

# Decision Notice



Decision 010/2012 Mr Allan Hogg and the University of Edinburgh

Legal Opinions

Reference No: 201101668

Decision Date: 9 January 2012

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**Kevin Dunion**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
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## Summary

Mr Allan Hogg requested from the University of Edinburgh (the University) the full legal Opinions obtained by the University regarding its right to use George Square Gardens, Edinburgh. The University initially withheld the Opinions in their entirety under section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, the University disclosed redacted versions of the Opinions, as it recognised that certain parts had been summarised to Mr Hogg, and so they could no longer be held to be confidential in their entirety. However, the University continued to apply the exemption in section 36(1) to the parts of the Opinions that were still withheld. Mr Hogg remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the University had dealt with Mr Hogg's request for information in accordance with Part 1 of FOISA, by withholding the redacted information within the Opinions under section 36(1) of FOISA. He did not require the University to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 36(1) (Confidentiality)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. Mr Hogg had been in discussions with the University regarding its decision to hold events in George Square Gardens, Edinburgh (the Square) without consulting or compensating other proprietors on the Square. On 18 August 2010, the University advised Mr Hogg that it had obtained legal Opinions from two professors regarding its rights to use the Square for events and provided Mr Hogg with a one page summary of the Opinions.
2. On 8 December 2010, solicitors acting on behalf Mr Hogg wrote to the University and requested a copy of the full Opinions.



3. Subsequent references to correspondence from and to Mr Hogg should be read as including correspondence sent from and to his solicitors on his behalf.
4. The University responded on 6 January 2011. It advised Mr Hogg that it was withholding the Opinions in their entirety under section 36(1) of FOISA on the basis that they were subject to both litigation and legal advice privilege and, as such, a claim of confidentiality could be maintained in legal proceedings.
5. On 8 February 2011, Mr Hogg wrote to the University requesting a review of its decision. In particular, Mr Hogg took the view that since the University had previously provided a summary of the Opinions it could not be a breach confidentiality to disclose the Opinions themselves.
6. The University notified Mr Hogg of the outcome of its review on 18 March 2011. It accepted that it should have disclosed the parts of the opinions that had previously been summarised in correspondence with Mr Hogg. The University explained that it had applied the reasoning set out in the Commissioner's *Decision 056/2010 Mr William Lonsdale and the Scottish Further and Higher Education Funding Council* and concluded that privilege no longer applied to those sections of the Opinions which had been disclosed in the summary. Also following the approach taken in *Decision 056/2010*, the University considered that privilege was retained in the parts of the Opinions which had not been summarised previously, and it continued to withhold that information on the grounds that it was exempt under section 36(1) of FOISA.
7. On 9 September 2011, Mr Hogg wrote to the Commissioner, stating that he was dissatisfied with the outcome of the University's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr Hogg had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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9. On 21 September 2011, the University was notified in writing that an application had been received from Mr Hogg and was asked to provide the Commissioner with any information withheld from him. The University responded with the information requested and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted the University, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the University was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.



11. In response, the University submitted that it considered the withheld information to be exempt from disclosure in terms of section 36(1) of FOISA, and provided submissions to support its case. The University relied upon its public interest arguments provided in its review response to Mr Hogg.
12. The investigating officer also requested and obtained from Mr Hogg during the investigation his submissions on the matters to be considered in the case including why he considered that the public interest favoured disclosure.
13. These submissions received from Mr Hogg and the University are summarised and considered where relevant in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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14. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Hogg and the University and is satisfied that no matter of relevance has been overlooked.

### Section 36(1) - Confidentiality

15. The University has applied the exemption in section 36(1) of FOISA to withhold the parts of the Opinions requested by Mr Hogg, which it considered had not been summarised in its previous correspondence with him. It maintained that the information attracted both legal advice privilege and litigation privilege.
16. The exemption in 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. Among the types of communication which fall into this category are those which are subject to legal professional privilege. One aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*). Another aspect of legal professional privilege is legal advice privilege. The University has argued that both apply to the withheld opinions.
17. Communications *post litem motam* are granted confidentiality in order 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. 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.



18. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation: the communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded.
19. Whilst legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given, for legal advice privilege to apply, certain conditions must be fulfilled. The information being withheld must relate to communications with a legal adviser, such as a solicitor or an advocate which may include an in-house legal adviser. The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of the legal adviser's professional relationship with his/her client.
20. In this case, the withheld information is contained within two legal Opinions obtained from two Professors of Conveyancing and instructions from the University's solicitors to one of the Professors (which are appended to the relevant Opinion). The Opinions discuss the right to use and grant leases in relation to the Square and ultimately the rights of the other proprietors of buildings in the Square.
21. The Commissioner is satisfied that the withheld information in this context is a communication between legal adviser and client, provided in circumstances in which legal advice privilege could apply. Having considered the correspondence provided by the University to substantiate its claim, the Commissioner is also satisfied that the Opinions were obtained in contemplation of litigation, and so litigation privilege could also apply.
22. 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.

*Was the information confidential?*

23. Information cannot be privileged unless it is also confidential. For the exemption to apply, the withheld information must be information in respect of which a claim to confidentiality of communications (in this case in the form of legal professional privilege) could be maintained in legal proceedings. In other words, the claim must be capable of being sustained at the time the exemption is claimed.
24. A claim of confidentiality will not be capable of being maintained where information has (prior to a public authority's consideration of an information request or conducting a review) 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.



25. In this case, a one page summary of the withheld legal opinions was provided to Mr Hogg on 18 August 2010. Following its review in March 2011 the University provided Mr Hogg with redacted versions of the Opinions, disclosing the parts of the Opinions that it considered had been summarised to Mr Hogg. The University maintained that the remaining parts remained confidential and so privileged.
26. In its submissions, the University made reference to *Decision 056/2010* and concluded that privilege no longer applied to those sections of the Opinions which had been disclosed in the summary provided and which were then reflected in the disclosed parts of the legal Opinions.
27. In his request for review, Mr Hogg argued that, since the University had indicated what the Opinions said, it could not be a breach of confidence to disclose the actual documents. In his submissions during the investigation, he expressed concerns as to whether the summary provided was a fair summary of the advice, and did not hide other points suggesting that the University may have overstepped its entitlement in the use of the Square.
28. In *Decision 056/2010*, the Commissioner re-considered the position taken in previous decisions as to whether the disclosure of part of legal advice in effect waives privilege in the whole. In *Decision 002/2008 Ms D Cairns and the City of Edinburgh Council*, the Commissioner said:

"...a party cannot "cherry pick" or put part of a privileged document or series of documents [where these relate to the same issue] into the public domain without waiving the privilege in the remainder."
29. In *Decision 056/2010* the Commissioner concluded that the rule against "cherry picking" has only been established in Scots case law in the context of court proceedings. Similarly to *Decision 056/2010*, the summary provided to Mr Hogg in this case was not in the context of court proceedings and so the Commissioner has concluded that the rule against "cherry picking" does not apply in this case.
30. Therefore, the extent of the loss of the confidentiality (and so privilege) in the Opinions depends on the extent to which the advice therein had been summarised previously (i.e. prior to the University's decision at review). A central consideration in this case is whether the University has correctly assessed the extent to which the confidentiality of the legal opinions had been lost, and so the extent to which the exemption in section 36(1) could continue to be applied.
31. Having examined the summary disclosed and the withheld information, the Commissioner is satisfied that, following its review, the University correctly identified and disclosed the parts of the Opinions which had been summarised within the correspondence to Mr Hogg on 18 August 2010. He is satisfied that the parts of the Opinions that the University has continued to withhold have not been summarised, and so they remain confidential and privileged.
32. The Commissioner therefore finds that the University correctly applied the exemption in section 36(1) of FOISA to the withheld information.



33. The exemption in section 36(1) is, however, a qualified exemption, which means that it is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that certain information is exempt under section 36(1), the Commissioner must go on to consider whether, in all circumstances of the case, the public interest in disclosing that information is outweighed by the public interest in maintaining the exemption. Unless he finds that it is, he must order the information to be disclosed.

