



Scottish Information
Commissioner

**Decision 006/2008 Ms Tracy Phillips (or Shepherd) and the
City of Edinburgh Council**

Questions relating to a statutory notice

Applicant: Ms Tracy Phillips (or Shepherd)

Authority: City of Edinburgh Council

Case No: 200700761

Decision Date: 16 January 2008

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 006/2008 Ms Tracy Phillips (or Shepherd) and the City of Edinburgh Council

Information relating to a boundary wall dispute – legal advice withheld under section 36(1) of the Freedom of Information (Scotland) Act 2002 on the basis of legal professional privilege – Council’s decision upheld in part

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1 (General entitlement); 2 (Effect of exemptions); 36(1) (Confidentiality).

The full text of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Ms Phillips’ solicitor wrote on her behalf to the City of Edinburgh Council (the Council) requesting information relating to a statutory notice that had been served on her concerning a boundary wall.

During the course of the Commissioner’s investigation the Council provided Ms Quigley with certain information, but withheld solicitor/client communications on the basis of confidentiality under section 36(1) of FOISA.

Following an investigation the Commissioner found that the Council had complied with Part 1 of FOISA in withholding certain of the withheld information. However, the Commissioner also found that the Council had breached the requirements section 1(1) of FOISA by wrongly applying the exemption in section 36(1) to certain other information which he did not consider to fall within the scope of the exemption. The Commissioner required the Council to disclose a number of documents to the applicant.



Background

1. On 25 May 2005, the Council served Ms Phillips with a statutory notice under the Civic Government (Scotland) Act 1982 in relation to repairs that were required to be carried out on a section of boundary wall. The statutory notice is a means of alerting and informing owners that a problem has been identified relating to their building or property and that action is required of them to carry out repairs. The notice named Ms Phillips as one of 17 proprietors involved, but Ms Phillips was of the view that the statutory notice had been issued to her incorrectly. Ms Phillips' solicitor (Ms Quigley) corresponded with the Council about the matter on her behalf on a number of occasions from August 2005.
2. On 23 February 2007, Ms Quigley wrote to the Council on behalf of her client asking 12 questions relating to the statutory notice that had been issued. The Council acknowledged receipt of Ms Quigley's letter on 6 March 2007.
3. In a letter of 26 March 2007, Ms Quigley stated that she still hoped to receive answers to 9 of the 12 questions (questions 3, 4, 5, 7, 8, 9, 10, 11 and 12) raised in her letter of 23 February 2007. In response to this, the Council carried out a review.
4. The outcome of the Council's review was sent to Ms Quigley on 3 April 2007. In its letter the Council informed Ms Quigley that it had considered the matter carefully. With regard to questions 7 to 12 inclusive, the Council was of the view that what was being sought was legal argument rather than information held by the Council as defined in FOISA.
5. With regard to question 3, which concerned the information the Council possessed or evidence it had relied upon which allowed it to maintain that Ms Phillips was the owner or joint owner of the relevant section of the boundary wall, the Council was of the view that what was being sought was legal advice provided to the Council. Ms Quigley was informed by the Council that such information was exempt in terms of section 36(1) of FOISA. The council advised Ms Quigley that it did not consider that the public interest favoured release of that information and that an authority must be able to consider legal advice in private.
6. With regard to question 4, which asked for details of the "fair and reasonable" steps that had been taken by the Council in order to ascertain liability in relation to the wall, the Council advised Ms Quigley that the steps taken involved an examination of the titles and the obtaining of legal advice.



