

Decision Notice



Decision 061/2009 Mr John Lindsay and Audit Scotland

Legal advice obtained by Audit Scotland

Reference No: 200900160
Decision Date: 26 May 2009

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr Lindsay requested from Audit Scotland information on a number of topics, including legal advice obtained by Audit Scotland. Audit Scotland released some information but withheld the legal advice in terms of section 36(1) of FOISA. Following a review, Mr Lindsay remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Audit Scotland had partially failed to deal with Mr Lindsay's requests for information in accordance with Part 1 of FOISA. While he found that Audit Scotland had acted correctly by withholding the information in terms of section 36(1) of FOISA, he also found that it had breached the requirements of section 10(1) by failing to respond to Mr Lindsay's request within the specified timescale.

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); 10(1) (Time for compliance), 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. Mr Lindsay was in correspondence with Audit Scotland in relation to the Controller of Audit's statutory report on East Lothian Council (*Departmental reorganisation and voluntary redundancy of the chief executive SR 2007/1*). This correspondence included Audit Scotland writing to Mr Lindsay on 8 April 2008.
2. On 24 October 2008, Mr Lindsay emailed Audit Scotland requesting the following information:
 1. *Pensionable Travel Allowance or Leased Car*

You wrote to me on 8th April giving me an explanation of the above and the number of your employees receiving it.
 - a) *Could you please now provide me with an update of the current position including any legal or personnel advice internal or external which you have taken about it.*



- b) *Could you provide me with an outline of the sequence of events including communications with all parties which led to the deletion of the word "pensionable" in the phrase "pensionable travel allowance or lease car" from your website some time in February/March 2008.*
 - c) *Please confirm that whatever the label given to this allowance either now or in the past it is a travel allowance payable to 77 employees as an alternative to a leased car and is pensionable, as originally described on your website.*
2. *SR Report 2007/1 - Departmental Reorganisation and Voluntary Redundancy of the Chief Executive*

Please provide me with a copy of all the legal advice you took or were given by third parties including that both taken and given [if any] by the Accounts Commission concerning the above.

3. *Correspondence between East Lothian Council and Audit Scotland and/or the Accounts Commission*

Please provide me with copies of all communications between East Lothian Council and Audit Scotland, and between East Lothian Council and the Accounts Commission subsequent to the publication of the above Report to date.

3. Audit Scotland responded on 21 November 2008. In relation to request 1, Audit Scotland provided Mr Lindsay with an explanation of an ongoing project relating to its reward policy for staff, provided Mr Lindsay with some information and referred him to an earlier reply. It advised that except in the context of the project referred to, no additional legal or personnel advice had been sought.
4. In relation to requests 2 and 3, Audit Scotland provided certain information but withheld the remainder. In relation to request 2 Audit Scotland explained it required further time to consider its position in relation to the legal advice obtained.
5. In relation to request 3, Audit Scotland explained that because some of the remaining material held by Audit Scotland had originated from the Council, it had contacted the Council to obtain information which would inform its consideration of his request.
6. On 9 December 2008, Mr Lindsay emailed Audit Scotland and clarified that in relation to request 2, the legal advice he was seeking was not just that received from East Lothian Council but the legal advice received by Audit Scotland directly. The legal advice received by the Council and provided to Audit Scotland, however, falls within the scope of request 3 and was dealt with as such. Request 3 is the subject of a separate application to the Commissioner and will not be referred to further within this decision notice.



7. On 16 December 2008, Audit Scotland responded in relation to request 2, indicating that it was treating the legal advice it had obtained from its own legal advisors as exempt information under section 36 (1) of FOISA (which relates to information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings). Having considered the public interest test in section 2(1)(b) of FOISA, it concluded that the public interest in allowing legal advice to be fully received and discussed in confidence outweighed that in disclosure.
8. On 17 December 2008, Mr Lindsay emailed Audit Scotland requesting a review of its decision. not to release the legal advice
9. On 14 January 2009 Audit Scotland notified Mr Lindsay of the outcome of its review. It upheld the decision to withhold Audit Scotland's legal advice in terms of section 36(1) of FOISA.
10. On 27 January 2009, Mr Lindsay wrote to the Commissioner's Office, stating that he was dissatisfied with the outcome of Audit Scotland's 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 Mr Lindsay 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

12. On 13 February 2009, Audit Scotland was notified in writing that an application had been received from Mr Lindsay and asked to provide the Commissioner with any information withheld from the applicant. Audit Scotland responded with the information requested and the case was then allocated to an investigating officer.
13. The investigating officer subsequently contacted Audit Scotland, 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, Audit Scotland was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
14. Audit Scotland responded on 12 March 2009 providing submissions as to why its own legal advice and that obtained by the Council's was exempt in terms of section 36(1) of FOISA. These arguments will be considered in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has consider all of the withheld information and the submissions made to him by both Mr Lindsay and Audit Scotland and is satisfied that no matter of relevance has been overlooked.

