

Decision Notice



Decision 033/2014 Ms Carole Ewart and the Scottish Ministers

Legal advice

Reference No: 201301528

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Summary

On 2 October 2012, Ms Ewart asked the Scottish Ministers (the Ministers) for the legal advice that the Scottish Government used to make its decision on whether the Freedom of Information (Amendment) (Scotland) Bill was compliant with the European Convention on Human Rights (ECHR). The Ministers withheld the information on the basis that it was exempt from disclosure.

Following an investigation, the Commissioner was satisfied that the Ministers were entitled to withhold the information on the basis that it was subject to legal professional privilege and was accordingly exempt from disclosure under section 36(1) of FOISA.

The decision also considers the relationship between Article 10 of the European Convention on Human Rights and FOISA.

Relevant statutory provisions

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

European Convention on Human Rights (ECHR) Article 10 (Freedom of Expression)

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.

Leander v Sweden (1987) 9 EHRR 433

Roche v UK (2006) 42 EHRR

Background

1. On 2 October 2012, Ms Ewart requested a copy of the legal advice that the Scottish Government used to make its decision on whether the Freedom of Information (Amendment) (Scotland) Bill (the Bill) was compliant with the European Convention on Human Rights (ECHR).



2. The Ministers responded on 29 October 2012. The Ministers informed Ms Ewart that the information was exempt from disclosure in terms of section 36(1) of FOISA on the basis that it comprised legal advice which was subject to legal professional privilege.
3. On 29 October 2012, Ms Ewart emailed the Ministers requesting a review of their decision. Ms Ewart considered that the public had a right to know whether the Bill was compliant with the ECHR. She also considered that accessing information was a human right under Article 10 of the ECHR.
4. The Ministers notified Ms Ewart of the outcome of their review on 22 January 2013. The Ministers upheld their application of the exemption in section 36(1). Additionally, the Ministers informed Ms Ewart that they considered the information to be exempt in terms of section 29(1)(c) of FOISA on the basis that it related to the provision of advice by any of the Law Officers, or any request for the provision of such advice.
5. On 24 June 2013, Ms Ewart wrote to the Commissioner, stating that she 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 Ms Ewart made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 5 August 2013, the Ministers were notified in writing that an application had been received from Ms Ewart and were asked to provide the Commissioner with the information withheld from her. 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. The Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. The Ministers responded on 9 September 2013, providing submissions on why they considered the requested information was exempt from disclosure in terms of sections 29(1)(c) and 36(1) of FOISA.



Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Ms Ewart and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Section 36(1) of FOISA - Confidentiality

11. 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.
12. In this case, the Ministers submitted that the exemption in section 36(1) applied to all of the information falling within the scope of Ms Ewart's request, by virtue of it constituting legal advice provided to the Ministers (as client) by legal advisers (in this case, the Law Officers), acting in their respective professional capacities.
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 his/her professional capacity and
 - (iii) The communications must occur in the context of the legal adviser's professional relationship with his/her client.
14. The information being withheld under this exemption is legal advice obtained by the Scottish Ministers from the Law Officers. Having considered the content of the withheld information and the circumstances under which it was obtained (i.e. in the context of a professional relationship between a legal adviser and their client, in the course of which confidential legal advice was requested and provided), the Commissioner is satisfied that the information meets the conditions set out in the above paragraph and is subject to legal advice privilege.
15. Information cannot be privileged 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 could be maintained in legal proceedings. In this case, the claim to confidentiality is in the form of legal advice privilege. 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 requester.