7. In relation to question 5, which concerned the qualifications, experience and status of the persons on whom the Council had relied on for confirmation that Ms Phillips was the owner or joint owner of the relevant section of wall and was liable in that capacity, the Council advised that the information was third party personal data, the release of which it considered to be exempt under section 38(2)(a) of FOISA.
8. On 25 May 2007, Ms Quigley wrote to my Office on behalf of Ms Phillips, setting out her dissatisfaction with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Ms Quigley had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

The Investigation

10. On 25 June 2007, the Council was notified in writing that an application had been received from Ms Quigley on behalf of Ms Phillips and asked to provide my Office with copies of all the information withheld from the applicant.
11. The Council wrote to my Office on 27 July 2007, providing copies of the information withheld. In its letter the Council reiterated its view that questions 7 to 12 of Ms Phillips' request did not constitute requests for information under FOISA. Consequently, the Council argued that there was no information held on these questions and nothing had been withheld. The case was then allocated to an investigating officer.
12. On 6 November 2007, the Council was invited to comment on Ms Quigley's application in terms of section 49(3)(a) of FOISA, both generally and on certain specific points raised in the letter. At the same time, Ms Quigley was advised of my investigating officer's understanding that the application was restricted to questions 3, 4 and 5: no comment was received from or on behalf of the applicant in response to this and accordingly the investigation has been confined to these three questions.
13. The Council responded with its comments on 22 November 2007. In its letter, the Council stated that there had been substantial correspondence with Ms Quigley about matters related to the statutory notice and that this was ongoing. The Council stated that the matter had still to be resolved.



14. The Council also stated that it had had reconsidered question 5 of Ms Phillips request and was now able to provide her with details of the qualifications, experience and status of the persons upon whom the Council had relied. The Council provided a copy of a letter it was sending to Ms Quigley in this connection.
15. The Council noted in relation to question 4 that Ms Quigley had been advised in the review letter of 3 April 2007 of the steps taken by it to ascertain liability in relation to the wall, that is an examination of the titles and the obtaining of legal advice. The Council advised that it was of the view that nothing more could be added in this respect.

The Commissioner's Analysis and Findings

16. In coming to a decision on this matter, I have considered all of the submissions and other information that have been presented to me by both Ms Quigley (on behalf of Ms Phillips) and the Council and I am satisfied that no matter of relevance has been overlooked.
17. I am satisfied that that the Council has now provided adequate responses to two of the three questions comprising Ms Phillips' application for a decision. Ms Quigley has been advised of this I do not understand her client to require a decision on either of these points. Consequently, this decision will confine itself to question 3 of the original request. This sought information the Council possessed or evidence it had relied upon which allowed it to maintain that Ms Phillips was the owner or joint owner of the relevant section of the boundary wall. The Council interpreted Ms Phillips' request as being a request for legal advice it had obtained on this issue, which I accept as a reasonable interpretation in the circumstances. The Council was of the view that this information was exempt in terms of section 36(1) of FOISA.

Section 36(1) - confidentiality of communications

18. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communication could be maintained in legal proceedings. One type of communication which falls into this category is communications which are subject to legal professional privilege. Legal professional privilege can itself be split into two categories – legal advice privilege and litigation privilege (also known as communications *post litem motam*). It is the first of these categories, legal advice privilege, which has been claimed by the Council in this case. It covers communications between lawyers and their clients, where legal advice is sought or given.



19. In this case the Council identified 17 documents which it considered fell within the scope of question 3 of Ms Phillips' information request. In its submission to me, the Council asserted that these documents consisted of communications between solicitor and client which were subject to legal advice privilege.
20. Having considered the information that has been withheld by the Council in relation to question 3, I am of the view that documents 20 and 22 relate simply to the description of procedures followed and are not communications which could be subject to legal advice privilege. I am satisfied that these documents are not exempt under section 36(1) of FOISA and require them to be disclosed to Ms Phillips (either directly or through her solicitor).
21. I am of the view that the remainder of the 17 documents withheld by the Council constitute either legal advice or communications from the client in relation to the obtaining of legal advice and therefore am satisfied that they comprise information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, I accept that this information is exempt in terms of section 36(1) of FOISA.

