

# Decision Notice

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## **Decision 020/2017: Mr Francis Berry and the Scottish Parliamentary Corporate Body**

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### **Legal advice to the Presiding Officer on legislative competence**

Reference No: 201602088

Decision Date: 10 February 2017



Scottish Information  
Commissioner

## Summary

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The Scottish Parliamentary Corporate Body was asked for a copy of the advice to the Presiding Officer on the legislative competence of the Air Weapons and Licensing (Scotland) Bill. The SPCB refused the request because the information was legally privileged and exempt from disclosure.

The Commissioner agreed that the advice was exempt from disclosure.

## Relevant statutory provisions

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

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

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1. On 9 September 2016, Mr Berry made a request for information to the Scottish Parliamentary Corporate Body (the SPCB). He asked for a copy of the advice to the Presiding Officer on the legislative competence of the Air Weapons and Licensing (Scotland) Bill. This Bill became the Air Weapons and Licensing (Scotland) Act 2015<sup>1</sup> (“the 2015 Act”).
2. Section 31 of the Scotland Act 1998 requires the Presiding Officer to decide whether or not, in his or her view, the provisions of a Bill would be within the legislative competence of the Scottish Parliament, and to state his/her decision. The then Presiding Officer’s statement on the legislative competence of the 2015 Act is available on the Scottish Parliament’s website<sup>2</sup>.
3. The SPCB responded on 30 September 2016 by issuing a refusal notice which stated that the information requested was exempt from disclosure under section 36(1) of FOISA (Confidentiality). The SPCB explained why, in its view, the public interest favoured withholding the legal advice. To assist Mr Berry, the SPCB provided background information (taken from the Scottish Parliament’s *Guidance on Public Bills*<sup>3</sup>) in relation to the legislative competence of Bills and the Presiding Officer’s role in relation to legislative competence.
4. On 17 October 2016, Mr Berry wrote to the SPCB requesting a review of its decision. He challenged what he saw as an assumption that the advice was subject to an inherent solicitor/client privilege, noting that the Presiding Officer sought guidance on a public matter, not a personal one. Mr Berry commented that the funding for such advice came from the public purse. He commented that the legislation in question affected many people: given that there were “no checks and balances to oppose a ruling by the Presiding Officer”, he believed that disclosure of the advice would be the best method to verify the Presiding Officer’s professional standards.

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<sup>1</sup> [http://www.legislation.gov.uk/asp/2015/10/pdfs/asp\\_20150010\\_en.pdf](http://www.legislation.gov.uk/asp/2015/10/pdfs/asp_20150010_en.pdf)

<sup>2</sup> <http://www.parliament.scot/LargePDFfiles/SPPB219.pdf> (This PDF file is 42.29 MB)

<sup>3</sup> <http://www.parliament.scot/parliamentarybusiness/Bills/15707.aspx>

5. The SPCB notified Mr Berry of the outcome of its review on 7 November 2016. The review upheld the original decision that the information was exempt in terms of section 36(1) of FOISA.
6. On 15 November 2016, Mr Berry applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Berry was unhappy that the advice had been withheld and commented that the current system within the Scottish Parliament offers no way to verify the integrity of the Presiding Officer and those offering advice.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that Mr Berry made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 7 December 2016, the SPCB was notified in writing that Mr Berry had made a valid application. The SPCB was asked to send the Commissioner the advice withheld from Mr Berry. The SPCB provided the advice and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SPCB was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

## **Commissioner's analysis and findings**

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10. In coming to a decision on this matter, the Commissioner considered the withheld advice and the relevant submissions, or parts of submissions, made to her by both Mr Berry and the SPCB. She is satisfied that no matter of relevance has been overlooked.
11. In addition to section 36(1) of FOISA, the SPCB submitted that the withheld information was exempt from disclosure under sections 30(b) and 30(c) of FOISA (Prejudice to effective conduct of public affairs).

### **Section 36(1) - confidentiality of communications**

12. 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. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
13. 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.

14. The SPCB submitted that the information withheld was advice from a professional legal adviser acting in that capacity: it was legal advice given to the then Presiding Officer of the Scottish Parliament by the Office of the Solicitor to the Scottish Parliament (OSSP). The SPCB explained that the legal advice was provided to assist the then Presiding Officer in carrying out her statutory duty of deciding, on or before the introduction of the Air Weapons and Licensing (Scotland) Bill, whether the provisions of the Bill would be within the legislative competence of the Scottish Parliament.
15. The SPCB said that the legal advice paper was provided to the Presiding Officer in confidence. The document was marked “Restricted” and was made available only to the Presiding Officer and copied to the Chief Executive of the Scottish Parliament. There had been no disclosure of the advice or any waiver of confidentiality and the SPCB argued that the advice continued to be covered by legal advice privilege.
16. The SPCB noted Mr Berry’s view that no solicitor/client privilege attached to the withheld information because the Presiding Officer was seeking advice on a public matter rather than a private one, and that the advice had been paid for by public money. It did not find these arguments to be relevant to the application of the exemption in section 36(1) of FOISA. The SPCB referred to the Commissioner’s guidance<sup>4</sup> on section 36(1) exemption, which confirms that communications between public authorities and their in-house legal advisers are covered by legal advice privilege (other than for the purposes of enforcement proceedings under European Union Competition Law).
17. The SPCB referred to *Decision 064/2010 Brian McKerrow and the Scottish Parliamentary Corporate Body*<sup>5</sup>, which considered whether advice given to the Presiding Officer in relation to the legislative competence of a Scottish Parliament Bill attracted legal advice privilege. The SPCB referred to paragraph 34 where the Commissioner said:

