

Decision Notice



Decision 054/2011 Lothian and Borders Fire Brigade Union and Lothian and Borders Fire Board

Transcripts of interviews of named individuals

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Scottish Information Commissioner

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Summary

Lothian and Borders Fire Brigade Union (the Union) requested from Lothian and Borders Fire Board (the Board) transcripts of interviews between seven named individuals and Lothian and Borders Fire and Rescue Service's (LBFRS) accident investigation team. The Board responded by advising the Union that it was withholding the information in terms of section 36(1) and (2) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, the Union remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Board had dealt with the Union's request for information in accordance with Part 1 of FOISA, by correctly withholding the requested information under section 36(1) of FOISA. He did not require the Board to take any action.

Relevant statutory provisions and other sources

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

1. For the purposes of FOISA, this decision is concerned with the actions of Lothian and Borders Fire Board (the Board), which is the joint board serving as the fire authority for five local authorities. The Board is a Scottish public authority for the purposes of FOISA.
2. The day to day running of the fire service is carried out by Lothian and Borders Fire and Rescue Service. For clarity, in this decision notice Lothian and Borders Fire Board is referred to as "the Board", while Lothian and Borders Fire and Rescue Service is referred to as "LBFRS". LBFRS is not, itself, a Scottish public authority for the purposes of FOISA, but was responsible for dealing with the information requests considered in this decision notice on behalf of the Board.



3. On 16 July 2010, Lothian and Borders Fire Brigade Union (the Union) wrote to LBFRS requesting the following information copies of the interview transcripts between the LBFRS accident investigation team and seven named individuals. The interviews sought by the Union relate to an incident in July 2009, when a firefighter died while tackling a fire at an Edinburgh pub.
4. LBFRS responded on 13 August 2010. LBFRS indicated that it was withholding the requested information as it considered it exempt from disclosure in terms of section 36(1) and (2) of FOISA.
5. On 16 August 2010, the Union wrote to LBFRS requesting a review of its decision. The Union drew LBFRS's attention to a previous request where LBFRS, after contact with the Scottish Information Commissioner, reached an informal agreement with the Union to release two interview transcripts. The Union submitted that the current request was materially similar to the earlier request and the transcripts should be released to it in the terms of the existing informal agreement.
6. LBFRS notified the Union of the outcome of its review on 10 September 2010. It upheld its original decision to withhold the information in terms of section 36(1) and (2) of FOISA, and noted that it was not bound by any precedent in respect of the way it had handled previous requests.
7. On 30 September 2010, the Union wrote to the Commissioner, stating that it was dissatisfied with the outcome of LBFRS'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 the Union 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

9. On 30 September 2010, LBFRS was notified in writing that an application had been received from the Union and was asked to provide the Commissioner with any information withheld from it. LBFRS responded with the information requested and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted LBFRS, 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, LBFRS was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.



11. In response, LBFRS submitted that it considered the requested information exempt from disclosure in terms of section 36(1) and 36(2) of FOISA, and provided detailed submissions supporting its application of these exemptions, including its views on the public interest test.
12. The investigating officer also contacted the Union during the investigation, seeking its submissions on the matters to be considered in the case. The submissions obtained from LBFRS and the Union are summarised and considered (where relevant) in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

13. 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 the Union and LBFRS and is satisfied that no matter of relevance has been overlooked.

Section 36(1) - Confidentiality

14. 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*).
15. 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.
16. 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.
17. In this case, LBFRS advised that the withheld information comprises interviews with seven members of LBFRS Senior Command Team who were involved in the incident at which a firefighter lost his life.



18. LBFRS advised that an investigation commenced almost immediately following the incident, and that correspondence with legal advisors and insurers was initiated shortly thereafter and maintained. It explained that, at a meeting with legal advisors in April 2010, LBFRS was advised by senior Counsel to take statements from the relevant Senior Command Team members to inform its preparations for any subsequent litigation. The transcripts of those interviews constitute the withheld information in this case, and it is LBFRS's view that the information was prepared in contemplation of litigation, and is therefore exempt in terms of section 36(1) of FOISA.
19. To support its arguments, LBFRS provided the Commissioner with a copy of the legal advice relating to this matter which makes clear that the interviews with the Senior Command Team (transcripts of which are the subject of this information request) were undertaken at the behest of senior Counsel, in contemplation of litigation.
20. Before the Commissioner can accept that the transcripts are exempt under section 36(1), he must also consider whether privilege has been waived, i.e. that the information is no longer confidential as a result of public disclosure of the information concerned by LBFRS. Having considered the facts in this case and the information available, he accepts that the privilege in the transcripts has not been waived.
21. Having reviewed the context and timing of the interview transcripts, the Commissioner is satisfied that they were created by LBFRS in contemplation of litigation. The interviews were conducted when LBFRS was facing potential litigation on several fronts and were undertaken in response to legal advice provided to LBFRS. In the circumstances, the Commissioner is satisfied that the withheld information comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, the Commissioner accepts that this information is exempt in terms of section 36(1) of FOISA.
22. The exemption in section 36(1) is a qualified exemption, which means that the application of this exemption is subject to the public interest test set out in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.

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 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 (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally, including cases such as this which concerns litigation privilege. Consequently, while he will consider each case on an individual basis, he is likely to order the release of such communications in highly compelling cases only.

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24. With regard to the public interest, LBFRS consider there to be no compelling reason why, in this instance, the Commissioner should overrule its right to confidentiality in respect of litigation privilege, concluding that there is a greater public interest in maintaining the right to confidentiality of communications (and thus withholding the information) than in releasing it.
25. The Union submitted that it is in the public interest for LBFRS to disclose the withheld information to the Union. The Union explained that it is currently investigating the circumstances surrounding the death of the firefighter at the incident to which the interviews relate, and that the withheld information will ensure the accuracy of its findings. The Union argued that, as the representative body for fire fighters within LBFRS, its investigation aims to inform LBFRS and the wider fire service community of the reasons why the firefighter lost his life whilst engaged in fire fighting duties.
26. The Union maintained that it is therefore in the public interest for it to be able to produce an accurate report into the circumstances of this accident. The Union also noted that the report it produces will be forwarded as evidence for a Fatal Accident Inquiry.
27. In this case, the Commissioner recognises that the Union has strong reasons for believing that disclosure of the transcripts would be in the public interest. The Commissioner accepts that disclosure would add to the general understanding of the events surrounding the firefighter's death and would also enable the Union to ensure that its report was as factually accurate as possible. Disclosure of the transcripts would also give the public an overview of how LBFRS managed the incident during which the fatality occurred and would enable greater transparency of how LBFRS discharges its duties. However, the Commissioner also recognises that LBFRS is potentially facing litigation in relation to the incident, and he finds that there is a greater public interest in allowing LBFRS to prepare fully for litigation, without these preparations being open to examination by the other party.
28. On balance, therefore, 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).
29. Given that the withheld information is found to be exempt in terms of section 36(1) of FOISA, the Commissioner is not required to consider the application of the exemption in section 36(2) of FOISA.

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DECISION

The Commissioner finds that Lothian and Borders Fire Board complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Lothian and Borders Fire Brigade Union.

Appeal

Should either Lothian and Borders Fire Brigade Union or Lothian and Borders Fire Board 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
15 March 2011



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.

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