

Decision Notice

Decision 067/2015: Mr James Taylor and the City of Edinburgh Council

Legal advice ensuring compliance with Human Rights legislation

Reference No: 201500398

Decision Date: 28 May 2015



Scottish Information
Commissioner

Summary

On 19 December 2014, Mr Taylor asked the City of Edinburgh Council (the Council) for information relied upon to prove a statement by Council officer that the Council's processes – in respect of taxi licensing – complied with Human Rights legislation. The Council first told Mr Taylor that it did not hold any information. At review, it withheld information under section 36(1) of FOISA, considering that the information was legal advice in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Following this review, Mr Taylor remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had properly responded to Mr Taylor's request for information in accordance with Part 1 of FOISA and was entitled to withhold the information under section 36(1).

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)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 19 December 2014, Mr Taylor made a request¹ for information to the Council, during ongoing correspondence with the Council over matters relating to its processes for the regulation of taxi licences. In its response to a previous information request, the Council had told Mr Taylor that its procedures were compliant with Human Rights legislation. Mr Taylor asked for information to prove the assertion that the Council ensures its process complied with Human Rights. He asked what "subset" of the information already provided to him had been used to substantiate this claim.
2. On 20 January 2015, the Council gave notice, in terms of section 17 of FOISA, that it was unable to provide Mr Taylor with the specific recorded information requested because the Council did not hold the information.
3. On 25 January 2015, Mr Taylor wrote to the Council questioning why it did not hold the information. He asked how the Council could rely on information to substantiate its statement and not hold that information.
4. The Council notified Mr Taylor of the outcome of its review on 23 February 2015. The Council apologised for any confusion arising from its previous reply, but wished to make clear that it held no additional information that fell within the scope of his request, other than the legal advice which was the subject of an earlier, related decision from the Commissioner - *Decision 132/2014 Mr James Taylor and the City of Edinburgh Council*². The Council told Mr Taylor that this decision notice confirmed that the only information held by the Council and falling within the scope of his previous request was legal advice provided to members of

¹ https://www.whatdotheyknow.com/request/compliance_with_echr_and_hra_199#incoming-621259

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201400236.aspx>

the Regulatory and Licensing Sub-Committee. The Council stated that the information it held remained unchanged from the date of Mr Taylor's previous request.

5. The Council confirmed that the information relied upon by the named Council officer (the legal advice) was still held and was part of the Council's records. It stated that, in *Decision 132/2014*, the Commissioner had accepted that the Council was entitled to withhold the legal advice under section 36(1) of FOISA. The Council therefore continued to withhold the information under the same exemption and maintained its view that the public interest in the disclosure of this information did not outweigh the public interest in maintaining legal professional privilege.
6. On 26 February 2015, Mr Taylor applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Taylor stated he was dissatisfied with the Council's decision to withhold information. Mr Taylor referred to the previous decision by the Commissioner (*Decision 132/2014*), and asked that the legal advice should be disclosed to him on the basis that it had been disseminated by the Council beyond its agreed original "client". (In the previous case, the Council had described the "client" receiving the confidential legal advice as the Councillors who were new members of the Regulatory and Licensing Sub-Committee, to whom the advice was made available through their induction training pack.) Mr Taylor considered that the confidentiality test required to comply with section 36(1), or other relevant sections, of FOISA could no longer be satisfied, as the legal advice had been shared with Council officers.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Taylor made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 26 March 2015, the Council was notified in writing that Mr Taylor had made a valid application. The Council was asked to send the Commissioner the information withheld from him. The Council provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

Commissioner's analysis and findings

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

Request for information

11. Section 1(1) of FOISA creates a general entitlement to access information held by a Scottish public authority, subject to the application of any exemptions in Part 2 of FOISA and any other relevant provision in Part 1. "Information" is defined in section 73 of FOISA as "information recorded in any form". Given this definition, it is clear that FOISA does not usually require a public authority to create recorded information in order to respond to a

request, or to provide information which is not held in a recorded form (e.g. about a person's intentions or opinions). The definition excludes unrecorded information.

