

# Decision Notice



Decision 026/2012 CAAN Scotland and the Scottish Ministers

Legal advice on the compatibility of section 42 of the Criminal Justice and Licensing (Scotland) Act 2010 with the ECHR

Reference No: 201101173

Decision Date: 7 February 2012

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

CAAN Scotland requested from the Scottish Ministers (the Ministers) information that supports the Scottish Government's position that legislation creating an offence for possessing extreme pornography is compatible with the European Convention on Human Rights (ECHR). The Ministers responded by advising CAAN Scotland that it considered the information to be exempt from disclosure in terms of section 36(1) of FOISA. Following a review, in which the Ministers upheld their reliance on section 36(1) of FOISA, CAAN Scotland remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with CAAN Scotland's request for information in accordance with Part 1 of FOISA. The Commissioner found that the Ministers had correctly applied the exemption in section 36(1) of FOISA to the withheld information.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 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. CAAN Scotland had been in correspondence with the Scottish Government during the development and Scottish Parliamentary passage of the Bill that became the Criminal Justice and Licensing (Scotland) Act 2010 (CJLA). That correspondence was focussed on section 42 of the CJLA which created a new offence of possession of extreme pornography.
2. On 11 March 2011, CAAN Scotland wrote to the Ministers to request the following information;
  - a. What were the discussions and correspondence that led to the development of the original 2005-06 consultation on extreme pornography.



- b. Responses to the Revitalising Justice consultation<sup>1</sup> relevant to section 42 of the CJLA, and what happened to these responses.
  - c. Documentation that supported the Scottish Government's position that the extreme pornography legislation is compatible with the European Convention on Human Rights (ECHR).
3. The Ministers responded on 8 April 2011, indicating that in order for them to be able to identify information which would address part (a) of CAAN Scotland's request, they required further information from CAAN Scotland (which they specified). However, some background information was provided about the decision to consult on the proposals.
4. In response to part (b) of CAAN Scotland's request, the Ministers provided copies of the responses received, subject to the redaction of information that the Ministers considered to be personal data, and exempt from disclosure under section 38(1)(b) of FOISA.
5. The Ministers refused to provide CAAN Scotland with the information sought at part (c) of its request. They indicated that the relevant information was legal advice, and withheld it under the exemption in section 36(1) of FOISA.
6. On 25 May 2011, CAAN Scotland wrote to the Ministers requesting a review of their decision regarding the information covered by part (c) of its request. In particular, CAAN Scotland commented that it had not been clearly established that all of the information requested in part (c) falls under the purview of section 36(1) of FOISA. CAAN Scotland also considered that as a consequence of information that had been included in the Policy Memorandum<sup>2</sup> concerning the Criminal Justice and Licensing Bill, the Ministers had waived any confidentiality in the withheld information.
7. The Policy Memorandum had indicated at paragraph 608

The Bill also makes provision for creating offences of possession of extreme pornography. This could give rise to issues under Article 8 and Article 10 [of the ECHR]. Any interference with rights protected by these Articles must be in accordance with and prescribed by law, for a legitimate aim and must be necessary and proportionate. Each of these tests is met as regards possession of extreme pornography.

CAAN highlighted that the Policy Memorandum states that the extreme pornography section of the Bill was compatible with the ECHR, and it took this to be a summary of any documents in the Government's possession that relate to the ECHR and extreme pornography.

<sup>1</sup> <http://www.scotland.gov.uk/Publications/2008/09/24132838/0>

<sup>2</sup> [http://parlamaid-alba.org/S3\\_Bills/Criminal%20Justice%20and%20Licensing%20\(Scotland\)%20Bill/b24s3-introd-pm.pdf](http://parlamaid-alba.org/S3_Bills/Criminal%20Justice%20and%20Licensing%20(Scotland)%20Bill/b24s3-introd-pm.pdf)