*“...the information found to fall within the scope of Mr McKerrow’s request for information was contained in a document containing legal advice from a solicitor to the Presiding Officer in relation to the competence of the Family Law (Scotland) Bill. The Commissioner is satisfied that this information attracts legal advice privilege.”*
18. Having considered the content of the withheld information and all the submissions in this case, the Commissioner is satisfied that the information meets the conditions for legal advice privilege to apply, and that the exemption in section 36(1) of FOISA is engaged.
19. 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. 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*

20. The SPCB submitted that the public interest in withholding the legal advice outweighed the public interest in disclosure. It relied on the arguments put forward in its review response.
21. The SPCB identified the following arguments in favour of disclosing the legal advice in the public interest:

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<sup>4</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section36/Section36.aspx>

<sup>5</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2010/200902023.aspx>

- (i) It would permit enhanced scrutiny of the actions of the former Presiding Officer when deciding on the legislative competence of the Bill.
  - (ii) It would contribute to public debate on a matter of interest.
22. The SPCB identified the following arguments in favour of withholding the advice in the public interest:
- (i) It is in the public interest for the Presiding Officer to receive the most comprehensive legal advice on legislative competence in confidence, in order to assist him or her in carrying out his/her statutory role.
  - (ii) Disclosing legal advice which was so directly connected to the Presiding Officer's function would have a restraining and suppressive effect. It would hamper the Presiding Officer from communicating freely, frankly and fully with legal advisers about the competence of a Bill being introduced in Parliament. This, in turn, would affect the core business of the Parliament and the scheme for devolution as set out in the Scotland Act 1998.
23. The SPCB highlighted the Commissioner's view in another case involving a request for legal advice (*Decision 209/2007 Mr Adam Ingram MSP and the SPCB*, paragraph 45)<sup>6</sup>
- "I agree with the SPCB that releasing the legal advice would expose the legal advice offered and would inhibit others from offering such advice in the future. It is important for officials to be able to obtain such legal advice in confidence".*
24. The SPCB commented that the Commissioner's guidance<sup>7</sup> stated that "public interest" was "something which is of serious concern and benefit to the public", not merely something of individual interest. While the disclosure of the particular legal advice may be of individual interest to Mr Berry and perhaps to a number of other members of the public, in the SPCB's view it was necessary to consider more generally whether it better served the public to withhold the advice. The SPCB was not aware of there being any widespread public controversy over the subject matter of the Bill, or indeed its competence, and so did not think that disclosure of the legal advice would amount to "something which is of serious concern and benefit to the public".
25. The SPCB explained that there were other mechanisms by which the legislative competence of a Bill is scrutinised. The SPCB acknowledged that while the Presiding Officer's decision was not subject to challenge, it was not determinative of the status of that Bill or resulting legislation, and should not be considered in isolation. The Presiding Officer's statement on the legislative competence of a Bill provides assurance to members of the Parliament that an independent third party has considered issues of competence at the point of introduction. The Presiding Officer's role sits alongside other checks and balances. For example, there are statutory roles for the law officers and the Secretary of State in protecting the public interest in ensuring the devolution settlement is respected.
26. The SPCB commented that it was clear from the debates on the Scotland Bill that a decision was taken not to include a mechanism for challenge to the Presiding Officer's certificate in

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<sup>6</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200700120.aspx>

<sup>7</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx>

order to protect the independence of that function. The SPCB explained that during the passage of the Bill there is opportunity for public scrutiny of the competence of its provisions in a public forum. Once a Bill is enacted, a member of the public may challenge the competence of a provision in an Act through the courts. The public were therefore afforded opportunities to engage in scrutiny of the legislative process in a way which, the SPCB submitted, best served the public interest when considering the legislative process as a whole.