12. In his application to the Commissioner, Mr Taylor explained that he made his request “to identify the precise information [the named officer] was relying on to justify his claim.” The Council identified the information in question but withheld it under section 36(1) of FOISA.
13. The Council explained to the Commissioner that the withheld information was the only information that fell within Mr Taylor’s request. It explained how it had assessed what recorded information it held, describing the searches it had conducted and listing the Council personnel it had consulted.
14. The Commissioner accepts that the Council has identified all the information falling within the request. She will now consider whether the Council was correct to withhold the information under section 36(1) of FOISA.

Section 36(1) of FOISA - Confidentiality

15. 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 covered by legal advice privilege, which covers communications between lawyer and client in which legal advice is sought or given.
16. The Council withheld legal advice provided by a Council solicitor to members of the Regulatory and Licensing Sub-Committee in an induction training pack. This is the same information as that considered by the Commissioner in *Decision 132/2014*. The Council maintained that this information was subject to legal advice privilege, as it covered communication between the Council's Solicitor and their client, in which legal advice was provided.
17. 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 their professional capacity and the communications must occur in the context of the legal adviser's professional relationship with their client.
18. In his application, Mr Taylor submitted (with reference to *Decision 132/2014*):

“Para 20 clearly identifies that legal advice privilege can only apply between a professional legal adviser (in this case the council solicitor) and the client (in this case identified as the new elected councillor officials of the Regulatory Committee and licensing Sub-Committee). This has therefore been clearly established and accepted.

“While Councillors perform their duties associated with council policy, there is no distinct legal rights connection between elected councillors and unelected council officials. Neither is legally linked with the other; neither can be held accountable to the other’s line of responsibility and accountability.”

19. Mr Taylor believed that, this being so, the Council’s officers had no legal entitlement or right of access to the legal advice provided to the new members of the Regulatory Committee and Licensing Sub-Committee. Given that a Council officer was relying on the legal advice as the basis for his statement that the Council’s process complied with Human Rights legislation, Mr

Taylor believed that "...the information relied on in this case has been divulged out-with the lawyer/client confidentiality requirement and the information is no longer legally confidential".

20. Mr Taylor also referred to paragraph 23 of *Decision 132/2014*, which states that information cannot be privileged unless it is confidential, and that such claim to confidentiality must be capable of being sustained when the information is requested. He believed that the Council's defence of the information's confidentiality was no longer legally competent and the information should be disclosed.
21. The Council stated that the Induction Training Information Pack was a confidential document that the Council has not placed into the public domain, and does not intend to in the future. As a consequence, the Council considered that the legal advice contained within it remained confidential. The Council was made aware of Mr Taylor's dissatisfaction and invited to comment. It stated:

"The Council strongly disagrees with Mr Taylor's interpretation of the breaching of the lawyer/client confidentiality requirement in these circumstances. The provision of the training to the Regulatory Committee is provided by Council Officers. It is the Council's position that Council Officers within the Licensing service would fall within the definition of a client under the briefing guidance and tests set out by the Commissioner."
22. The Council stated that the Council officer named in Mr Taylor's request had been supplied with the legal advice to ensure he fulfilled his role in respect of the investigation of licensing complaints, with particular relevance to his dealings with the Council's Regulatory Committee. Again, the Council considered that this officer met the definition of a client, in respect of the legal advice provided by the Council's solicitors.
23. The Council apologised that its position had not been made clear in its previous submissions, when it had described the client as the recipient of the training material containing the legal advice (i.e. the new members of the Regulatory Committee and Licensing Sub-Committee).
24. The advice at issue was created by a Council solicitor for the Council. The Regulatory Committee that received the advice is not a separate legal person from the Council. Rather, it obtains its powers, rights and duties through the Council's powers, rights and duties as Licensing Authority under the appropriate legislation.
25. The Commissioner takes the view that an in-house Solicitor working for a Scottish local authority has one client: the Council. This means that an official working for the Council can be a client, in terms of legal advice sought and given. Elected members can also be the client, particularly when the advice is sought or received in their capacity as a member of a Council committee. Therefore, although the Commissioner accepts that there is a difference between officials and elected members, she accepts that both can be considered as the client in relation to legal advice from the Council's in-house Solicitor.
26. For a claim of confidentiality to be maintained, the information must not have been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. If this happens, the information ceases to be confidential. Where 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.
27. For the reasons outline above, the Commissioner does not accept that the confidentiality of the legal advice was lost by making it available to some Council officers.

