



**Decision 023/2005 Mr David Emslie and Communities
Scotland**

Request for correspondence between legal adviser and client

**Applicant: Mr David Emslie
Authority: Communities Scotland
Case No: 200501380
Decision Date: 19 August 2005**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 023/2005 – Mr Emslie and Communities Scotland

Request for correspondence between legal adviser and client – Communities Scotland withheld advice from applicant on the basis of section 36(1) of the Freedom of Information (Scotland) Act 2002 – information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings – decision partially upheld by Commissioner

Facts

Mr Emslie submitted an information request to the Scottish Executive on 17 January 2005. The request was passed to Communities Scotland, an agency of the Scottish Executive, who responded to Mr Emslie. The request relates to allegations of fraud made by Mr Emslie in relation to Grampian Housing Association and to his request that Communities Scotland investigate his allegations. Information was provided to Mr Emslie in response to his request, but copies of correspondence between Communities Scotland and a legal adviser were withheld.

Outcome

The Commissioner found that Communities Scotland had complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding certain information from Mr Emslie, but found that it had breached Part 1 of FOISA in failing to provide one item of correspondence to Mr Emslie.

Appeal

Should either Mr Emslie or Communities Scotland 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 of receipt of this notice.



Background

1. On 17 January 2005, Mr Emslie submitted a request for information to the Scottish Executive asking for information in relation to an alleged fraud by Grampian Housing Association.
2. This request was subsequently dealt with by Communities Scotland, a Scottish Executive agency. Communities Scotland took responsibility for the request, replied to Mr Emslie on 14 February 2005 and supplied him with information relating to his request. However, records were withheld from Mr Emslie on the basis of section 36(1) and section 35(1)(g) of the Freedom of Information (Scotland) Act 2002 (FOISA).
3. Mr Emslie was dissatisfied with the response from Communities Scotland and asked it to review its original decision on 16 February 2005. In this letter Mr Emslie also made an additional information request under FOISA and a subject access request under the Data Protection Act 1998. Neither of these additional requests forms part of this investigation.
4. On 15 March 2005, Communities Scotland issued its review decision. It upheld its original decision to withhold records under section 36(1) of FOISA on the basis that the information constituted confidential communications between a legal adviser and client. (This letter referred to two records being withheld on this basis, but I note that three records were in fact withheld.) However, Communities Scotland reversed its decision to withhold records under section 35(1)(g) of FOISA and released those records to Mr Emslie.
5. On 23 March 2005, I received an application from Mr Emslie and the case was allocated to an Investigating Officer within my Office.

The Investigation

6. Mr Emslie's appeal was validated by establishing that he had made a valid information request under FOISA and had appealed to me only after asking Communities Scotland to review the response to his request.



7. A letter was sent by the Investigating Officer to Communities Scotland on 19 May 2005, asking for its comments on the application in terms of section 49(3) of FOISA. Communities Scotland was also asked to provide my Office with a copy of the information withheld from Mr Emslie, together with an analysis of its use of section 36(1) to withhold information from Mr Emslie.
8. A full response to this request was received from the Freedom of Information Unit of the Scottish Executive on behalf of Communities Scotland on 9 June 2005. (All subsequent references to “the Executive” are to that Unit, acting on behalf of Communities Scotland.)

Submissions from the Executive

9. The submission from the Executive stated that all of the information withheld was considered to be exempt under section 36(1) of FOISA as the correspondence constituted legal advice and was therefore subject to confidentiality in legal proceedings.
10. The correspondence is described by the Executive as part of a record of long-running correspondence about the allegations of fraud which Mr Emslie has made to Communities Scotland as regulator of registered social landlords. Similar allegations have been made by Mr Emslie to the Department of Work and Pensions (DWP) and the Scotland Office.
11. Section 36(1) is a qualified exemption in that it is subject to the public interest test. The Executive states that when considering whether to release the information, consideration was given to the public interest ensuring that Communities Scotland adequately discharges its regulatory functions and the extent to which disclosure would contribute to scrutiny of this.
12. However, the Executive stated that there is also significant public interest in ensuring that decisions taken by a regulator are taken in a fully informed legal context. The Executive states that Communities Scotland needs high quality, comprehensive legal advice for the effective conduct of its regulatory role and that the advice needs to be given in context and with a full appreciation of relevant facts. Without this comprehensive advice, the Executive argues, the quality of Communities Scotland’s decision-making as regulator would be much reduced.



