



# Decision Notice 106/2024

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## Correspondence with Teneo Restructuring Limited

**Authority: Scottish Ministers**

**Case Ref: 202200142**

### Summary

The Applicant asked the Authority for correspondence between Teneo Restructuring Limited and specified directorates and individuals in 2021. The Authority disclosed one document in redacted form and withheld the remainder of the information requested under a number of exemptions, particularly that the information was legally privileged and that the public interest favoured withholding it. The Commissioner investigated and found that the Authority had complied with FOISA in responding to the request.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 36(1) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner)

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 19 November 2021, the Applicant made a request for information to the Authority. The Applicant asked for any correspondence between Teneo Restructuring Limited (Teneo) and employees of the Authority, specifically civil servants in the legal directorate or justice directorate, special advisers and the offices of the Lord Advocate, the First Minister, the Deputy First Minister and the Justice Secretary (including the Ministers themselves) in 2021.
2. The Authority responded on 20 December 2021. The Authority disclosed one document in redacted form, withholding personal data (section 38(1)(b) of FOISA) and information that

would reveal the source of its legal advice (section 30(c) of FOISA). The Authority withheld the remaining information on the basis it constituted personal data (section 38(1)(b) of FOISA) or it related to litigation proceedings and was therefore legally privileged (section 36(1) of FOISA) and the public interest test did not favour disclosure of the withheld information.

3. On 6 January 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he considered the Authority had not carried out adequate searches and he did not consider that it had applied either the exemptions or the public interest test appropriately.
4. The Authority notified the Applicant of the outcome of its review on 28 January 2022, upholding its original decision without modification. The Authority explained that its searches had been extensive and all relevant information had been identified, that the exemptions it applied were correct and that the public interest test did not favour disclosure of the withheld information.
5. On 2 February 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review for the following reasons:
  - there is public interest in the involvement of Teneo with the Authority, particularly given Teneo specialise in managing the fallout from major scandals
  - some but not all of the correspondence requested may fall under litigation privilege (section 36(1) of FOISA), which should not be used as a blanket exemption
  - the Authority has spent a significant amount of public money on litigation support from Teneo and the high-profile nature of the litigation and the potential monetary consequences of any advice from Teneo meant that the public interest is overwhelmingly in favour of disclosure of the information requested.

## **Investigation**

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 16 March 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was subsequently allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These questions related to its reliance on section 36(1) of FOISA to withhold the requested information.
9. The Applicant was provided with a high-level summary of the Authority's submissions, and he submitted further public interest arguments for disclosure of the withheld information.
10. The Applicant did not raise in his application as a matter of dissatisfaction the searches carried out by the Authority or the Authority's reliance on section 38(1)(b) of FOISA. The

Applicant also confirmed that he did not require the Commissioner to investigate the Authority's reliance on section 30(c) of FOISA.

11. Consequently, the Commissioner's investigation has only considered the Authority's reliance on section 36(1) of FOISA.

## **Commissioner's analysis and findings**

12. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### ***Section 36(1) - Confidentiality***

13. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The Authority withheld all of the requested information under this exemption.
14. During the investigation, the Authority confirmed that a single document was considered exempt on the basis of legal advice privilege, while it continued to withhold the remaining withheld information on the basis of litigation privilege.
15. Legal advice privilege applies to communications in which legal advice is sought or provided. For legal advice privilege to apply, certain conditions must be fulfilled.
  - (i) The information must relate to communications with a professional legal adviser, such as a solicitor or 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.
16. Litigation privilege is different and covers documents created in contemplation of litigation (also known as communications post litem motam).
17. Communications post litem motam are granted confidentiality to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent/s, or prospective opponent/s, will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation.
18. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.
19. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given (and sought) in relation to the potential litigation. However, the communication need not involve a lawyer and the litigation contemplated need never actually happen for the privilege to apply. It will continue to apply after any litigation has been concluded.
20. 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.

21. The 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 other words, the claim must have been capable of being sustained at the time the exemption is claimed.
22. 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.