Technical issues

16. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case. The Commissioner notes that having received Mr Lindsay's request on 24 October 2008 Audit Scotland did not respond (in substantive terms) to request 2 until 16 December 2008. It does not appear to have required clarification of the request – and certainly did not seek any in terms of section 1(3) of FOISA.
17. The Commissioner therefore finds that Audit Scotland failed to respond to this request within the 20 working days allowed by section 10(1) of FOISA and thereby failed to comply with Part 1 of FOISA.

Section 36(1) Confidentiality

18. Audit Scotland indicated that it was relying upon the exemption contained in section 36(1) of FOISA to withhold the legal advice it had obtained.
19. The exemption in section 36(1) of FOISA exempts from disclosure information in respect of which a claim of 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 which is legal advice privilege. Legal advice privilege covers communications between lawyer and client in which legal advice is sought or given.
20. For legal advice privilege to apply, certain conditions must be fulfilled. The communication must be with a professional legal advisor, such as a solicitor (including an in-house one) or an advocate. The legal adviser must be acting in their professional capacity as such and the communication must occur in the context of their professional relationship with their client. The information must be confidential between lawyer and client: privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy.
21. Audit Scotland supports the Accounts Commission and the Auditor General in carrying out their statutory duties under the Local Government (Scotland) Act 1973 and the Public Finance and Accountability (Scotland) Act 2000 respectively. Audit Scotland confirmed that in carrying out the investigation which resulted in the Controller of Audit's statutory report on East Lothian Council (referred to in paragraph 1 above), it had obtained the advice of Senior Counsel on certain questions. A copy of this advice was provided to the Commissioner.



22. Having considered the content of the legal advice and the circumstances under which it was obtained (i.e. in the context of a professional relationship between a legal advisor and their client, in the course of which confidential legal advice was provided) that the information in it is subject to legal advice privilege and therefore exempt information under section 36(1) of FOISA. Having considered in particular the Controller of Audit's report referred to above, he accepts Audit Scotland's argument that in this case privilege has not been waived.
23. The exemption in section 36(1) is, however, 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 this exemption, 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

24. 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 (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. 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.
25. In considering the public interest in terms of section 2(1)(b) of FOISA, Audit Scotland indicated that it had taken account of the following;
 - a. Issues it believed favoured disclosure:
 - i. The information may be of interest to the applicant.
 - b. Issues it believed favoured maintenance of the exemption
 - i. The information was obtained as part of a process leading to an audit report in the public interest. It is one piece of information of many taken into account in informing the Audit Scotland report and in itself gives an incomplete picture.
 - ii. Audit Scotland should be permitted to communicate in confidence with legal advisors in order to obtain comprehensive legal advice to assist its consideration of matters arising from the audit and to inform decisions about whether to make a formal public report under the local government legislation.
 - iii. Legal advice informs Audit Scotland's understanding and helps it form robust views about effective oversight of expenditure of public funds.



26. Audit Scotland confirmed it considered requests on a case by case basis and in this particular case believed, on balance, that the public interest was best served by allowing legal advice to be fully received and discussed in confidence, under legal privilege, to assist in forming its thinking and views prior to reporting in public.
27. Having considered the public interest arguments on both sides, whilst accepting that Mr Lindsay has an interest in receiving the information in question and recognising that there are reasons which might justify disclosing legal advice of this kind in certain circumstances, in this instance the Commissioner does not consider that the public interest in disclosure of this particular legal advice is sufficiently compelling to outweigh the strong public interest in the confidentiality of communications between legal advisor and client. Consequently, he accepts that Audit Scotland correctly withheld the legal advice in terms of section 36(1) of FOISA.

DECISION

The Commissioner finds that Audit Scotland partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Lindsay.

The Commissioner finds that by withholding information in terms of section 36(1) of FOISA, Audit Scotland complied with Part 1.

However, by failing to respond to Mr Lindsay's request for information within the timescales laid down by sections 10(1), Audit Scotland failed to comply with Part 1. In this case, noting that the information was properly withheld in any event, the Commissioner does not require any further action in response to this particular application in relation to this failure.



Appeal

Should either Mr Lindsay or Audit Scotland 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.

Kevin Dunion
Scottish Information Commissioner
26 May 2009



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.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) ... the receipt by the authority of the request; or

...

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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