27. The SPCB reiterated its view that disclosure of the advice would be detrimental to its proper function. The Presiding Officer must be able to receive comprehensive and confidential legal advice as to devolved competence in order to fulfil the Presiding Officer's statutory function for every Bill.
28. The SPCB also drew the Commissioner's attention to a number of court cases which have emphasised the strong public interest in maintaining the right to confidentiality of communications between legal advisers and clients. The SPCB cited:
  - *Three Rivers District Council and Others v Governor and Company of the Bank of England* (2004) UK HL 48<sup>8</sup>
  - *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB)<sup>9</sup>.
  - Previous decisions by the Commissioner, including *Decision 064/2010 Brian McKerrow and the Scottish Parliamentary Corporate Body*.
29. Mr Berry made a number of arguments in favour of the advice being disclosed. He questioned whether the Bill was within the legislative competence of the Scottish Parliament and whether it was compatible with European legislation (concerns which he had already raised with the then Presiding Officer and with the Scottish Government). He argued that disclosure of the legal advice would increase scrutiny of the actions of the Presiding Officer and would be the best method to verify the Presiding Officer's professional standards, given that "there are no checks and balances to oppose a ruling by a Presiding Officer". He believed such scrutiny was justified as the advice was on a public matter, not a personal one, and noted that the funding for the advice came from the public purse.
30. Mr Berry was strongly of the view that, in contrast to what the SPCB argued, the legislation in question affected many people and that there was therefore a public interest in scrutiny. He said that if the estimated number of air weapons in Scotland was correct, the legislation would apply to potentially hundreds of thousands of members of the public.
31. Finally, Mr Berry submitted that Article 42 of the EU Charter of Fundamental Rights grants the public the right to review information held by agencies within the Union. He argued that the Presiding Officer's refusal to reveal received advice runs contrary to Article 42, as does section 36 of FOISA.

#### *The Commissioner's conclusions*

32. The Commissioner notes that Article 42 of the EU Charter of Fundamental Rights provides a right to access documents, but this right is limited to documents of the European Parliament,

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<sup>8</sup> <http://www.bailii.org/uk/cases/UKHL/2004/48.html>

<sup>9</sup> <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

Council and Commission.<sup>10</sup> The legal advice sought by Mr Berry is not a document of any of these institutions. As such, Article 42 is not relevant here.

33. The issue for the Commissioner to consider is whether the public interest in disclosing the legal advice given to the Presiding Officer outweighs the public interest in maintaining the exemption in section 36(1).
34. The Commissioner accepts that disclosure of the legal advice would increase transparency, particularly in relation to the Presiding Officer's function. Disclosure would allow the public to see the actual advice that was given, and enable them to assess the content of that advice. The Commissioner accepts there is an identifiable public interest in disclosure of the legal advice in terms of accountability and transparency with respect to the Presiding Officer's consideration of the Bill.
35. The Commissioner also accepts Mr Berry has identified a public interest inasmuch as the Bill (which became the 2015 Act) will affect the public. The broadly stated aim of the legislation is to protect public safety and advance public health, provisions which are of public interest.
36. However, the public interest in disclosure of the legal advice must be balanced against the public interest in maintaining the right to confidentiality of communications between legal adviser and client, and the public interest in the proper functioning of the legislature. The Commissioner is of the view that these two factors carry more weight, in this instance, than the public interest in increasing the accountability of the functions of the Presiding Officer.
37. 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* (see paragraph 28 above). Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
38. The Commissioner accepts that disclosing the legal advice, which is so directly connected to the Presiding Officer's function, would have a restraining and suppressive effect and would hamper the ability of the Presiding Officer to communicate freely, frankly and fully with legal advisers about the competence of a Bill being introduced in Parliament. She accepts that this, in turn, would be likely to affect the core business of the Parliament and the scheme for devolution as set out in the Scotland Act 1998.
39. There is a strong public interest in the Presiding Officer being able to receive full unhindered legal advice on any issue of competence of proposed legislation. Without such comprehensive advice, the decision making of the Presiding Officer would be restricted, which would not be in the public interest.
40. The Commissioner also notes that there are other ways to scrutinise the legislative competence of a proposed Bill; disclosing the legal advice to the Presiding Officer is not the only way to ensure accountability in terms of legislative competence. The *Guidance on Public Bills* quoted by the SPCB (and provided by the SPCB to Mr Berry) makes it clear how a bill can be scrutinised in respect of legislative competence.

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<sup>10</sup> <http://fra.europa.eu/en/charterpedia/article/42-right-access-documents>

41. The Commissioner has considered Mr Berry's submission that disclosure would allow scrutiny of the Presiding Officer to verify integrity or proper conduct. There is a general public interest in enabling the scrutiny of any official's actions and decision, and particularly so when the officer holds a position with as much constitutional importance as the Presiding Officer. However, the Commissioner has received no evidence suggesting that the then Presiding Officer acted in any way improperly in respect of the Bill in question to add weight to this submission.
42. On balance, the Commissioner is satisfied, in all the circumstances of this case, that the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemption in section 36(1). She has concluded that the SPCB was entitled to withhold the information under section 36(1) of FOISA.
43. Having accepted that the information was correctly withheld in terms of section 36(1) of FOISA, the Commissioner is not required to consider whether the SPCB was correct to rely on the exemptions in sections 30(b) and 30(c) of FOISA.

## Decision

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The Commissioner finds that the Scottish Parliamentary Corporate Body complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Berry.

## Appeal

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Should either Mr Berry or the SPCB 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**10 February 2017**



### 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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