#### *The Authority's submissions*

23. The Authority submitted that the information requested (except for a single document, which constituted legal advice) was created solely because of litigation, which was live at the time of the Applicant's information request and requirement for review.
24. The Authority explained that it considered the exemption applicable as the information requested consisted of full, frank and confidential correspondence relating to the preparation and defence of litigation proceedings involving the Lord Advocate.
25. The Authority noted that some of the correspondence was not between legal advisers, but it still considered that litigation privilege applied to this information.
26. Regarding the single document it was withholding under legal advice privilege, the Authority explained that the information is clearly legal advice and that all of the necessary conditions for legal advice privilege to apply are satisfied.
27. The Authority also submitted that none of the withheld information had been shared with anyone outwith the Authority (other than to the Commissioner for the purpose of his investigation), that the information has remained confidential (and will continue to) and that all of the necessary conditions for legal privilege to apply are satisfied.

#### *The Applicant's submissions*

28. The Applicant accepted the high likelihood that some of the withheld information may fall under litigation privilege, but he did not accept that all of it did.
29. The Applicant explained that he believed much of the withheld information may include discussions between Ministers and officials which may consider litigation, but not be legally privileged.

#### *The Commissioner's view*

30. Regarding the information withheld on the basis of legal advice privilege, the Commissioner has considered the content of the information and the circumstances in which it was created and he is satisfied that the information meets the conditions for legal advice privilege to apply.
31. All the conditions stated above (in paragraph 15) apply: the information involves communications with a legal adviser, who is acting in their professional capacity and the communications occur in the context of the legal adviser's professional relationship with their client.

32. Regarding the information withheld on the basis of litigation privilege, the Commissioner notes that his guidance on section 36(1) of FOISA and his previous decisions make clear that the information that can be considered exempt is wider than correspondence with legal advisors. Providing that the Authority can support its position that the information was created in contemplation of litigation, section 36(1) of FOISA will apply.
33. The Commissioner accepts the Authority's submission that the content of the withheld information under consideration here and the advice sought has not been disclosed in such a way as to result in the loss of the quality of confidence and that it has not been made public, either in full or in summary.
34. Having reviewed the withheld information and considered the Authority's submissions, the Commissioner is satisfied that the withheld information was (except for a single document that he is satisfied attracts legal advice privilege) created in contemplation of litigation and that none of the withheld information has been made public, either in full or in summary.
35. The Commissioner is not required to consider whether the information that falls to be considered as litigation privileged would also attract protection by virtue of legal advice privilege.
36. Consequently, the Commissioner accepts that the information withheld by the Authority under section 36(1) of FOISA is exempt from disclosure.

***Public interest test***

37. 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. Having decided that the information is exempt under section 36(1), 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

***The Authority's submissions***

38. The Authority recognised that there is public interest in disclosure of the withheld information as a part of open, transparent and accountable government.
39. Regarding the single document withheld on the basis of legal advice privilege, the Authority explained that there is a very strong public interest in maintaining the exemption for the following reasons:
  - it remains important in all cases that legal advisers can provide free and frank legal advice which considers and discusses all issues and options without fear that their advice may later be disclosed and potentially taken out of context
  - in areas such as this, which are the subject of public scrutiny, an expectation that legal advice could be released would inevitably lead to the legal advice being more circumspect and less effective.
40. Consequently, the Authority stated that it considered there is a strong public interest in protecting the confidentiality of this information in order to ensure that it was able to discuss and take policy decisions in full possession of thorough and candid legal advice. This ensures that it can take decisions in a fully-informed legal context, having received legal advice in confidence as any other client would.

