

Decision Notice

Decision 218/2014: UNISON Glasgow City Branch and Glasgow City Council

Legal advice

Reference No: 201401913

Decision Date: 08 October 2014



Scottish Information
Commissioner

Summary

On 9 April 2014, UNISON Glasgow City Branch (Unison) asked Glasgow City Council (the Council) for the legal Opinion provided by Richard Keen QC to the Council concerning the Council's power to implement the recommendations outlined in its Executive Committee report of 17 April 2014.

The Council responded by advising Unison that it considered the requested information to be exempt from disclosure in terms of section 36(1) of FOISA (Confidentiality). Following a review, Unison remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council was correct to withhold the information. She did not require the Council to take any action.

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. A report on the "Future delivery of home care to older people in Glasgow" (the Report) was examined and discussed by the Council's Executive Committee on 17 April 2014. The Report was accompanied by a business case entitled "Future delivery of home care to older people in Glasgow" (the Business Case). One of the key recommendations in the report concerned the transfer of home care services from the Council to Cordia (Services) LLP (Cordia), which is an arms-length body, wholly owned by the Council.
2. The Council obtained legal advice from Richard Keen QC to determine whether it had *vires* (legal power) to implement the recommendations outlined in the Report.
3. On 9 April 2014, Unison asked the Council to provide the legal advice described above.
4. The Council responded on 9 May 2014. The Council notified Unison that it considered the information to be exempt in terms of section 36(1) of FOISA, as it was information in respect of which the Council could maintain a claim to confidentiality of communications in legal proceedings and the public interest did not favour disclosure.
5. On 12 June 2014, Unison wrote to the Council requesting a review of its decision on the basis that there was a compelling public interest in the legal opinion being disclosed.
6. The Council notified Unison of the outcome of its review on 7 July 2014. It upheld its initial decision.
7. On 24 July 2014, Unison wrote to the Commissioner. Unison applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Unison stated it was dissatisfied with the outcome of the Council's review because it believed that it was in the public interest that the information be disclosed.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Unison made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
9. On 29 July 2014, the Council was notified in writing that Unison had made a valid application. The Council was asked to send the Commissioner the information withheld from it. The Council provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions, including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
11. The Council provided submissions to the investigating officer.

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 Unison and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 36(1) - Confidentiality

13. 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 (LPP), applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
14. In this case the Council submitted that the exemption in 36(1) applied to the information falling within the scope of Unison's request, by virtue of it constituting legal advice provided to the Council (the client) by a legal adviser (Richard Keen QC) acting in his professional capacity.
15. 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.
16. 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 his 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 the above paragraph and is subject to legal advice privilege.
17. Information cannot be privileged unless it is also confidential. It must be information in respect of which a claim to confidentiality of communications could be maintained in legal

proceedings. The claim must be capable of being sustained at the time the exemption is claimed: the information must possess the quality of confidence at that time, so it cannot have been made public, either in full or in a summary substantially reflecting the whole. The Commissioner is satisfied that this information remained confidential at the time the Council responded to Unison's information request and requirement for review (and that it remains so now).

Public interest test

18. The exemption in section 36(1) is subject to the public interest test in section 2(1)(b) of FOISA.
19. 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. In a Freedom of Information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB). Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.

Submissions from Unison

20. In its request for review, Unison argued that there was a compelling public interest in making public the legal opinion regarding the transfer of home care services for older adults. Unison noted that public funds and the financial liabilities of managing those funds were now being transferred (from the Council) to an external company (Cordia). Unison argued that within a local authority, there is accountability and governance, lacking in an external company.
21. In addition, Unison contended that there were key stakeholders (such as service users, families, the NHS) who have the right to know that the statutory obligations and framework under which this service must be governed are being followed, and the right to see the legal advice that underpinned that. Unison argued that the client group in question was a vulnerable group and it was important to ensure that their legal rights were upheld. Unison argued that, for these reasons, it was incumbent on the Council to share its legal advice.
22. In its application to the Commissioner, Unison also argued that disclosure would serve the public interest in ensuring effective oversight of public expenditure, in ensuring that the Council is adequately discharging its regulatory functions, and in contributing to public debate on the provision of care.

Submissions from the Council

23. The Council acknowledged that there is a general public interest in public authorities being open to scrutiny and accountable for their actions.
24. With regard to ensuring that the Council was adequately discharging its regulatory functions and contributing to the public debate on the provision of care, the Council submitted that it had explained to Unison that, having reviewed the legal Opinion, the Council was satisfied that there was no legal impediment to the implementation of the recommendations.
25. The Council noted that its Executive Committee had discussed the Report and Business Case at a meeting on 17 April 2014, and that page 25 of the Business Case discusses the Council's *vires* to implement the recommendations. The Business Case states that the recommendations expand the current relationship between the Council and Cordia, with

Cordia being contracted to assist the Council to fulfill its statutory duty to provide community care services. The Business Case indicates that if the recommendations are followed, the statutory function remains with the Council.

26. The Council noted that Unison had been given a copy of the Report and the Business Case.
27. The Council was satisfied that the correspondence between itself and Unison and the legal position stated in the Business Case (which has been examined and discussed by the Council's Executive Committee) largely satisfies the public interest in ensuring that the Council is adequately discharging its regulatory functions.
28. With regard to ensuring effective oversight of public expenditure and contributing to the public debate on the provision of care, the Council submitted that the information requested relates to the Council's *vires* to implement the recommendations outlined in the Report, and does not cover public expenditure. Public expenditure and all other matters relating to the recommendations outlined in the Report are contained in the Report and the Business Case which has been examined and discussed by the Council's Executive Committee.
29. The Council submitted that it had also considered the public interest in ensuring the Council is able to obtain and consider legal advice on a confidential basis. The Council contended 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.
30. The Council referred to a previous decision from the Commissioner, *Decision 033/2014 Ms Carole Ewart and the Scottish Ministers*, which stated that there is a strong public interest in maintaining the confidentiality of communications between legal adviser and client. The Council also referred to *Decision 023/2005 Mr David Emslie and Communities Scotland*, which stated that there will always be a strong public interest in maintaining the right to confidentiality of communications between a legal advisor and their client and that, while each case will be considered on an individual basis, the Commissioner is only likely to order the release of such communications in highly compelling cases.
31. The Council concluded that, on balance, the public interest in disclosure of the information is outweighed by the public interest in ensuring that the Council is able to obtain and consider legal advice on a confidential basis, and that the exemption contained in section 36(1) of FOISA should be maintained.

Commissioner's view

32. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where:
 - the privileged material discloses wrongdoing by or within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material discloses an apparently irresponsible and wilful disregard of advice
 - a large number of people are affected by the advice
 - the passage of time is so great that disclosure cannot cause harm.

33. After careful consideration, the Commissioner is satisfied that none of the considerations set out above apply here.
34. The Commissioner acknowledges the concerns raised by Unison, and she accepts that there are strong public interest arguments in ensuring that the delivery of home care provided to older adults has been properly considered by the Council and that its decision to “transfer out” the service to a private company is a lawful one. On the other hand, the Commissioner acknowledges the strong inherent public interest in maintaining legal professional privilege. In this case, having considered the information in context, she has been unable to identify any public interest consideration of equal or greater weight which would favour disclosure.
35. In all the circumstances of the case, therefore, the Commissioner is satisfied that the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption in section 36(1). Consequently, she finds that the Council was entitled to withhold the information under that exemption.

Decision

The Commissioner finds that Glasgow City Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by UNISON Glasgow Branch.

Appeal

Should either UNISON Glasgow Branch or Glasgow City Council 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
Scottish Information Commissioner

8 October 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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