

Decision Notice

Decision 194/2014: Mr X and the Scottish Ministers

Legal advice

Reference No: 201400794

Decision Date: 11 September 2014



Scottish Information
Commissioner

Summary

On 10 February 2014, Mr X asked the Scottish Ministers (the Ministers) for all the legal advice obtained by the Scottish Government in relation to the Children and Young People (Scotland) Bill.

The Ministers withheld the legal advice from Mr X.

The Commissioner investigated and found that the Ministers were entitled to withhold the advice on the basis that it was subject to legal professional privilege and was exempt from disclosure 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 10 February 2014, Mr X made a request for information to the Ministers via the [whatdotheyknow](http://www.whatdotheyknow.com) website¹. The information requested was all the legal advice obtained by the Scottish Government in relation to the Children and Young People (Scotland) Bill (the Bill).
2. The Ministers responded on 7 March 2014. They informed Mr X that the information was exempt from disclosure in terms of sections 29(1)(c) and 36(1) of FOISA. This was on the basis that the information related to the provision of advice by any of the Law Officers (section 29(1)(c)) and comprised legal advice in respect of which a claim to confidentiality of communications could be maintained in legal proceedings (section 36(1)).
3. On 10 March 2014, Mr X emailed the Ministers requesting a review of their decision. Mr X considered that the nature of the Bill and its far reaching consequences meant that the public interest favoured the information being disclosed.
4. The Ministers notified Mr X of the outcome of their review on 3 April 2014. The Ministers upheld their original decision without modification.
5. On 7 April 2014, Mr X wrote to the Commissioner. Mr X applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr X stated he was dissatisfied with the outcome of the Ministers' review because the public interest in disclosing the information was not outweighed by that in maintaining the exemptions.
6. Mr X subsequently clarified that he only wished to see information relating to the "named person" and "information sharing" provisions contained in the Bill.

¹ <https://www.whatdotheyknow.com>

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr X made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
8. On 16 April 2014, the Ministers were notified in writing that Mr X had made a valid application. The Ministers were asked to send the Commissioner the information withheld from him which related to the “named person” and “information sharing” provisions within the Bill. The Ministers provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application (and answer specific questions) including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

Commissioner’s analysis and findings

10. 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 Mr X and the Ministers. She 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.
 - (i) The information must relate to communications with a professional legal adviser, such as a solicitor or an advocate;
 - (ii) The legal adviser must be acting in their professional capacity; and
 - (iii) The communications must occur in the context of the legal adviser's professional relationship with their client.
13. The information being withheld under this exemption is legal advice obtained by the Scottish Ministers from their legal advisers. The Ministers submitted that all of the information was legal advice provided by qualified legal professionals acting in their capacity as legal advisers.
14. 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 the conditions set out in paragraph 12 above and is subject to legal advice privilege.

15. Information cannot be privileged 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 could be maintained in legal proceedings. In this case, the claim to confidentiality is in the form of legal advice privilege. 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 of its response to the information request and communicates the outcome to the requester.
16. 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.
17. 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 all of the information sought by Mr X is exempt from disclosure under section 36(1) of FOISA.
18. 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

19. 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).²
20. While not binding on the Commissioner, the Commissioner agrees with the reasoning set out by the High Court and has adopted that reasoning here.
21. 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). According to Mr Justice Wynn Williams, this is 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."
22. Mr Justice Wynn Williams stated at paragraphs 41 and 53 of his judgement:

² <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

“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 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.”

23. The Commissioner will now go on to consider the public interest arguments made by Mr X and the Ministers.
24. The Ministers considered it was vital that lawyers and officials have the private space to fully and frankly consider proposals and ensure they are consistent with the requirements of other legislation before the Ministers reach a final informed legal position in relation to any Bill they introduce. This would also apply to any amendments that they lodge, as well as their position on any amendments lodged by MSPs. In the Ministers’ view, there was a strong public interest in allowing lawyers to provide frank legal advice as and when needed.
25. The Ministers also submitted that the disclosure of some of the information had the potential to compromise their ability to defend their legal interests by unfairly exposing to challenge their internal legal exchanges. They considered that this could potentially diminish the reliance that Ministers can place on the advice having been fully considered without fear of disclosure.
26. The Ministers also stated that a judicial review of the “named person” provisions in the Children and Young People (Scotland) Act 2014 (the 2014 Act) had been lodged in court by certain stakeholders who opposed the provisions. They argued that, in the forthcoming legal challenge, the internal legal discussions and advice of the other parties to the challenge would not be expected to be released into the public domain. Consequently, it would be unfair to put the Ministers at a potential disadvantage by exposing their internal legal discussions to public scrutiny.
27. The Ministers submitted that it was a matter of public record that the Law Officers checked and approved any Bills before they were introduced into the Scottish Parliament (as happened in this case) to ensure they were compliant with the European Convention on Human Rights (ECHR). As a result, the Bill would not have been introduced unless confirmation had been received from the Law Officers that it was compatible with the European Court’s jurisprudence. In the Ministers’ view, this should largely satisfy the public

interest in terms of providing sufficient reassurance to stakeholders that the 2014 Act's compliance with the ECHR was thoroughly considered and checked by senior legal advisers.

28. Finally, the Ministers argued that there was a significant public interest in protecting the ability of Ministers and their legal advisers to seek and receive comprehensive legal advice in confidence to enable them to make fully informed decisions on their legislative proposals.
29. Mr X argued that the public had a right to see the information as it would have a direct impact on the privacy, rights and responsibilities of every parent and child in Scotland.
30. Mr X submitted that the Bill had progressed through the Scottish Parliament despite a widespread outcry from parents, parent organisations and the legal establishment. He argued that questions had been raised by a number of legal experts about the Bill's compatibility with the Data Protection Act 1998 and Article 8 of the ECHR.
31. Mr X argued that the rights and responsibilities of every parent and child should outweigh the exemption in this case. He submitted that the volume of legal opinion suggesting that some of the Bill's provisions were illegal meant that the public interest in disclosure far outweighed the need to keep the information secret.
32. In this case, the Commissioner accepts there is a public interest in disclosure of the information under consideration in order to scrutinise the actions of the Ministers and to contribute to transparency and accountability.
33. The Commissioner has also considered the strong public interest in ensuring that bodies, including the Ministers, are able to obtain and consider legal advice on a confidential basis. The Commissioner also acknowledges 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.
34. The Commissioner acknowledges the strong arguments that Mr X has advanced, and the obvious concerns he shares with other members of the public about the provisions of the Bill. However, 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. It is a matter of public record that the Law Officers advise the Ministers on the legislative competence of all Bills introduced to the Scottish Parliament, and the Commissioner considers that this, in large part, satisfies the public interest in this case.
35. Consequently, the Commissioner accepts that the Ministers were entitled to withhold the legal advice under section 36(1) of FOISA.
36. Having reached this conclusion, the Commissioner is not required to consider the application of section 29(1)(c) of FOISA which the Ministers also applied to the withheld information.

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 Mr X.

Appeal

Should either Mr X 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.

Margaret Keyse
Head of Enforcement

11 September 2014

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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