



Decision Notice 152/2024

Legal advice: review of admissibility decisions

Authority: Commissioner for Ethical Standards in Public Life in Scotland
Case Ref: 202400354

Summary

The Applicant asked the Authority for information relating to legal advice sought concerning a review of admissibility decisions made since August 2020. The Authority provided some information and withheld the remainder on the basis that it was subject to legal advice privilege and therefore exempt from disclosure under FOISA. 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 3 July 2023, the Applicant made the following request for information to the Authority:

In the Annual Report and Accounts from the Commissioner 2021/2022 and in the proceedings of the Local Government Housing and Planning Committee of 10/1/2023 reference is made to the seeking of legal advice on the recommendation of the Auditor General regarding a review of admissibility decisions made since August 2020.

Please would you forward -

A copy of correspondence, papers and all other materials seeking such legal advice including minutes of meetings relating thereto.

A copy of the legal advice/opinion as rendered and all correspondence, minutes and papers relating thereto.

2. The Authority responded on 28 July 2023. It disclosed some information (Senior Management Team minutes of 30 June 2023) and withheld the remainder under section 36(1) of FOISA. The Authority considered that the remaining information (the legal advice and related correspondence) was subject to legal advice privilege and that the public interest favoured the Authority being able to receive - without restriction - full, unhindered legal advice to allow it to reach fully informed decisions.
3. On 20 August 2023, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the Authority's decision to withhold the information because there appeared to be inaccuracy (in the Local Government, Housing and Planning Committee minute of 10 January 2023) concerning the recommendation relating to the external investigation and its independence (where the Auditor General had recommended that all eligibility decisions and investigations carried out since August 2020 should be reviewed by an appropriate *external* investigator). As such, he believed it was in the public interest that the scope and detail of the advice sought should be available, to enable transparency that the legal advice was in relation to an external review.
4. The Authority notified the Applicant of the outcome of its review on 15 September 2023, fully upholding its original decision. The Authority recognised the public interest in transparency and in the enhanced scrutiny of its decision-making processes which, it stated, the disclosed minutes had provided insight into. It believed, however, that this was outweighed by the public interest in maintaining the confidentiality of communications between a legal adviser and their client. In the Authority's view, disclosure of the information would diminish its ability to freely and frankly exchange views with legal advisers, which was vital to the proper exercise of its functions.
5. On 5 March 2024, 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 decision, in its review outcome, to withhold the legal advice and related correspondence.

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 21 March 2024, 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 focussed on the Authority's justification for withholding the information under section 36(1) of FOISA, including consideration of the public interest test.

Commissioner's analysis and findings

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

Section 36(1) - Confidentiality

10. 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. This includes communications subject to legal professional privilege. An aspect of legal professional privilege is legal advice privilege which, the Authority argued, applied in this case.
11. Legal advice privilege applies to communications between legal advisers and their clients in which legal advice is sought or given. The following conditions must be fulfilled for legal advice privilege to apply:
 - (i) the communications must involve a professional legal adviser, such as a solicitor or an advocate (this may include an in-house legal adviser or an external solicitor engaged by the authority);
 - (ii) the legal adviser must be acting in his/her professional capacity, and
 - (iii) the communications must occur in the context of the legal adviser's professional relationship with his/her client.
12. In his application to the Commissioner, the Applicant submitted that, while the Authority had provided minutes which provided an insight into the decision-making process, it was not the decision-making process which was of concern. Rather, it was whether or not the decision-making process related properly to the recommendations of the Auditor General.
13. By way of background, the Authority explained that the information requested related to a recommendation made by its external auditor following its 2020/21 audit, published in December 2021. The recommendation stated, "*all eligibility decisions and investigations carried out since August 2020 [and until March 2021] should be reviewed by an appropriate external investigator*". The Authority submitted it began investigating how best to implement this recommendation in early 2022, which included a decision to seek external legal advice.
14. In its submissions to the Commissioner, the Authority maintained that section 36(1) of FOISA applied to the withheld information, the content of which related to, or referenced, communications with a legal adviser acting in their professional capacity, where the Authority was the client and where legal advice was being sought and provided. In evidence of this, the Authority provided the Commissioner with full details of the individuals within the parties who had sought and provided the legal advice.
15. The Authority explained that it had made two relevant statements at the meeting of the [Local Government, Housing and Planning Committee on 10 January 2023](#)¹, in response to a question from William Coffey about the 2019-2021 period (specifically, paragraphs 4 and 5 of the response to that question). It confirmed that the legal advice had not been shared with that Committee and that the response given to the question clearly stated that the advice was "*to the effect that*" and did not quote from the legal advice itself.

¹ https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/LGHP-10-01-2023?meeting=14085&iob=127577#orscontributions_C2457394

16. The Authority considered that the legal advice itself was substantial (consisting of 4,000 words). However, it took the view that the response given to the Committee could not be considered comprehensive, but rather it provided an explanation and addressed legitimate public interest without disclosing sufficient detail for the legal advice to lose its nature of confidentiality.
17. While the Authority had not shared the legal advice with the Local Government, Housing and Planning Committee, it confirmed that it had subsequently shared it with the Public Audit Committee, further to an evidence session on 30 March 2023. It explained (with supporting evidence) that the legal advice had been shared with the Public Audit Committee for a limited purpose and on the express basis that it was to remain confidential.