16. Having considered 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.
17. 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 Ms Ewart is exempt from disclosure under section 36(1) of FOISA.
18. 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

19. The Court of Session, which hears appeals from the Commissioner's decisions, has not yet considered in any detail the public interest test in relation to the exemption in section 36(1) of FOISA. However, the equivalent test contained in the (UK) Freedom of Information Act 2000 (FOIA) was considered by the High Court in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB).¹
20. While not binding on the Commissioner, the Commissioner agrees with the reasoning set out by the High Court and has adopted that reasoning here.
21. In the High Court, Mr Justice Wynn Williams upheld a line of decisions from the Information Tribunal in which it was determined that there is a significant in-built weight of public interest in maintaining the equivalent of the section 36(1) exemption in FOISA (i.e. section 42 of FOIA). According to Mr Justice Wynn Williams, this is because of the strong constitutional importance attached to legal professional privilege and, thereby, the protection of free and frank communications between lawyers and their clients. This was summed up, according to Mr Justice Wynn Williams, in the case of *R v Derby Magistrates Court ex parte P* [1996] 1 AC487, where Lord Taylor stated at page 507D:

“Legal professional privilege is much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.”

22. Mr Justice Wynn Williams stated at paragraphs 41 and 53 of his judgement:

“It is also common ground, however, that the task of the Tribunal, ultimately, is to apply the test formulated in section 2(2)(b) [of FOIA, the equivalent of section 2(1)(b) of FOISA]. A person seeking information from a government department does not have to demonstrate that “exceptional circumstances” exist which justify disclosure. Section 42 is not to be elevated “by the back door” to an absolute exemption. As [counsel for the Information Commissioner]

¹ <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>



submits in her Skeleton Argument, it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any qualified exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.

...

The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption; in any event ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least."

23. The Commissioner will now go on to consider the public interest arguments made by Ms Ewart and the Ministers.
24. Ms Ewart did not make any specific submissions to the Commissioner regarding the public interest test. However, in her review request to the Ministers, she asserted that the public had a right to know whether the Bill was ECHR compliant.
25. In the Ministers' view, an authority should be able to communicate with its legal advisers fully and frankly in confidence. Similarly, as in this case, its advisers should be able to communicate amongst themselves fully and frankly in confidence in order to come to a final and informed legal view.
26. The Ministers argued that it is a matter of public record that the Law Officers would have considered whether or not the Bill was in the legislative competence of the Scottish Parliament and that would have included consideration of ECHR compliance². The Ministers stated that the fact that they had acknowledged that one of the Scottish Government's most senior legal advisers considered the legislative competence of the Bill before it was introduced should provide sufficient reassurance to Ms Ewart and others on this point.
27. In the Ministers' view, while the issue of legislative competence may be of some general public interest, this did not mean that it was in the public interest for legal advice on the issue to be disclosed. The Ministers argued that there was a significant public interest in protecting the ability of Ministers and their legal advisers to seek and receive comprehensive legal advice in confidence to enable them to make fully informed decisions on the legislative competence of proposed legislation.

² Paragraph 2.35 of the Scottish Ministerial Code (2011 edition) states, "A Bill must ... be accompanied by a statement, which will have been cleared with the Law Officers, that the Bill is within the legislative competence of the Scottish Parliament."



28. In this case, the Commissioner accepts there is a public interest in disclosure of the information under consideration in order to scrutinise the actions of the Scottish Government and to contribute to transparency and accountability.
29. The Commissioner has also considered the strong public interest in ensuring that all organisations, including the Scottish Government, are able to obtain and consider legal advice on a confidential basis. The Commissioner also acknowledges that 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.
30. In this instance, and at the time of the Ministers' decision on review, the Commissioner is not satisfied that the public interest in disclosure of this particular information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal advisor and client. The Commissioner considers the fact that it is a matter of public record that the Law Officers advise the Ministers on the legislative competence of all Bills introduced to the Scottish Parliament in large part satisfies the public interest in this case.
31. Consequently, the Commissioner accepts that the Ministers were entitled to withhold the legal advice under section 36(1) of FOISA.
32. Having reached this conclusion, the Commissioner is not required to consider the application of section 29(1)(c) of FOISA which the Ministers also applied to the withheld information.