### **Public interest test**

34. Mr Hogg put forward a number of arguments as to why disclosure of the withheld information would, in his view, be in the public interest. In particular, he highlighted that the general public has generous use of the Square and so there is a public interest in the reasonableness of any restrictions imposed upon its use.
35. As noted above, Mr Hogg also expressed concern regarding whether the summarised and incomplete versions provided a fair summary of the opinions provided and did not hide points indicating that the University has overstepped its entitlement to use the Square.
36. Mr Hogg submitted that the University as a public body and should not be allowed to use FOISA to defend its actions especially when there is a possibility of litigation or the actions are unjustifiable.
37. Overall, Mr Hogg argued that the interests of the public at large, and of the small group of proprietors (other than the University) of buildings on the Square, outweigh any right to refuse disclosure. He maintained that disclosure was both of interest to, and in the interests of the public, and the public interest in disclosure outweighed that in maintaining any exemption.
38. The University argued that the public interest would be better served by withholding the information to which the exemption applies. It highlighted that previous decisions by the Commissioner accepted that there is a significant public interest in maintaining the exemption in section 36(1) of FOISA and that an authority should be permitted to communicate its position to its advisers fully and frankly in order to obtain the most comprehensive legal advice in order to defend its position, should that become necessary.
39. The University considered that there was a general public interest in the transparency and openness of public authorities, particularly enabling scrutiny of the legality of their actions. However, the University balanced this with the fact that the Opinions dealt with legal aspects of the University's rights to enter into contracts in relation to the Square; matters which affect a very small number of proprietors and not the general public.



40. The University also referred to the possibility that Mr Hogg may raise litigation proceedings against the University and cited the Information Tribunal decision *EA/2007/0092, Foreign and Commonwealth Office and the Information Commissioner*<sup>1</sup> which states that “*The interest in disclosure is ..... weaker still where there is the possibility of future litigation in which those arguments will be deployed.*”
41. The Commissioner accepts that Mr Hogg has identified a public interest in disclosure of the information under consideration, in relation to the public (also local residents’) use of the Square and how those rights of use might be affected.
42. Against this, however, the Commissioner has identified a stronger public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds.
43. 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. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District University and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
44. The Commissioner recognises that there is some public interest in this case, in enabling full understanding of the University’s rights with respect to the use of the Square, and so the restrictions on public access that such use may cause.
45. However, the Commissioner also recognises that the privilege protecting legal advice and communications *post litem motem* serves the public interest by ensuring that parties which may be involved in litigation are able to assess and prepare their case without fear of documents produced for that purpose being disclosed to the other party. The fairness of such proceedings would be undermined if the status of one party as a public authority entailed that it was not allowed the same protections as another party.
46. While the Commissioner has given some weight to the public interest favouring disclosure in this case, he does not consider it to be sufficiently heavy to outweigh the considerable public interest in maintaining the right to confidentiality of privileged communications of the type considered in this decision.
47. On balance, the Commissioner is therefore satisfied, in all the circumstances of this case, that the public interest in disclosure of the information under consideration is outweighed by the public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds

<sup>1</sup> [http://www.informationtribunal.gov.uk/DBFiles/Decision/i153/FCO%20v%20IC%20\(EA-2007-0092\)%20Decision%2029-04-08%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i153/FCO%20v%20IC%20(EA-2007-0092)%20Decision%2029-04-08%20(w).pdf)





48. Therefore, he is satisfied that the University correctly applied the public interest test in withholding the redacted parts of the Opinions and that this information is exempt from disclosure by virtue of section 36(1) of FOISA.

## DECISION

The Commissioner finds that the University of Edinburgh complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Allan Hogg.

## Appeal

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Should either Mr Allan Hogg or the University wish to appeal against this decision, there is an 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.

**Margaret Keyse**  
**Head of Enforcement**  
**9 January 2012**



## Appendix

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### 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.

...

- (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.

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