The Commissioner's views on section 36(1)

18. Having considered the submissions from both parties, together with content of the withheld information and the circumstances under which the legal advice was sought and obtained by the Authority, the Commissioner is satisfied that the information in question meets the conditions set out in paragraph 11 above and, therefore, is subject to legal advice privilege.
19. 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.
20. The Commissioner has carefully considered the response given by the Authority to the Local Government, Housing and Planning Committee on 10 January 2023. While he accepts that the response given references the nature of the legal advice given in relation to the Auditor General's recommendation regarding the external investigation, the Commissioner is satisfied that this does not amount to disclosing the legal advice itself, or a comprehensive summary thereof.
21. Turning to the sharing of the legal advice with the Public Audit Committee, the Commissioner is satisfied that it was shared with that Committee in a confidential capacity and for a specific limited purpose, and he therefore does not consider that legal advice privilege has been waived as a result of this.
22. In light of this, the Commissioner is satisfied that the information in question remained confidential at the time the Authority dealt with the Applicant's information request and requirement for review (and that it remains so now).
23. The Commissioner is therefore satisfied that the exemption in section 36(1) of FOISA is engaged for this information.

Public interest test – section 36(1)

24. The exemption in section 36(1) is subject to the public interest test in section 2(1)(b) of FOISA.
25. In his request for review (which arguments, the Applicant submitted, he wished to rely on), the Applicant referred to the recommendation of the Auditor General that all eligibility decisions and investigations carried out since August 2020 should be reviewed by an appropriate external investigator. In his view, the advice reported in the minute of the meeting of the Local Government, Housing and Planning Committee of 10 January 2023 appeared to be lacking in balance in relation to those cases where the Authority's

investigation had led to a decision not to exonerate the individual concerned. He also believed there appeared to be inaccuracy in relation to the recommendation relating to the external investigation and the independence of same. In light of this, the Applicant believed it was in the public interest that the scope and detail of the legal advice sought should be made available.

26. In his application to the Commissioner, the Applicant argued that, even if the legal advice was withheld, it was not unreasonable (and was in the public interest) to ensure that the seeking of same properly covered the precise recommendations of the Auditor General and, particularly, the recommendation of the Auditor General for an external investigation.
27. In its submissions to the Commissioner, the Authority acknowledged the public interest in full disclosure of the information to aid the public's understanding of its decision not to implement the Auditor General's recommendation regarding the external investigation.
28. However, the Authority considered these factors to be outweighed by the strong inherent public interest in maintaining confidentiality of communications between legal advisers and clients. It submitted that it must be able to have free and frank exchanges with its legal advisers in order to obtain the correct legal advice. In the Authority's view, if it was believed that such free and frank exchanges might later be disclosed, this would have a chilling effect on its relationship with its advisers, and this may lead to future exchanges having to be more circumspect, ultimately leading to incorrect advice being provided, paid for and followed, which was clearly not in the public interest.
29. In addition, the Authority believed that its public comments to the Local Government, Housing and Planning Committee about the common law principle of *functus officio* did not represent anything approaching full disclosure of the legal advice. It considered, however, that this was sufficient to assist the public's understanding of why the Auditor General's recommendation regarding the external investigation could not be followed. Recognising the public interest in the implementation of the Auditor General's recommendation, the Authority submitted it had sought to address that interest in its comments to the Committee.
30. On balance, the Authority believed that full disclosure of the request for the legal advice and the legal advice itself was not in the public interest.

The Commissioner's views on the public interest – section 36(1)

31. 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 \(QB\)](#)². Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.

² [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o'brien+\)\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o'brien+)))

32. The Commissioner accepts that there is a notable public interest in disclosure of legal advice, in terms of accountability and transparency, with respect to assisting understanding the Authority's decision not to implement the Auditor General's recommendation regarding the external investigation. He recognises that this would provide transparency of what the request for the legal advice comprised, and the legal advice itself.
33. The Commissioner recognises 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. In this particular case, he has given weight to the Applicant's views regarding the public interest in disclosure of information that would provide such transparency over whether the request for the legal advice properly covered the precise recommendations of the Auditor General, in particular, the recommendation of the Auditor General for an external investigation.
34. The Commissioner has also taken into account the public interest arguments offered by the Authority in maintaining the right to maintain confidentiality between client and legal adviser, and their ability to have free and frank exchanges to obtain sound legal advice, the absence of which would lead to a chilling effect and may even lead to incorrect advice being sought and/or provided in future.
35. The Commissioner accepts that there exists a strong public interest in transparency and scrutiny of the information requested which would explain, in detail, why the legal advice contributed to the Authority's decision not to implement the Auditor General's recommendation regarding an external investigation. In the Commissioner's view, however, this is met to a certain extent by the public explanation given to the Local Government, Housing and Planning Committee on 10 January 2023.
36. The Commissioner also recognises the strong inherent public interest in maintaining confidentiality between client and legal adviser, with particular regard to the candid views set out in the request for the legal advice in this case. He accepts that disclosure of this information could lead to future requests for legal advice being less frank, resulting in the advice received being less focussed. He can see no public interest in disclosure of information which could cause this effect.
37. The Commissioner is therefore not satisfied that the public interest in disclosure of the information requested in this case was sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
38. In conclusion, after careful consideration, the Commissioner is satisfied that the Authority correctly withheld all of the information requested 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.

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

16 July 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).

...