

# Decision Notice



Decision 032/2012 Mr W. Hunter Watson and the Scottish Ministers

Legal advice

Reference No: 201101970

Decision Date: 17 February 2012

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**Kevin Dunion**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
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## Summary

Mr Watson requested from the Scottish Ministers the legal advice they had obtained concerning the compatibility of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act) with the European Convention on Human Rights (ECHR). The Ministers withheld the information under sections 29(1)(a), 30(b)(i) and 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Watson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with Mr Watson's request for information in accordance with Part 1 of FOISA, by correctly applying the exemption contained in section 36(1) of FOISA to the withheld information. He did not require the Ministers to take any action.

## 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 the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 25 June 2011, Mr Watson wrote to the Ministers requesting a copy of the legal advice obtained by the Ministers concerning the compatibility of the 2003 Act with rights under the ECHR.
2. The Ministers responded on 25 July 2011. They advised Mr Watson that they were withholding the requested information under the exemptions in sections 29(1)(a) (on the basis that it related to the formulation of government policy), 30(b)(i) (on the basis that it would, or would be likely to, prejudice substantially the free and frank provision of advice) and 36(1) (on the basis that it comprised information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings) of FOISA.



3. On 1 September 2011, Mr Watson wrote to the Ministers requesting a review of their decision. In particular, Mr Watson considered that there was a public interest in the information being disclosed.
4. The Ministers notified Mr Watson of the outcome of their review on 20 September 2011, upholding their previous decision in full.
5. On 17 October 2011, Mr Watson wrote to the Commissioner, stating that he 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
6. The application was validated by establishing that Mr Watson 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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7. On 2 November 2011, the Ministers were notified in writing that an application had been received from Mr Watson and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, 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 any provisions of FOISA they considered applicable to the information requested.
9. In response, the Ministers submitted that they considered the requested information to be exempt from disclosure in terms of sections 29(1), 30(b)(i) and 36(1) of FOISA and provided submissions supporting their application of these exemptions including their views on the public interest test.
10. The investigating officer also contacted Mr Watson during the investigation seeking his submissions on the matters to be considered in this case. The relevant submissions received from both Mr Watson and the Ministers will be considered fully in the analysis and findings section below.

## Commissioner's analysis and findings

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11. 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 Watson and the Ministers and is satisfied that no matter of relevance has been overlooked.



### Section 36(1) of FOISA - Confidentiality

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 (LPP), 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. The information must relate to communications with a professional legal adviser, such as a solicitor or an advocate. 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.
14. In this case, the Ministers submitted that the exemption in section 36(1) applied to all of the information falling within the scope of Mr Watson's request, by virtue of it constituting legal advice provided to the Ministers (as client) by legal advisers, acting in their respective professional capacities.
15. In his submissions, Mr Watson drew the Commissioner's attention to the case of *Akzo Nobel Chemicals Ltd v European Commission*<sup>1</sup>. Mr Watson contended that the ruling in this case showed that in-house counsel do not benefit from LPP under EU competition law and that only external counsel, not bound by an employment contract with their client can benefit from LPP. Mr Watson considered this judgement may be of relevance since he believed the advice provided to the Scottish Government was likely to have been obtained from a legal adviser within the Scottish Government.
16. The Commissioner has considered Mr Watson's submissions in relation to the *Akzo* case. However, the Commissioner notes that the decision of the Court of Justice relates specifically to a case involving EU competition law. As such, the Commissioner does not consider it is relevant to, or creates any precedent on, the matters under consideration in the present case regardless of the origins of the legal advice.
17. Having considered the Ministers' submissions and the withheld information, the Commissioner is satisfied that the information comprises communications between legal advisers and client, provided in circumstances in which legal advice privilege could apply.

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<http://curia.europa.eu/juris/document/document.jsf?text=&docid=82839&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=4569>



18. Information cannot be privileged, however, unless it is also confidential. For the section 36(1) 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 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: for this to be the case, the information must possess the quality of confidence at that time (i.e. at least up to the point at which the authority carries out its review and communicates the outcome to the applicant).
19. A claim of confidentiality will not be capable of being maintained where information has 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 all or part of the information under consideration, any privilege associated with that information (or the relevant part) is also effectively lost.
20. Having considered the Ministers' submissions and the contents of the withheld information, the Commissioner is satisfied that the legal advice referred to above has not been made public, either in full, or in summary.
21. Having considered the submissions made by both Mr Watson and the Ministers, the Commissioner is satisfied that the withheld information includes information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, the Commissioner accepts that all of the information sought by Mr Watson is exempt from disclosure under section 36(1) of FOISA.
22. 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. Therefore, having decided that the 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 the information is outweighed by the public interest in maintaining the exemption.