The public interest test

22. The exemption in section 36(1) is subject to the public interest test contained in section 2(1)(b) of FOISA and I must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption.
23. The Council argued that the information should be withheld and referred to previous decisions where I had indicated that such information should only be provided where there were compelling reasons to do so. The Council was of the view that no compelling reasons had been put forward in this instance.
24. The Council stated that this matter concerned a dispute about a statutory notice, a normal dispute between parties which might or might not give rise to litigation. The Council submitted that there were no compelling reasons for any of its legal advice to be made available to the solicitor representing the other party to the dispute. Additionally, it argued that it was not in the public interest for such advice to be made available, as it was necessary for public authorities to be able to obtain and consider legal advice in private. The Council pointed out that the dispute had not yet been resolved and that its handling by the Council might be referred by Ms Phillips or her solicitor to the Office of the Scottish Public Services Ombudsman.



25. As I have stated in 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 and there are many judicial comments on the fundamental nature of this confidentiality in our legal system. Many of the arguments in favour of maintaining confidentiality of communications were discussed in *Three Rivers District Council and Others v Governor and Company of the Bank of England* (2004) UK HL 48:
<http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>
26. In Decision 023/2005 - *Mr David Emslie and Communities Scotland*, I concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client and therefore, while I will consider each case on an individual basis, I am likely to order the release of such communications in highly compelling cases only. I have reiterated this in a number of subsequent decisions.
27. I accept that there is a public interest in enhancing scrutiny of the legality of the actions of a public body and, by extension, the effective oversight of expenditure of public funds and obtaining value for money. In this instance there is a public interest argument in favour of disclosure based on enhanced scrutiny, in that publication of the legal advice to the Council in relation to this planning issue would allow the public to assess the legal advice upon which the decision to issue the statutory notice was based.
28. The public interest arguments favouring withholding the legal advice include:
- an authority or person should be permitted to communicate their position to their advisers fully and frankly in confidence, in order to obtain the most comprehensive legal advice to defend their position adequately should that become necessary;
 - it is in the public interest for a public authority to receive/give the most comprehensive legal advice about its proposed actions;
 - there could not be said to be a general public interest in matters relating to the boundary wall in question, but rather a personal interest on the part of Ms Phillips;
 - that there are procedures available for any interested party who is dissatisfied with a statutory notice issued under section 87 of the Civic Government (Scotland) Act 1982 and Ms Phillips did not exercise her right of appeal to the Sheriff Court at the appropriate time; and



- disclosure of legal advice to the Council would have a restraining and suppressive effect and would substantially hamper the ability of the Council to communicate freely, frankly and fully with its legal advisers about matters of concern.
29. On balance, therefore, I would conclude that the public interest in disclosing the information is outweighed by the public interest maintaining the exemption in section 36(1) of FOISA. Whilst I recognise that there are reasons which might justify disclosing the legal advice to Ms Phillips, in this instance I do not consider that they are so highly compelling as to outweigh the public interest in the confidentiality of legal communications. Therefore, I am satisfied that on this occasion the Council applied the public interest test correctly in withholding information from Ms Phillips under section 36(1).

Decision

I find that the City of Edinburgh Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding the majority of the information requested by Ms Phillips in her question 3 under section 36(1) of FOISA.

However, I also find that the City of Edinburgh Council breached the requirements of Part 1 (and in particular section 1(1)) of FOISA by wrongly applying the exemption in section 36(1) to documents 20 and 22. I do not accept that these are communications covered by the exemption in section 36(1) of FOISA and require their disclosure to Ms Phillips, either directly or through her solicitor, within 45 days after the date of intimation of this notice.



Appeal

Should Ms Phillips or the City of Edinburgh Council wish to appeal against my decision, there is a 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 notice.

Kevin Dunion
Scottish Information Commissioner
16 January 2008



Appendix

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 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 –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
 - (b) section 26;
 - (c) section 36(2);
 - (d) section 37; and
 - (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.
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