8. The Ministers notified CAAN Scotland of the outcome of their review on 23 June 2011. In their response, the Ministers sought to address the two areas of dissatisfaction raised by CAAN Scotland. The Ministers advised that, having examined the withheld information, they considered it to be legal advice and falling within the definition in section 36(1) of FOISA, as it was information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Therefore, the Ministers submitted, the information fell within scope of section 36(1) of FOISA.
9. Regarding CAAN Scotland's comments concerning references to the compatibility of the provisions regarding extreme pornography within the ECHR, the Ministers responded that the Policy Memorandum is a standard routine document which presents a conclusion, but does not include any of the detailed legal advice which had been provided to ministers and officials previous to that conclusion. Therefore, the Ministers concluded that the contents of the policy memorandum did not have the effect of disclosing the advice and waiving the legal professional privilege. As a consequence, the Ministers explained that the information remained exempt under section 36(1) of FOISA.
10. On 30 June 2011, CAAN Scotland wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
11. The application was validated by establishing that CAAN Scotland 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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12. On 8 July 2011, the Ministers were notified in writing that an application had been received from CAAN Scotland and was asked to provide the Commissioner with any information withheld from it. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
13. The investigating officer subsequently contacted the Ministers on 21 July 2011, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on their application of the exemption in section 36(1) of FOISA, and the public interest test associated with it.
14. A response was provided by the Ministers on 9 August 2011, providing submissions on the application of section 36(1) of FOISA and the associated public interest test.



15. Further submissions were sought and received from the Ministers during the course of the investigation. In particular, the investigating officer advised the Ministers of her initial view that certain information they had judged to fall outside the scope of the request was actually relevant to request. The Ministers confirmed in response that they considered section 36(1) of FOISA to be applicable to all of the information that the investigating officer considered to fall within the scope of the CAAN Scotland's request.
16. The investigating officer also contacted CAAN Scotland during the investigation, seeking its submissions on the matters raised by this case, in particular why it considered that the public interest lay in disclosure of the information that has been withheld. CAAN Scotland's submissions were received on 29 August 2011.
17. CAAN Scotland's submissions, along with those of the Ministers, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below

## Commissioner's analysis and findings

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18. 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 CAAN Scotland and the Ministers and is satisfied that no matter of relevance has been overlooked.

### Withheld information

19. When asked to provide the withheld information to the Commissioner, the Ministers provided a single document. They indicated that the main body of this document fell outwith the scope of CAAN Scotland's information request, but an annex contained within an annex to the main document contained relevant information, which had been withheld.
20. Having reviewed both the document and the associated annexes, the Commissioner considers that some relevant information is contained in both annexes (but not the main document). The Commissioner finds that the information from paragraph 11 onwards in the first annex, and the whole of the second annex, falls within the scope of CAAN Scotland's information request. He has considered the information to be the withheld information in what follows.
21. After being advised that the Commissioner was likely to reach such a conclusion during the investigation, the Ministers indicated that they considered the exemption in section 36(1) of FOISA to apply to all of this information.

### Section 36(1) - confidentiality

22. Section 36(1) 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 in this category are those subject to legal professional privilege. One aspect of legal professional privilege is legal advice privilege.



23. 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 must relate to communications with a professional legal adviser, such as a solicitor or an advocate. This 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 that adviser's professional relationship with his/her client.
24. Having reviewed the information under consideration, the Commissioner is satisfied that it constitutes legal advice, prepared by officials in the Scottish Government's Legal Directorate acting in their professional capacity as solicitors to the Scottish Government. He is satisfied that the withheld information was created and exchanged in circumstances where legal advice privilege could apply.
25. There is a further matter to be considered, however, before the Commissioner can determine whether, or to what extent, the section 36(1) exemption is applicable in the circumstances of this case.
26. Information cannot be privileged unless it is also confidential. For the exemption to apply, the withheld information must be information in respect to which a claim to confidentiality of communications (in the form of legal advice 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.
27. 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 outcome of a review in respect of that request) 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.
28. In its application, CAAN Scotland maintained that confidentiality in relation to the withheld information had been waived, since it considered that information contained in paragraph 608 of the Policy Memorandum about the Criminal Justice and Licensing Bill (and reproduced in paragraph 7 above) constituted a summary of the documents. As such, CAAN Scotland considered that confidentiality in the information has been waived. CAAN Scotland referred to the Commissioner's decision *002/2008 Ms D Cairns and the City of Edinburgh Council* in support of this position.
29. The Ministers commented on CAAN Scotland's views in their submissions to the Commissioner. They noted that, when responding to CAAN Scotland's requirement for review, they had explained that the Policy Memorandum is a standard routine document which presents a conclusion but does not include any of the detailed advice which had been provided to ministers and officials previous to that conclusion. They maintained that the Policy Memorandum, being a policy document and not legal by nature, is not sufficiently detailed to pertain to the level of legal advice contained in the withheld information. As such, the Ministers do not accept that waiver has taken place.



