

# Decision Notice

---

## Decision 202/2014: Mr David Caldwell and the Scottish Ministers

---

### Legal advice on tuition fees

Reference No: 201401482

Decision Date: 19 September 2014



Scottish Information  
Commissioner

## Summary

---

On 13 January 2014, Mr Caldwell asked the Scottish Ministers (the Ministers) for legal advice they held on charging students from the rest of the United Kingdom if Scotland were to become independent. The Ministers withheld the advice on the basis that it was subject to legal professional privilege. Following an investigation, the Commissioner accepted this.

## 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 the Appendix to this decision. The Appendix forms part of this decision.

## Background

---

1. On 13 July 2014, Mr Caldwell made a request for information to the Ministers. The information requested included any legal advice on the legality of charging tuition fees to students from the rest of the United Kingdom if Scotland were to become independent, other than the legal opinion obtained by Universities Scotland.
2. The Ministers responded on 27 January 2014. They informed Mr Caldwell that they considered the information to be exempt from disclosure under section 36(1) of FOISA, as it was subject to legal advice privilege and the public interest did not favour disclosure.
3. On 25 March 2014, Mr Caldwell wrote to the Ministers, requesting a review of their decision. He believed there was an overwhelming public interest in disclosure.
4. The Ministers notified Mr Caldwell of the outcome of their review on 23 April 2014. They upheld their original decision.
5. On 10 July 2014, Mr Caldwell wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Caldwell stated he was dissatisfied with the outcome of the Ministers' review because he believed it was in the public interest that the information be disclosed.

## Investigation

---

6. The application was accepted as valid. The Commissioner confirmed that Mr Caldwell made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
7. On 16 July 2014, the Ministers were notified in writing that Mr Caldwell had made a valid application. They were asked to send the Commissioner the information withheld from Mr Caldwell. The Ministers provided the information and the case was allocated to an investigating officer.

8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions. In particular, they were asked to justify their reliance section 36(1) of FOISA.
9. The Ministers provided submissions to the investigating officer.

## **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 Mr Caldwell and the Ministers. She is satisfied that no matter of relevance has been overlooked.
11. Having considered the Ministers' submissions, the Commissioner agrees with them on what information fell within the scope of Mr Caldwell's request.

### **Section 36(1) - Confidentiality**

12. 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. This includes communications subject to legal professional privilege. An aspect of legal professional privilege is legal advice privilege, which the Ministers argued applied in this case.
13. Legal advice privilege applies to communications between legal advisers and their clients in which legal advice is sought or given. The following conditions must be fulfilled for legal advice privilege to apply:
  - (i) The communications must involve a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser or an external solicitor engaged by the authority.
  - (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 Ministers submitted that section 36(1) of FOISA applied to the content of the legal advice because the advice was provided by a qualified lawyer, acting in that capacity, and was legal advice provided in the context of the lawyer's professional relationship with their client (the Ministers).
15. Having considered the content of the information withheld as legal advice and the circumstances under which it was obtained by the Ministers, the Commissioner is satisfied that this information meets the conditions set out in paragraph 13 above and therefore is subject to legal advice privilege.
16. Information cannot be privileged unless it is also confidential. It must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed: the information must possess the quality of confidence at that time, so it cannot have been made public, either in full or in a summary substantially reflecting the whole. The Commissioner is satisfied that this information remained confidential at the time the Ministers

responded to Mr Caldwell's information request and requirement for review (and that it remains so now).

#### *Public interest test*

17. The exemption in section 36(1) is subject to the public interest test in section 2(1)(b) of FOISA.
18. 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. In a Freedom of Information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB). Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.

#### *Submissions by Mr Caldwell*

19. In his requirement for review, Mr Caldwell stated that he considered it to be overwhelmingly in the public interest that the legal advice should be published for reasons of openness and transparency, and so that informed judgements could be made on an issue on which senior experts had cast serious doubts on the legality of the Ministers' proposed scheme.

#### *Submissions by the Ministers*

20. In their submissions, the Ministers recognised the public interest in disclosure of the withheld information, to promote openness in relation to their policy position and to help inform public debate. On the other hand, they submitted that this was met in part in *Scotland's Future* (the White Paper on Scottish independence), which provided the public and stakeholders with information on the Ministers' position and its rationale to help inform public debate.
21. The Ministers also submitted that there was a very strong public interest in maintaining legal professional privilege and ensuring the confidentiality of communications between legal advisers and their clients or other legal advisers. They continued that it remained important in all cases for lawyers to be able to provide free and frank legal advice, considering and discussing all issues and options, without fear that the advice might be disclosed and (potentially) taken out of context.
22. The Ministers believed this to be particularly important in relation to constitutional issues in the period leading up to the referendum on independence, given the amount of political, public and media scrutiny of their proposals. In areas subject to political debate, such as this, the Ministers submitted that any expectation that legal advice could be released would inevitably lead to that advice being much more circumspect (and therefore less effective). The confidentiality of such information should, therefore, be protected, to allow Ministers to consider legal advice privately and reach a fully considered position.
23. The Ministers identified a particularly strong public interest in maintaining legal professional privilege in relation to a significant piece of legal advice such as this, which might have a bearing on future negotiations with the European Commission and the UK Government. They stated that, should the referendum result in a vote for independence, plans for Scotland's EU membership and subsequent position on charging tuition fees would be the subject of discussion and negotiation involving them and both of these other parties. To reveal details of how the Ministers had arrived at a policy position by releasing the legal

advice would, they argued, be likely to have a material bearing on the Ministers' position in these negotiations.

24. In conclusion, the Ministers recognised some public interest in releasing the legal advice, but did not believe this was sufficient to outweigh the very strong public interest in maintaining the confidentiality of legal advice in this case.

#### *Commissioner's view*

25. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications 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 or within an authority
- the material discloses a misrepresentation to the public of advice received
- the material discloses 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.

26. After careful consideration, the Commissioner is satisfied that none of the considerations set out above apply here. The Commissioner acknowledges the strong inherent public interest in maintaining legal professional privilege. In this case, having considered the information in context, she has been unable to identify any public interest consideration of equal or greater weight which would favour disclosure.

27. In all the circumstances of the case, therefore, the Commissioner is satisfied that the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption in section 36(1). Consequently, she finds that the Ministers were entitled to withhold the information under that exemption.

## **Decision**

---

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

## **Appeal**

---

Should either Mr Caldwell 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 September 2014**

### 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](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**