41. On balance, the Authority considered that the public interest in maintaining the exemption outweighs that in disclosure, given the overriding public interest in maintaining the confidentiality of communications between lawyers and their clients and the public interest in allowing for full and detailed internal consideration of the legal issues in relation to the consideration of policy actions in relation to this matter.
42. Regarding the information withheld on the basis of litigation privilege, the Authority noted that the correspondence between it and Teneo was created solely because of litigation, which was live at the time of the Applicant's information request and requirement for review
43. The Authority explained that the purpose of the correspondence was to facilitate investigations into a court action through the identification, procurement and instruction of independent expert evidence in order to both provide litigation support to the Lord Advocate on the prospects of defending that court action (potentially in court).
44. The Authority stated that it therefore considered that disclosure of the information could prejudice the ongoing legal proceedings and inhibit the carrying out of legitimate investigations.
45. On balance, the Authority explained that it considered that the public interest favoured maintaining the exemption, as there is a strong public interest in maintaining confidentiality of legally privileged communications on administration of justice grounds.

#### *The Applicant's submissions*

46. The Applicant stated that it is central to the principle of open government that the operation of government is as transparent as possible, particularly when it comes to accountability for actions taken.
47. The Applicant explained that the public interest in information requested is significant due to the millions of pounds in public money that has been lost due to the failures of the Crown Office and it was central to the principle
48. The Applicant noted that his request focuses on £400,000 spent on litigation support and he disagreed that information should be withheld simply because it may at some point have been linked to possible litigation: if this were the position for all cases, the public would never be able to hold the Authority to account.
49. The Applicant explained that he considered it reasonable for the requested information to be disclosed to help the public better understand the reasons behind such a significant public contract, particularly if it is for public relations and brand management rather than legal action itself.
50. The Applicant argued that, even if the contract does relate to solely legal action, the public interest in disclosure of the information requested far outweighs that in maintaining the exemption.
51. In summary, the Applicant stated that it would be detrimental to the principles of accountability and transparency for the exemption to be upheld and it is fundamental that such information be disclosed to the public in order for it to be scrutinised

### *The Commissioner's view*

52. 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.
53. 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 \(QB\)](#)<sup>1</sup>. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
54. 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 disclosure of the information. For example, disclosure may be appropriate where (the list is not exhaustive):
- the privileged material discloses wrongdoing by/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.
55. Having examined withheld information, while the Commissioner accepts that the contents of the legal advice and the legally privileged communications would be of interest to the Applicant and to the general public, he does not consider that any of the above categories would apply.
56. While of interest to the public, the litigation in this case is not of fundamental importance to all individuals living in Scotland (unlike, for example, the subject matter in [Decision 048/2022](#)<sup>2</sup>) and the money spent on the litigation has already been published and reported on, which has enabled a degree of accountability and scrutiny.
57. The Commissioner must also take account of the important public interest in legal professional privilege itself and the public interest in allowing public authorities to obtain confidential legal advice and to engage in legally privileged communications in contemplation of litigation.
58. On balance, the Commissioner considers that greater weight should be afforded to the arguments which would favour withholding the information. There is a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, and he believes, particularly given that the litigation was a live issue at the date of the Applicant's requirement for review, that this outweighs the public interest in disclosing the information under consideration here.

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<sup>1</sup> <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

<sup>2</sup> [Decision 048/2022 | Scottish Information Commissioner \(itspublicknowledge.info\)](#). In this case, the Commissioner exceptionally required disclosure of some of the withheld information (relating to legal advice on the topic of a second independence referendum in 2020) on the basis that the substantial public interest in disclosure outweighed the in-built public interest in maintaining the exemption in section 36(1) of FOISA.

59. In all the circumstances of this case, therefore, the Commissioner concludes that the public interest in disclosing the information was outweighed by that in maintaining the exemption in section 36(1) of FOISA. Consequently, he finds that the Authority was entitled to withhold the correspondence under that exemption.

## **Decision**

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

## **Appeal**

Should either the Applicant or the Authority 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.

**David Hamilton**

**Scottish Information Commissioner**

**30 May 2024**



## **Appendix 1: 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
- ...

#### **47 Application for decision by Commissioner**

- (1) A person who is dissatisfied with -
  - (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -
  - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify –

- (i) the request for information to which the requirement for review relates;
- (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);  
and
- (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).