law.”
17. Having viewed the information under consideration, the context in which it was obtained and is held, and the Ministers’ explanation of its nature, the Commissioner is satisfied that it does fall within the scope of Ms Stihler’s request, which was for “any” relevant advice. She will therefore go on to consider whether the Ministers were entitled to withhold this information from Ms Stihler.

Section 36(1) of FOISA - Confidentiality

18. 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.
19. The Ministers stated that they were relying on the exemption in section 36(1) to withhold the underpinning legal advice that had been obtained from the Law Officers and the SGLD on the basis that the information was subject to legal advice privilege. The advice in question was provided by lawyers in relation to the text in published documents on EU membership, to ensure that these documents did not contain any wrong statements of the law.
20. For legal advice privilege to apply, certain conditions must be fulfilled.
 - 1) The communication must be with a professional legal adviser, such as a solicitor or advocate.
 - 2) The legal adviser must be acting in their professional capacity as such and the communication must occur in the context of their professional relationship with their client.

³ <http://www.scotland.gov.uk/Resource/0041/00412247.pdf>



3) The information must be confidential between lawyer and client.

Privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy.

21. The information being withheld under this exemption is legal advice obtained by the Scottish Ministers from the SGLD and the Law Officers. Having considered the content of the withheld information and the circumstances under which it was obtained (i.e. in the context of a professional relationship between a legal adviser and their client, in the course of which confidential legal advice was requested and provided), the Commissioner is satisfied that the information meets all of the conditions set out in the above paragraph and is subject to legal advice privilege.
22. 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).
23. 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.
24. Having considered the contents of the withheld information, the Commissioner is satisfied that the legal advice referred to above has not been made public, either in full, or in summary. The detail of the advice which was provided to the Ministers was not contained within the specified Government publications to which it referred.
25. The Commissioner is satisfied that the withheld information includes information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, the Commissioner accepts that all of the information sought by Ms Stihler is exempt from disclosure under section 36(1) of FOISA.
26. 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. 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

27. The Court of Session, which hears appeals from the Commissioner's decisions, has not yet considered in any detail the public interest test in relation to the exemption in section 36(1) of FOISA. However, the equivalent test contained in the (UK) Freedom of Information Act 2000 (FOIA) was considered by the High Court in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB).⁴
28. While not binding on the Commissioner, the Commissioner agrees with the reasoning set out by the High Court and has adopted that reasoning here.
29. In the High Court, Mr Justice Wynn Williams upheld a line of decisions from the Information Tribunal in which it was determined that there is a significant in-built weight of public interest in maintaining the equivalent of the section 36(1) exemption in FOISA (i.e. section 42 of FOIA). This is, according to Mr Justice Wynn Williams, because of the strong constitutional importance attached to legal professional privilege and, thereby, the protection of free and frank communications between lawyers and their clients. This was summed up, according to Mr Justice Wynn Williams, in the case of *R v Derby Magistrates Court ex parte P* [1996] 1 AC487, where Lord Taylor stated at page 507D:

“Legal professional privilege is much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.”

30. Mr Justice Wynn Williams stated at paragraphs 41 and 53 of his judgement:

“It is also common ground, however, that the task of the Tribunal, ultimately, is to apply the test formulated in section 2(2)(b) [of FOIA, the equivalent of section 2(1)(b) of FOISA]. A person seeking information from a government department does not have to demonstrate that “exceptional circumstances” exist which justify disclosure. Section 42 is not to be elevated “by the back door” to an absolute exemption. As [counsel for the Information Commissioner] submits in her Skeleton Argument, it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any qualified exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.

...

The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant

⁴ <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>



weight to be afforded to the exemption; in any event ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.”

31. The Commissioner will now go on to consider the public interest arguments made by Ms Stihler and the Ministers.
32. In her application to the Commissioner, Ms Stihler argued that it is in the public's interests to be furnished with the full facts on this topic which includes the legal advice which the Scottish Government holds on this question. Ms Stihler submitted that a precedent had been established for publishing such information as the UK Government had published its legal advice on the subject.
33. The Ministers acknowledged that the issue of Scotland's membership of the EU has been high profile and attracted a considerable amount of publicity. They also acknowledged that there was a public interest in understanding what legal advice was received and the legal basis of any statements made by Ministers. However, they considered that interest was outweighed by the strong public interest in protecting legal professional privilege by maintaining the confidentiality of communications between legal advisers and clients and the consequent harm to the public interest if this confidentiality was not maintained.
34. In the Ministers view, it is crucial that they are able to receive free and frank legal advice on matters of such constitutional importance. Similarly, those providing the advice should be free to consider all of the relevant aspects and deal with them comprehensively without the risk of that advice being released into the public domain where it may be taken out of context or referred to partially. In the Ministers' view, the public interest is served by Ministers and officials continuing to be able to receive confidential legal advice on that basis.
35. The Ministers submitted that there was no public interest in releasing advice taken out of the proper context of the process of policy development which would risk misrepresentation of the Government's position. The Ministers also explained that the White Paper on independence which is due to be published in November 2013 will be informed by, and fully consistent with, any legal advice which has been provided. The Ministers stated that their position will be set out clearly in the White Paper which will be produced as a result of the proper process of a free and frank exchange of advice and views on EU membership and other aspects of constitutional reform.
36. In relation to the point raised by Ms Stihler concerning the UK Government's publication of legal advice, the Ministers noted that the advice in question was not obtained from the UK Government's Law Officers. Instead, the UK Government had published independent advice provided by Professors Alan Boyle and James Crawford⁵. The Ministers stated that the UK Government had not indicated whether it had received legal advice from its Law Officers on this subject.

