

Decision Notice



Decision 079/2009 Ms Diana Cairns and the City of Edinburgh Council

Legal advice held by Council

Reference No: 200900533
Decision Date: 9 July 2009

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Summary

Ms Cairns requested from the City of Edinburgh Council (the Council) a copy of the joint legal opinion it had obtained in relation to the use of common good land. The Council responded by relying on section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) to withhold this information from Ms Cairns. Following a review, Ms Cairns remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Ms Cairns' request for information in accordance with Part 1 of FOISA. The Commissioner found that privilege in the legal advice had been waived and therefore the Council had not been entitled to rely on the exemption in section 36(1) of FOISA for withholding this information.

He required the Council to disclose a copy of the legal opinion to Ms Cairns.

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); 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. On 11 December 2008, Ms Cairns wrote to the Council requesting the following information:
A copy of the recent joint legal opinion obtained by the Council from Malcolm Thomson QC and one other about the common good issue relating to Portobello Park.
2. A response was provided by the Council to Ms Cairns on 12 January 2009. In this response the Council advised that it was not willing to release the legal opinion to Ms Cairns and relied on the exemption in section 36(1) of FOISA.



3. On 5 February 2009, Ms Cairns wrote to the Council requesting a review of its decision. In particular, Ms Cairns drew the Council's attention to the fact that it had previously withheld a legal opinion from her under the same exemption, a decision the Commissioner had not upheld when she applied to him. Ms Cairns explained that she considered the circumstances of this case were the same, as she believed the essence of the opinion to be in the public domain.
4. The Council notified Ms Cairns of the outcome of its review on 9 March 2009. In its response, the Council advised Ms Cairns that it was upholding its reliance on section 36(1) of FOISA for withholding the legal opinion from her. The Council explained that it did not accept that the general rule on waiver of legal privilege applied in a situation where, as here, there were no legal proceedings.
5. On 16 March 2009, Ms Cairns wrote to the Commissioner's Office, stating that she was dissatisfied with the outcome of the Council's 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 Cairns 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

7. On 19 March 2009, the Council was notified in writing that an application had been received from Ms Cairns and asked to provide the Commissioner with any information withheld from her. The Council responded with the information requested, together with submissions as to its justification for relying on section 36(1) of FOISA. The case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, 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, the Council was asked to provide more detailed arguments on its consideration of the public interest test in section 2(1)(b) of FOISA.
9. A response was received from the Council on 8 May 2009. Its submissions will be considered further in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

10. 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 Ms Cairns and the Council and is satisfied that no matter of relevance has been overlooked.
11. As mentioned above, Ms Cairns requested from the Council a particular legal opinion it had obtained from two Senior Counsel. The Council has withheld this information from Ms Cairns under section 36(1) of FOISA.

Section 36(1) – 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 comprising communications between a legal adviser and client. Such communications are protected by a form of legal professional privilege known as legal advice privilege. For legal advice privilege to apply, certain conditions must be fulfilled.
13. Firstly, the information being withheld must relate to communications with a legal adviser, such as a solicitor or advocate. The legal adviser must be acting in their professional capacity and the communications must occur in the context of their professional relationship with their client.
14. In this case, the two Senior Counsel had been asked by the Council to provide an opinion on a specific question relating to land under consideration for the building of a school. The opinion comprises advice within a relationship where the legal advisers (two advocates) have been asked to provide that advice in their professional capacity to a client (the Council). The Commissioner is therefore satisfied that this is a communication between a legal advisor and client, provided in circumstances in which legal advice privilege could apply.
15. Although the Commissioner is satisfied that the opinion constitutes information to which legal advice privilege could be attached, for the exemption under section 36(1) 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. This raises the issue of waiver. In this case, taking account of Ms Cairns' argument that the essence of the opinion is in the public domain already, the Commissioner needs to go on to consider whether the Council has waived legal professional privilege in relation to this advice.



Waiver of legal professional privilege

16. As the Commissioner indicated in *Decision 002/2008 Ms D Cairns and the City of Edinburgh Council*, in certain circumstances the holder (in this case, the Council) of privilege in particular advice sought or obtained from a legal advisor can be found to have waived it. Where the content of a privileged document has been disclosed in order to evidence, or provide authority for, a position maintained by the holder of the privilege, then privilege in that information will have been waived.
17. As noted in *Decision 002/2008 Ms D Cairns and the City of Edinburgh Council*, a party cannot “cherry pick” or put part of a privileged document or series of documents into the public domain without waiving the privilege in the remainder. This will not be the case, however, where a party has released some, but not all, of the privileged information it holds, as long as the disclosed information and the undisclosed information relate to separate issues, or are clearly severable from each other, so as not to create a misleading impression of the information disclosed. In these latter circumstances, the privilege in the undisclosed (separate or severable) information will remain intact.
18. In her request, request for a review and application to the Commissioner, Ms Cairns has expressed her belief that although the information requested does relate to a communication between a legal advisor and their client, the right to legal professional privilege has been waived as a consequence of an extract from the opinion appearing in a press statement released by the Council. Ms Cairns provided the Commissioner with a copy of this press statement.
19. The Council attempted to rebut Ms Cairns’ argument by referring to the general rule of waiver as derived from the principle referred to in Templeman, L.J., in the case of *Great Atlantic Insurance v Home Insurance*¹. In the Council’s view, the effect of this principle was that where a party deployed in court material which would otherwise be privileged, the opposite party and the Court must have an opportunity of satisfying themselves that what the party had chosen to release from privilege represented the whole of the material relevant to the issue in question. This, the Council argued, ensured that the Court’s decision was not based on misleading or incomplete evidence.
20. The Council went on to submit that it had been unable to find any cases extending the general rule in relation to legal privilege to a case where there were no legal proceedings. In the Council’s view, such an extension would be at odds with the principle underlying the rule. It concluded that the general rule applied only to conduct in the course of litigation and could not apply to this case, where there was no litigation.