28. Whilst part of the Induction Training Information Pack has been disclosed³ to Mr Taylor by the Council in terms of FOISA, and is in the public domain, the part which is relevant to Mr Taylor's request was not disclosed.
29. As far as the Commissioner is aware, the advice within an Induction training pack has not been disclosed to anyone other than those Councillors who have received training for the Regulatory Committee, and certain Council officers. The Council has explained that these officers required access to the advice so that they could fulfill their role in delivering training to elected members and in respect of the investigation of licensing complaints, with particular relevance to dealings with the Council's Regulatory Committee, and ensuring compliance with legal advice.
30. As far as the Commissioner can discern, the legal advice has been communicated to the new members of the Regulatory Committee and Licensing Sub-Committee and those few Council officers who are necessary and proper parties to the decision-making process to which the advice related.
31. The Council has not indicated whether its officers would be expected to keep the information confidential, or whether they were given any indication that such information was "privileged and confidential". Equally no indication has been given that the officers would not be aware of the privileged nature of the information.
32. 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. There is no evidence of loss of confidentiality. The Commissioner is satisfied that the information withheld under section 36(1) is (and was, at the time relevant for this decision) information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. She therefore accepts that it is exempt from disclosure under section 36(1) of FOISA.
33. The exemption in section 36(1) is subject to the public interest test set out in section 2(1)(b) of FOISA. 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.

The public interest test

34. In its response to Mr Taylor, the Council acknowledged that there was a clear public interest in disclosing the legal advice, as this would provide openness and transparency in local government. However, the Council submitted that any public interest in disclosing the legal advice was outweighed by the "overwhelming" public interest in ensuring that legal advice provided to the Council by its solicitor remained confidential.
35. The Council explained that the legal advice in question was provided as part of general training to Councillors. The Councillors would also receive additional specific legal advice focusing on any legal issues relating to a particular complaint; this advice would also be provided to the taxi driver who was the subject of the complaint. The Council took the view that a taxi driver subject to a complaint would be aware of any legal advice provided to

elected members in relation to his or her particular case. He or she would therefore be in a position to agree with or challenge such legal advice.

36. In relation to the information at issue, the Council submitted that the public interest in disclosure was outweighed by the Council's need to be able to seek and obtain legal advice without it being subsequently released into the public domain, potentially prejudicing the Council's position. This was particularly relevant regarding the advice provided to the Regulatory and Licensing Sub-Committee and the decisions that it makes. The Council argued that if individuals are dissatisfied with the Sub-Committee's decisions there are appropriate appeals processes to follow which would not require disclosure of the general background legal advice that the Sub-Committee received.
37. The Council referred to the view expressed in *Decision 132/2014* that, in determining where the balance of the public interest lies in relation to section 36(1), the Commissioner must take into account the significant weight to be attached that the public interest in maintaining the exemption. There will be occasions where this significant public interest may be outweighed by the public interest in disclosing the information, for example, disclosure may be appropriate where:
- the requirement for disclosure is overwhelming
 - the privileged material discloses wrongdoing by/within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material disclosed an apparently irresponsible and wilful disregard of advice
 - a large number of people are affected by the advice
 - the passage of time is so great that disclosure cannot cause harm.
38. The Council stated that none of these considerations apply in the circumstances of this particular case. After careful consideration, the Commissioner agrees that none of the considerations set out above apply here.
39. The Commissioner also notes as relevant the reasoning in paragraphs 33-37 of *Decision 132/2014*⁴ in respect of the courts' recognition of the significant in-built weight of public interest in maintaining the exemption to which section 36(1) applies.
40. In *Decision 132/2014* (issued on 17 June 2014), the Commissioner was not satisfied that the public interest in disclosure of the information (the same information as under consideration in this case) was sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal advisor and client. Other than the passage of time, the Commissioner is not aware of anything that would alter the balance of the public interest in case under consideration, and has concluded that, as before, the balance lies in maintaining the exemption and withholding the legal advice.
41. Consequently, the Commissioner accepts that the Council correctly withheld the information to which it applied section 36(1) of FOISA.

⁴ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201400236.aspx>

Decision

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

Appeal

Should either Mr Taylor or the Council 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.

Margaret Keyse
Head of Enforcement

28 May 2015

Appendix 1: 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.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info