#### *Public interest test*

23. 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 Council and others v Governor and Company of the Bank of England*<sup>2</sup>, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
24. The Ministers submitted that the disclosure of legal advice may result in a reluctance to seek advice in future and may result in decisions which are legally unsound and open to challenges which may otherwise have been avoided. The Ministers considered that without such comprehensive advice, the quality of decision making would be reduced which would be contrary to the public interest.

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<sup>2</sup> (2004) UKHL 48



25. The Ministers considered that it was in the public interest that the record of advice given and the process of decision making was recorded accurately and fully and that any legal advice must be part of that record.
26. Additionally, the Ministers also submitted that disclosure of this type of information has the potential to prejudice the government's ability to defend its legal interest by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered without fear or favour.
27. In Mr Watson's view, the 2003 Act is not compatible with the ECHR. He made a large number of comprehensive submissions to substantiate his view that the relevant legal advice has been disclosed, and submissions were also made on his behalf. The Commissioner has considered all of these carefully. Although the Commissioner has taken full account of the submissions, only some of these are summarised below.
28. In his submissions, Mr Watson argued that the disclosure of the information would mean that it would be difficult for the Scottish Government to respond to particular questions or criticisms concerning Scottish mental health legislation. He considered that disclosure of the information might stimulate public debate which could persuade the Scottish Government to amend mental health legislation.
29. Mr Watson submitted that, if the information were disclosed, in future, the Scottish Government may be encouraged to pay more attention to ECHR rights when it is enacting legislation. He also believed this could lead to the Scottish Parliament paying more attention to its obligations under the Scotland Act 1998 when future bills are debated. He further argued that the disclosure of the information would make it unlikely that the Scottish Government could maintain that ECT (electro-convulsive therapy) does not constitute a breach of a patient's human rights.
30. Mr Watson also submitted that the disclosure of the legal advice would be an important first step in ensuring that mental health patients are not, without adequate justification, treated against their will.
31. In Mr Watson's opinion, it was far-fetched to suggest that the disclosure of the information would discourage officials from seeking legal advice during the development of a bill.
32. Mr Watson contended that the Scottish Parliament had taken insufficient care to comply with the requirements of the Scotland Act 1998 when it passed the 2003 Act as he considered that the 2003 Act was not compatible with the ECHR. He contended that, should the legal advice be disclosed, media reporting of the issue would lead to a public debate which could lead to an improvement in the treatment of mental health patients.
33. Mr Watson also noted that the UK Government had disclosed the legal advice it had obtained from the Attorney General concerning the Iraq War.
34. The Commissioner has carefully considered the submissions on the public interest test made by both Mr Watson and the Ministers.



35. In this case, the Commissioner accepts that Mr Watson has identified a public interest in disclosure of the information under consideration in order to scrutinise the actions of the Scottish Government and to contribute to the wider debate on mental health legislation in Scotland and its compatibility with the rights afforded under the ECHR. The Commissioner acknowledges that disclosure of the information would contribute to transparency and accountability.
36. However, the Commissioner also recognises that there is a very significant public interest in the effective administration of justice, and he accordingly accepts that it is in the public interest that all organisations, including the Scottish Government, are able to obtain and consider legal advice on a confidential basis. In this case, the Commissioner does not consider there to be any public interest in the disclosure of information under consideration in this decision of equal or greater weight.
37. On balance, therefore the Commissioner is satisfied, in all the circumstances of the case, that the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemption in section 36(1).
38. Therefore, he is satisfied that the Ministers correctly applied the public interest test in withholding the legal advice from Mr Watson and that this information is exempt from disclosure by virtue of section 36(1) of FOISA.
39. Having reached this conclusion, the Commissioner has not gone on to consider any of the other exemptions that were applied by the Ministers to the information withheld in this case.

## 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 Mr Watson.



## Appeal

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Should either Mr Watson 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**  
**17 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.

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- (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.

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##### 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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