¹ *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529



21. As mentioned above, privilege in legal advice can be waived in a number of ways. In considering this case, the Commissioner has been mindful of the findings of the Information Tribunal (which, although not binding on his decision making, can be taken into account where relevant) in the case of *Malcolm Kirkaldie and the Information Commissioner and Thanet District Council* (Appeal number EA/2006/001). In this case the Tribunal comments that privilege can be waived in a number of ways, the most obvious being where one party to legal proceedings seeks to rely on privileged material and therefore discloses it. Where all the material relating to the matter in issue is disclosed, no real difficulty arises. The position becomes more complicated, however, where some material attracting privilege is disclosed but other material relating to the same matter is not. The Tribunal points out that while the courts recognise each party's freedom to choose whether and to what extent privilege is waived, they also recognise an obvious unfairness in the parties to litigation being allowed to "cherry-pick" the material they choose to disclose (the phrase used in *R v Secretary of State for Transport, Ex p. Factortame Ltd (Discovery)* [1997] 9 Admin LR 591 QB).
22. The Information Tribunal decision continues to the effect that the test for waiver is whether the *contents* of the document in question are being relied upon. A mere reference to a privileged document is not enough, but in the Tribunal's view (referring to the case of *Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd* [2003] EWCA Civ 901) quoting or summarising the contents amounts to waiver. It then states that publication of privileged information to the general public will deprive the information of any privilege which previously existed, with the consequence (for example) that any press release making use of privileged information will almost certainly result in a waiver of that privilege (*Chandris Lines Ltd v Wilson & Horton Ltd* [1981] 2 NZLR 600).
23. In *Kirkaldie*, the Information Tribunal concluded that legal advice privilege had been waived as a result of the partial disclosure of legal advice, in circumstances other than in the course of litigation or legal proceedings. Privilege was found to have been waived in the *Kirkaldie* case by the provision of a summary of the advice in question at a Council meeting, followed by the recording of that disclosure in the minute of the meeting. It should also be noted that in the *Chandris Lines* case referred to in the decision, privilege was waived by publication of part of the relevant document in a newspaper: while litigation was ongoing between the two parties, the disclosure in question was not made in the course of that litigation.
24. The case of *AWB Limited v Honorable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234, referred to in the Information Tribunal decision in the case of *James Kessler QC and the Information Commissioner and HM Commissioners for Revenue and Customs* (Appeal Number EA/2007/0043), also indicates that the principle waiver is not confined to material deployed in litigation. There, the Federal Court of Australia considered whether AWB had waived privilege in legal advice relating to its dealings under the Oil-For-Food Programme for Iraq. AWB had summarised the advice in its discussions with the Australian Government, the Independent Inquiry Committee of the UN ("IIC") and a Special Commission established by the Commonwealth of Australia ("the Commission"). The Court concluded that:



“Overall, I am satisfied that by means of these disclosures, AWB deployed the gist or substance of legal advice it had obtained. Moreover, I am satisfied that AWB made a conscious and voluntary decision to deploy this legal advice in its dealings with the Australian Government, the IIC and the Commission because it considered that it was in its commercial interests to do so. These actions are inconsistent with the maintenance of confidentiality in the legal advice.”²

25. Having taken the above judicial and Tribunal decisions into account, it appears to the Commissioner that where information which would otherwise be subject to legal advice privilege has been released by a Scottish public authority in support of a particular position it is taking, even in part or in summary and whether in the course of litigation or legal proceedings or otherwise, then privilege in the whole of that information will be deemed to have been waived. As indicated above, there are exceptions to this general rule in respect of undisclosed information which relates to separate issues, or is otherwise clearly severable, from the information which has been disclosed.
26. Having considered the information which was disclosed by the Council in its press release dated 1 December 2008, together with the content of the legal opinion withheld, the Commissioner is satisfied that the main essence of the legal opinion has in fact been placed in the public domain by the Council. In doing this, clearly in support of action it proposed to take in respect of certain land, the Commissioner considers the Council to have waived privilege in the whole content of the opinion. Basically, the opinion addresses one question and the Commissioner can identify nothing of substance in it which might reasonably be regarded as severable from the information in the press release.
27. As the Commissioner is satisfied in this case that the Council has waived its right to claim legal professional privilege in relation to the information withheld, he cannot uphold the Council's reliance on section 36(1) of FOISA. Therefore, the Commissioner is not required to go on to consider the application of the public interest test.

DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Cairns. In failing to disclose the legal opinion requested by Ms Cairns, the Council misapplied the exemption in section 36(1) of FOISA and thereby failed to deal with Ms Cairns' information request in accordance with section 1(1) of FOISA.

The Commissioner therefore requires the City of Edinburgh Council to disclose the legal opinion to Ms Cairns by 27 August 2009.

² Quote from paragraph 178 of *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234

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Appeal

Should either Ms Cairns or the City of Edinburgh Council 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
9 July 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.

...

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...