



Decision Notice 129/2024

Legal advice - refurbishment of school toilets

Authority: East Lothian Council

Case Ref: 202200474

Summary

The Applicant asked the Authority for legal advice provided by its in-house legal team in relation to the refurbishment of particular school toilets. The Authority withheld the information on the basis that it was legally privileged and that the public interest favoured withholding the information. 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 14 March 2022, the Applicant made a request for information to the Authority. The Applicant asked for the legal advice that was provided by the Authority's in-house legal team regarding the refurbishment of the toilets within Musselburgh Grammar School and, more specifically, its initial decision to install mixed sex toilets.
2. The Authority responded on 11 April 2022. The Authority informed the Applicant that it held information falling within the scope of her request but withheld it on the basis that it was subject to legal advice privilege and, therefore, exempt under section 36(1) of FOISA and that the public interest in maintaining the exemption outweighed that in disclosure.

3. On 11 April 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that she was dissatisfied with the decision because she considered that the public interest in disclosing the legal advice clearly outweighed that in maintaining the exemption under section 36(1) of FOISA.
4. The Authority notified the Applicant of the outcome of its review on 22 April 2022, upholding its original decision for the reasons previously stated.
5. On 25 April 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Authority's review for the same reason set out in her requirement for review.

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 1 June 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 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 focused on the Authority's reasons for withholding the legal advice and why it did not consider the public interest favoured disclosure of that advice.
9. The Applicant was also provided with an opportunity to provide further comments on why she considered the public interest favoured disclosure of the withheld information.

Commissioner's analysis and findings

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

Section 36(1) - Confidentiality

11. 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. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. The Authority confirmed that the withheld information was legal advice privilege.
12. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. 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 advocate
 - (ii) the legal adviser must be acting in their professional capacity

- (iii) the communications must occur in the context of the legal adviser's professional relationship with their client.

The Authority's submissions

- 13. The Authority submitted that as the Applicant specifically sought legal advice the withheld information is, by definition, covered by legal advice privilege.
- 14. The Authority stated that the withheld information meets all of the conditions set out above (in paragraph 12):
 - (i) it relates to communications between its employees and in-house solicitors
 - (ii) the in-house solicitors were acting in their professional capacity as legal advisers
 - (iii) the communications occurred in the context of the in-house solicitors' professional relationship with other Authority employees (i.e., they were engaged by those employees to provide legal advice in relation to the refurbishment of toilets within Musselburgh Grammar School).

The Applicant's submissions

- 15. The Applicant questioned whether the legal advice remained confidential as she considered that the advice had been shared widely within the Authority, particularly at a Parent Council meeting in January 2021 where the "summary conclusion" of the legal advice was made public by a representative of the Authority.

The Commissioner's view

- 16. Having considered the withheld information, the Commissioner is satisfied that it meets the conditions for legal advice privilege to apply.
- 17. The Commissioner notes the Applicant's view that the legal advice had been shared widely within the Authority, particularly at a Parent Council meeting in 2021. However, the Commissioner is satisfied that the withheld legal advice is more detailed than that summarised at that meeting and that the confidentiality of that advice had also not been lost or waived through being shared with limited relevant employees within the Authority.
- 18. The exemption in section 36(1) is a qualified exemption, which means that it is subject to the public interest test set out in section 2(1)(b) of FOISA. This means that exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in maintain the exemption.

The public interest test - section 36(1)

The Authority's submissions

- 19. The Authority stated that it did not accept that the legal advice should be disclosed because there had been a public consultation on the refurbishment of the toilets and noted that the main purpose of the consultation was the designation of the toilets, not their overall design.
- 20. The Authority explained that consultation exercises seek to gather views of stakeholders but it is legally responsible for the final decision and any resulting consequences. As such, the Authority explained that it is essential that it ensures its final decision is legally competent and it must, therefore, balance the views of stakeholders with appropriate legal advice.

21. The Authority noted that the Applicant had submitted that the cost in the design and refurbishment of the toilets meant the public had a legitimate interest in receiving the legal advice.
22. The Authority explained that the existing toilet facilities already required relocation due to the expansion of social space and that the legal advice, which related to the use and designation of the toilet facilities, did not result in any changes to the physical works planned or undertaken. The Authority argued that there is therefore no link between the legal advice and the financial impact of the relocation of the toilet facilities.
23. In summary, the Authority concluded that the public interest in disclosing the legal advice did not outweigh that in withholding it, particularly due to the importance that it be able to engage in candid and confidential discussions with its in-house legal team.

The Applicant's submissions

24. The Applicant explained that it took three years for the toilet design to be finalised and that, as the Authority undertook a public consultation on this matter, the disclosure of the legal advice would enhance scrutiny of the subsequent decision-making processes and thereby improve accountability and participation.
25. The Applicant submitted that the refusal to release the legal advice jeopardises public trust in the consultation process and the willingness of the public to participate in similar exercises in the future.
26. The Applicant explained that the public consultation process involved considerable sums of money and disclosure of the legal advice would contribute to ensuring effective oversight of expenditure of public funds and that the public obtained value for money in relation to the public consultation.
27. The Applicant noted that all local authorities in Scotland are under a statutory obligation to maintain their school estates in line with Education (Scotland) Act 1980 and that disclosure of the legal advice obtained by the Authority would contribute to ensuring that it is meeting its obligations when installing and providing toilet facilities.
28. The Applicant also submitted that the ramifications of the legal advice affect a very large number of people: current students, concerned parents, carers and grandparents, future students to the school, new build schools and all schools in Scotland that are proposing to refurbish their sanitary facilities.

The Commissioner's view

29. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities and that disclosure of the information requested would go some way towards satisfying that interest.
30. However, the Commissioner also acknowledges that there is a strong inherent public interest, recognised by the courts, in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds.
31. 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 \(QB\)](#)¹. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.

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 a compelling public interest in disclosing 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
 - the passage of time is so great that disclosure cannot cause harm.
33. While the Commissioner accepts, having examined the withheld information, that the contents of the advice would be of interest to the Applicant and to the general public, he does not consider that any of the above categories would apply.
34. The Commissioner must 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.
35. The Commissioner accepts that there is a strong public interest in a Scottish public authority being able to receive full, unhindered legal advice. Without such comprehensive advice being available to the Authority, its ability to come to fully-formed decisions would be restricted, which would not be in the public interest.
36. Having considered the public interest arguments advanced on both sides, and the withheld information, 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 adviser and client.
37. On balance, the Commissioner considers that greater weight should be afforded to the arguments which would favour maintaining the exemption. Consequently, the Commissioner is satisfied that the Authority correctly withheld the requested information under section 36(1) of FOISA.

Decision

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

¹ [Department for Business Enterprise & Regulatory Reform v O'Brien & Anor \[2009\] EWHC 164 \(QB\) \(10 February 2009\) \(bailii.org\)](#)

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

17 June 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).