Article 10 ECHR – Freedom of expression

33. In her application, Ms Ewart directed the Commissioner to a briefing prepared by the Campaign for Freedom of Information in Scotland (CFOIS) entitled "Human Rights and the Public's Right to Know".³ In Ms Ewart's view, she was entitled to access the requested information under FOISA as it (FOISA) should be compatible with the jurisprudence of the European Court of Human Rights (ECtHR). (Any reference to Ms Ewart's views in what follows is a reference to the views contained in the CFOIS's briefing.)
34. Ms Ewart stated that Article 10 of the ECHR provides that everyone has a right to hold an opinion and to receive and impart information (the full text of Article 10 is reproduced in the Appendix).
35. Ms Ewart referred to several decisions of the ECtHR which she considered lent weight to the arguments that Article 10 could be used as a means of accessing information rather than through a request under section 1 of FOISA.
36. In their submissions, the Ministers argued that Article 10 did not confer a right to be provided with information, but rather a right of access to available information without interference by a public body. In the Ministers' view, Article 10 was not, of itself, a way to access information and did not circumvent existing domestic legislation or prevent certain information from being

³ <http://www.cfoi.org.uk/pdf/foisahumanrightsbrief.pdf>



withheld. The Ministers also noted that the right created by Article 10 was not an absolute right and could be restricted under the conditions at paragraph 2 of Article 10.

37. In the Commissioner's view, if Article 10 confers a right to obtain information from a Scottish public authority, there is no reason to suppose that the boundaries of that right would mirror the statutory right of access under FOISA. Indeed, Ms Ewart's argument on Article 10 appears to be that her statutory right of access under FOISA is less than her Article 10 right may be.
38. The Commissioner notes that Article 10 confers (inter alia) a right "to receive ... information ... without interference by public authority ...". The issue is therefore whether this aspect of Article 10 gives rise to a general right of access to information held by Scottish public authorities which those authorities are unwilling to disclose.
39. The Commissioner has considered the judgment of the ECtHR in *Leander v Sweden* (1987) 9 EHRR 433⁴. In that case, the ECtHR held that "*The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual*". This means that the right to "receive" information in Article 10(1) covers cases where an authority is seeking to restrict someone from receiving information from another who wishes to impart it to him. It does not include a right to obtain information directly from the authority itself when the authority is unwilling to provide it.
40. The Commissioner notes that the interpretation adopted in the *Leander* decision has been applied repeatedly in subsequent decisions of the ECtHR. For example, in *Roche v UK* (2006) 42 EHRR⁵, the ECtHR held that "*the freedom to receive information prohibits a Government from restricting a person from receiving information that others may wish or may be willing to impart to him and that that freedom cannot be construed as imposing on a State ... positive obligations to ... disseminate information of its own motion*".
41. The Commissioner considers there is no general right of access to information under Article 10. Consequently, she does not consider that Article 10 confers a right to receive information that is otherwise exempt under FOISA.
42. The Commissioner is aware that relationship between Article 10 and the (UK) Freedom of Information Act 2000 is currently being considered by the Supreme Court in the case of *Kennedy v The Charity Commission*. The Supreme Court heard evidence in that case on 29 October 2013, but has yet to issue its judgment. Given the expectation in FOISA (see section 49(3)(b) of FOISA) that the Commissioner issue decisions within four months, she has concluded that it is not appropriate to delay her decision until the judgement of the Supreme Court has been issued.

⁴ <http://www.bailii.org/eu/cases/ECHR/1987/4.html>

⁵ [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{\"fulltext\":\[\"roche\"\],\"documentcollectionid2\":\[\"GRANDCHAMBER\", \"CHAMBER\"\],\"itemid\":\[\"001-70662\"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{\)



DECISION

The Commissioner finds that, in respect of the matters raised in Ms Ewart's application, the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Ms Ewart.

Appeal

Should either Ms Ewart or the Scottish Ministers 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
19 February 2014



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.

...

- (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.

...



European Convention on Human Rights

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

...