Submissions from Mr Emslie

13. Comments from Mr Emslie were also considered during the investigation. Mr Emslie has submitted that he requires this legal advice to enable him and other tenants of Grampian Housing Association to stop the rent and service charge increases introduced by Grampian Housing Association. Mr Emslie considers the rent and service charge increases, which date from the 1980s, to be illegal and suspects that what he views as the refusal by Communities Scotland to act may be based on flawed legal advice.
14. Mr Emslie has also advanced the argument that it is in the public interest to know why Communities Scotland has failed to regulate Grampian Housing Association's administration of rents and service charges pertaining to his tenancy and those of the other tenants.

The Commissioner's Analysis and Findings

15. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.
16. One type of communication covered by this exemption is communications between legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. For example:
 - the information being withheld must relate to communications with a legal adviser. I am satisfied that advice from in-house solicitors may be covered by this exemption.
 - the legal adviser must be acting in his/her professional capacity and the communications must occur in the context of his/her professional relationship with his/her client.
 - the 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.
 - the privilege does not extend to communications which relate to fraud or to the commission of an offence.
 - the fact that advice was sought is not necessarily privileged.
 - it is likely that communications are privileged whether or not they relate to pending or contemplated litigation.



17. The first record withheld from Mr Emslie is an email from a solicitor for the Scotland Office. The email is a factual report of a telephone conversation which the solicitor had with Mr Emslie and appears to ask the DWP for instructions. The solicitor does not act for Communities Scotland or, indeed, for the Scottish Executive.
18. Although communications between a client and a legal adviser may be subject to legal professional privilege, the client may choose to make that communication available to a third party. In this case, the DWP has passed the email to Communities Scotland and, in doing so, any confidential status the email may have had has been lost.
19. Towards the end of the investigation, the Executive were asked to consider the status of the email from the solicitor for the Scotland Office. The Executive, in discussion with Communities Scotland, subsequently reconsidered the use of the exemption in section 36(1) of FOISA and accepted that the email should be released to Mr Emslie.
20. The second and third records withheld from Mr Emslie comprise a request for legal advice from Communities Scotland to its solicitors, i.e. to the Office of the Solicitors of the Scottish Executive, and the legal advice in response to this request. I am satisfied that this correspondence comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, both of these records are covered by the exemption contained in section 36(1) of FOISA.
21. However, as mentioned above, the exemption in section 36(1) is subject to the public interest test, and I must now go on to consider whether the public interest would be better served by the information being withheld or the information being released.
22. FOISA has brought about many changes to public life in Scotland, not least that for the first time communications between a legal adviser and a public authority client may be made public if it is in the public interest for those communications to be released.
23. 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 towards the end of last year in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48.
24. There will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, I am likely only to order the release of such communications in highly compelling cases.



25. Having read both the information provided to Mr Emslie as well as the information withheld from him, I am satisfied that there are no compelling reasons in this case for the legal advice to be released to Mr Emslie. Among the information already provided to Mr Emslie by Communities Scotland is information detailing the regulatory action Communities Scotland has proposed to undertake in relation to his complaint against Grampian Housing Association. As a result, I do not require the request for advice or the legal advice itself to be released.

Decision

I find that Communities Scotland failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding from Mr Emslie a copy of the email from the solicitor acting for the Scotland Office. As such it breached section 1(1) of FOISA. Communities Scotland has already offered to release the copy of this email to Mr Emslie and I instruct Communities Scotland to release this communication within 45 days of receipt of this Decision Notice.

I find that Communities Scotland complied with section 1(1) of FOISA in withholding from Mr Emslie a copy of the request for legal advice to its solicitors and the legal advice given in response to that request.

Kevin Dunion
Scottish Information Commissioner
19 August 2005