



Decision Notice 170/2024

Legal review relating to specific proposal

Authority: Argyll and Bute Council

Case Ref: 202400533

Summary

The Applicant asked the Authority for information relating to the legal review of a specific proposal. The Authority withheld the information on the grounds that it was legally privileged and the public interest favoured withholding it. The Commissioner investigated and found that the Authority was entitled to withhold the information.

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).

Background

1. On 6 November 2023, the Applicant made a request for information to the Authority relating to “the Legal Review & Assessment undertaken in advance of the Collective Leadership Model”. Specifically, she asked for:
 - 1) The Legal Review & Assessment undertaken to ensure there were no legal barriers to implementing the Authority’s proposed Collective Leadership Model for schools and information on who, outside the Project Team, this information was shared with
 - 2) A review of legislative requirements and advice shared by Legal Services with the Project Team and, if this information was shared with councillors, a list of those it was shared with

- 3) An explanation of how the proposal's impact on school identity was assessed, any reports, correspondence or communications assessing this and who this information was shared with
 - 4) The legal and financial review of school budgets to identify legal or financial barriers to the implementation of the proposal or any proposals for these to be overcome and when it was determined that the proposed Collective Leadership Model was not a "relevant proposal"
2. The Authority responded on 5 December 2023. The Authority explained that it considered parts 1 and 4 of the request to be for the same information. The Authority advised the Applicant that the legal advice had been shared, at various points, with various members of the School Leadership Structures Project Team and the Education Transformation Board. The Authority stated that, for all other parts of the request, it was withholding the information requested under section 36(1) of FOISA on the grounds that it was legally privileged and the public interest did not favour disclosure.
 3. On 21 December 2023, 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 Authority should have provided her with the information she had requested.
 4. The Authority notified the Applicant of the outcome of its review on 24 January 2024, upholding its original decision. The Authority confirmed that the legal review was not shared with councillors. The Authority also informed the Applicant that no financial review of the school budgets had been undertaken. The Authority therefore issued the Applicant with a notice, under section 17 of FOISA, that it held no relevant information in relation to that element of part 4 of her request.
 5. On 12 April 2024, 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 because, given other concerns she had with the process, she considered it necessary to confirm that an adequate legal assessment was made of the proposals.

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 23 April 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.
9. The Applicant was also invited to comment, which she did.
10. The Commissioner's decision is limited to the information withheld by the Authority under section 36(1) of FOISA as the Applicant did not challenge the section 17 notice issued by the Authority in relation to an element of part 4 of her request.

11. It is also not within the Commissioner's remit to comment on other concerns raised by the Applicant, which either do not relate to FOI law or to how the Authority responded to her request in this case.

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 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, applies.
14. 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 an 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.
15. Before information can attract legal advice privilege, it must be information for 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, and so cannot have been made public, either in full or in a summary substantially reflecting the whole.
16. The Commissioner has considered the content of the information and the circumstances under which it was created, and is satisfied that the information meets the conditions for legal advice privilege to apply:
 - the information involves communications with a legal adviser (a solicitor), who is acting in their professional capacity
 - the communications took place within the context of that legal adviser's professional relationship with their client (the Authority)
 - the information was, and remains, confidential.
17. The Applicant has suggested that, given the withheld information had already been shared within the Authority, it can be shared more widely.
18. As the Authority is the client here, the Commissioner does not agree that legal professional privilege has been waived by sharing the withheld information within the Authority on a limited basis with relevant parties. The Authority confirmed that the information has not been disclosed publicly or to others such that the information would lose its confidentiality

19. The Commissioner also recognises that for the Authority to effectively make use of its legal advice, it must be able to share it internally with relevant parties without the confidentiality of that information being considered waived.
20. As rehearsed earlier, the Commissioner is satisfied that the withheld information meets the conditions for legal advice privilege to apply.
21. 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. The exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in withholding it.

The public interest

The Authority's submissions

22. The Authority acknowledged that disclosing the withheld information would allow for greater transparency, accountability and scrutiny of decisions taken by the Authority.
23. However, the Authority noted the inherent public interest in maintaining the right to confidentiality of communications between a legal adviser and their client because:
 - public bodies should be able to take decisions based on strong, free and frank legal advice and understanding
 - it is in the public interest that this free and frank legal advice can be provided in a context in which confidence can be maintained that it cannot be misinterpreted, taken out of context or selectively quoted.

The Applicant's submissions

24. The Applicant submitted that there is broad concern with these proposals, both in the communities that would have been directly affected had the proposal been implemented and from the Educational Institute for Scotland.
25. The Applicant outlined her view that stakeholders felt misled by the consultation process, that it was conducted inappropriately and must therefore be fully scrutinised with the aim of preventing the recurrence of inappropriate behaviour. The Applicant considers the legality of the proposals to be a key element of this scrutiny.
26. The Applicant went on to argue that the faults in the process led to waste and undermined the necessary relationship of trust between the Authority and the communities it serves.
27. While the Applicant acknowledged that the Authority must have some safe space to prepare and test proposals, she submitted that, given the difficulties she had encountered with the Authority's consultation process, there was a greater need for further scrutiny of the process.
28. The Applicant also submitted that this information could not prejudice the Authority's considerations as the Authority had, by the date of her request, completed its consultation. The Applicant suggested that the Authority's failure to disclose the withheld information invited suspicion

The Commissioner's view

29. 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.

30. 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.
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. While the Commissioner notes the Applicant's view that withholding information invites suspicion, the Commissioner recognises that FOISA contains a range of exemptions under which Authorities can legitimately withhold information.
33. 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.
34. In this case, the Commissioner has given weight to the Applicant's views on the passage of time and on the public interest in disclosure of information that would provide transparency and scrutiny of the proposal's decision-making process, given her concerns about the how the consultation process had been conducted and the potential effect on communities had the proposal been implemented.
35. While the Commissioner notes the Applicant's view that the passage of time should permit disclosure, he recognises that, although the Authority had withdrawn its proposals at the time of the request, it may wish to bring in new proposals to address the same underlying issues. In any event, the Commissioner notes that the Applicant's request came only fifteen months after the Authority had decided not to proceed with these proposals.
36. In this case, the Commissioner fully acknowledges the Applicant's interests regarding the processes to which the legal advice would relate. While he also acknowledges the general public interest in transparency and accountability, the Commissioner is not satisfied (having considered the withheld information) that this public interest outweighs the strong public interest in maintaining confidentiality between client and legal adviser in this case.
37. Having considered the public interest arguments on both sides, the Commissioner is not satisfied, on balance, that the public interest in disclosure of the withheld information is sufficiently compelling to outweigh the strong inherent public interest in maintaining the confidentiality of communications between legal adviser and client.
38. Consequently, the Commissioner is satisfied that the Authority correctly withheld the information to which it applied the exemption in section 36(1) of FOISA.

Decision

The Commissioner finds that, in respect of the matters specified in the application, 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

20 August 2024