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf



37. The Commissioner has considered all of the submissions put to her regarding the public interest in this case. She accepts that the information under consideration in this case concerns a matter of considerable importance and consequence. The Commissioner acknowledges that there would be a significant public interest in its disclosure.
38. In previous decisions on this topic, the Commissioner has recognised that the forthcoming referendum will potentially effect a momentous change in Scotland's constitutional position. In her view, it is essential that the electorate should be able to make an informed decision when making their choice in the referendum. The Commissioner believes that disclosure of the legal advice obtained by the Ministers for the purposes of the published Scottish Government papers could assist the public in better understanding these issues.
39. She has also considered the strong public interest in ensuring that all organisations, including the Scottish Government, are able to obtain and consider legal advice on a confidential basis. The Commissioner has pointed out in many decisions that 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.
40. The Commissioner also notes that the Ministers have given a commitment to setting out their position on EU membership in the forthcoming White Paper which will reflect the specific legal advice they have received.
41. The Commissioner has considered the passage of time that has elapsed since the advice under consideration in this decision was provided to the Ministers (the advice in relation to *Choosing Scotland's Future* was provided in 2007). However, the issue remains under active discussion and the Ministers' policy position has yet to be published.
42. The Commissioner notes that legal advice has been published by the UK Government. However, the Commissioner does not consider that this creates any precedent which is binding, or necessarily persuasive, on the Scottish Ministers to do likewise. In the Commissioner's view, the doctrine of legal professional privilege applying in this case, to this public authority, should not be unduly affected or influenced by the actions of a distinct public authority, operating under a separate legal system and freedom of information regime.
43. In this instance, and at the time of the Ministers' decision on review, the Commissioner is not satisfied that the public interest in disclosure of this particular information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal advisor and client.
44. The Commissioner considers the fact that the Law Officers have reviewed the content of the specified publications largely addresses the public interest in ensuring that their content is legally accurate. Having considered the competing arguments for and against disclosure, the Commissioner is not persuaded that there is an overriding public interest in the disclosure of the information withheld in response to Ms Stihler's request. In particular, the Commissioner acknowledges the Ministers' commitment to setting out their position on EU membership in the forthcoming White Paper.



45. Consequently, she accepts that the Ministers were entitled to withhold the legal advice under section 36(1) of FOISA.

Comments on the Ministers' handling of the request

46. As noted above, on 23 November 2012, the Ministers informed Ms Stihler that they did not hold any specific legal advice regarding EU membership. During the investigation of Ms Stihler's previous application to the Commissioner which led to *Decision 111/2012*, the Ministers also informed the Commissioner that they did not hold the information sought by Ms Stihler.
47. The Commissioner has accepted the Ministers' explanation regarding their interpretation of what constitutes "specific" and "underpinning" advice. The Ministers explained that they had initially interpreted Ms Stihler's request as being for *specific* legal advice on this issue as distinct from advice that was obtained as part of the process of clearing the wording of the relevant EU material in the specified publications.
48. The Commissioner also accepts that the Ministers were entitled (under section 21(4)(b) of FOISA) to substitute a different decision in response to Ms Stihler's requirement for review.
49. However, in the Commissioner's view, it was the Ministers' handling of this request that led to their apparent shift in position as to whether they actually held any relevant legal advice. This handling, particularly the interpretation of the request, created unnecessary and avoidable confusion and speculation.
50. During the investigation into Ms Stihler's previous application, the Ministers informed the (previous) Commissioner, in December 2011, that no information was held. The Ministers persisted with this opinion until 19 March 2013 when they responded to Ms Stihler's requirement for review.
51. The Commissioner's view, is that this confusion could have been avoided had the Ministers not initially adopted an overly narrow interpretation of the request. As noted above, the request was for "any" legal advice that had been provided; the Ministers interpreted this as being a request for the "specific" advice, a term subsequently referred to by the Deputy First Minister and others.
52. Whilst the Commissioner has accepted that it may be possible to distinguish different types of legal advice provided by the SGLD and Law Officers, she is disappointed that the Ministers did not appear to recognise this. Sticking to their narrow interpretation of the request, they continued to maintain that no information was held until March 2013, some 21 months after Ms Stihler originally submitted her request. The Commissioner is concerned by the Ministers' apparent inability to have recognised and identified relevant information over such a lengthy period. Whilst she has no reason to believe that this apparent shortcoming will recur, she would urge the Ministers to ensure that a careful and correct interpretation is given to information requests in future.



DECISION

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

Appeal

Should either Ms Stihler or the Scottish Ministers wish to appeal against this decision, they have the right to 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.

Rosemary Agnew
Scottish Information Commissioner
7 October 2013



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.

...