30. 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."
31. However, in the more recent *Decision 056/2010 Mr William Lonsdale and the Scottish Further and Higher Education Funding Council*, the Commissioner reconsidered the position taken in previous decisions as to whether the disclosure or summarising of part of legal advice in effect waives privilege in the whole. 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.
32. The Commissioner is satisfied that there has not been any disclosure of the legal advice under consideration in the context of court proceedings. If any of the withheld information has been summarised publicly, the extent of the loss of the confidentiality (and so privilege) in that information will depend on the extent that it has been summarised. In line with the approach set out in *Decision 056/2010*, the Commissioner went on to consider whether, and the extent to which, the information under consideration has been publicly summarised, in order to determine if and the extent to which confidentiality has been lost.
33. Having examined the withheld information, together with the information in paragraph 608 of the Policy Memorandum, the Commissioner is satisfied that none of the legal advice under consideration is summarised within that paragraph. The Commissioner agrees that the Policy Memorandum states the conclusion reached by the Ministers in the light of their legal advice, but considers that it does not disclose the nature and content of that advice.
34. The Commissioner is therefore satisfied that the confidentiality and, as a consequence, the privilege in the withheld information has not been lost. The Commissioner accepts that the Ministers correctly applied the exemption in section 36(1) of FOISA to the withheld information.
35. 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 the withheld information is exempt under section 36(1), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the 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

36. CAAN Scotland provided a number of detailed arguments as to why disclosure of the withheld information would, in their view, be in the public interest. The Commissioner has noted, and taken all of these arguments into account where appropriate, although they are not summarised in full in this decision.



37. Overall, CAAN Scotland's submissions highlighted its concerns with the compatibility of section 42 of the CJLA with articles 8 and 10 of the ECHR, and about whether proper consideration had been given to this matter by the Scottish Government and Parliament. It maintained that disclosure of the information under consideration would allow consideration of whether public statements made by the Scottish Government had been misleading, what evidence and considerations had informed its conclusions about the compatibility of the law with the ECHR and whether Law Officers held concerns about the provision,
38. The Ministers acknowledged that there is a general public interest in transparency and accountability, and in ensuring that legislation is competent in terms of adherence to the right of liberty and security guaranteed by the ECHR.
39. However, they argued that it is crucial for the effective administration of government that legal advice can be provided to officials, and ultimately ministers, without fear or concern that such advice will be released into the public domain. Such release, the Ministers believe, would significantly compromise the position of both the providers of the advice and those receiving it.
40. The Ministers submitted that it would be harmful to the public interest if solicitors and clients could not discuss relevant issues and give and receive legal advice in confidence. Given the importance that the courts place on the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds, the Ministers argued that such communications should only be released in highly compelling cases.
41. Overall, the Ministers submitted that any public interest in the disclosure of the withheld information is outweighed by the public interest in ensuring that legal advisers and their clients can discuss relevant issues and give and receive legal advice in confidence.
42. Having considered the submissions from both CAAN Scotland and the Ministers (including those which are not fully summarised above), the Commissioner recognises that there is a significant public interest in ensuring that any legislation passed by the Scottish Parliament is compliant with the ECHR. This public interest applies generally, and also in relation to section 42 of the CJLA.
43. Disclosure in this case would enable public scrutiny of the advice supporting the Ministers' conclusion that section 42 of the CJLA was compliant with articles 8 and 10 of the ECHR, and so inform consideration of whether that advice was sound and based on appropriate considerations. Disclosure would allow testing of whether public statements made by the Ministers were consistent with the advice, and could prompt either confidence in or challenge to the Ministers' conclusions.
44. The Commissioner recognises that there is some weight to the public interest in disclosure in this case, particularly since the information under consideration concerns statutory provisions which limited individuals' rights to private and family life and freedom of expression, as provided for by articles 8 and 10 of the ECHR respectively.





45. However, against this, the Commissioner has identified a stronger public interest in protecting the ability of the Scottish Ministers to seek and receive comprehensive legal advice in confidence, to enable them to make fully informed decisions.
46. 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 Court 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.
47. On balance, the Commissioner is therefore satisfied, in all the circumstances of the case, that the public interest in disclosure of the information under consideration in this case is outweighed by the public interest in maintaining the exemption in section 36(1).

## DECISION

The Commissioner finds that the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by CAAN Scotland.

## Appeal

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Should either CAAN Scotland or the Scottish Ministers 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**  
**7 February 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 –

- (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.

...

##### 36 Confidentiality

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

...