

Decision Notice



Decision 292/2013 Mr James Cowan and Police Scotland

Legal advice on using volunteer air assets

Reference No: 201302352

Decision Date: 18 December 2013

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Rosemary Agnew

Scottish Information Commissioner

Kinburn Castle
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Summary

On 12 July 2013, Mr Cowan asked the Chief Constable of the Police Service of Scotland (Police Scotland) for legal advice about Police Scotland's decision not to use volunteer air assets. Police Scotland responded by withholding this information under section 36(1) of FOISA, on the basis that it was subject to legal advice privilege. The Commissioner accepted this following an investigation.

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. Mr Cowan is the Chairman of an organisation known as Civil Air Patrol (CAP), which is a voluntary organisation also known as Sky Watch. CAP's mission statement on their website is:
To promote for the benefit of the public, and the preservation and protection of people and property, the use of aerial observation over land and water to identify situations where people and property are at risk and then reporting such incidents to and working with the statutory emergency services and other such bodies as deemed appropriate.
2. By way of background, CAP submitted that it previously had agreements with five of the eight former Chief Constables of the then Scottish police forces ("the legacy forces"), which now constitute Police Scotland, regarding their respective use of CAP's volunteer air assets. That is, the use of CAP's pilots and aircraft, in private ownership, to assist in aerial searches for missing persons, etc.
3. On 8 May 2013, Police Scotland, following previous correspondence and discussion with CAP, wrote to CAP explaining that they had decided to stop using volunteer air assets. Amongst other factors informing this decision, they referred to having obtained legal advice.



4. On 12 July 2013, Mr Cowan wrote to Police Scotland requesting the legal advice referred to in the letter of 8 May 2013.
5. Police Scotland responded on 6 August 2013. They withheld the requested information in terms of section 36(1) of FOISA, as information to which a claim of confidentiality could be maintained in legal proceedings. They stated that the information was subject to legal professional privilege and, in particular, legal advice privilege. Police Scotland informed Mr Cowan that they were of the view that the public interest favoured withholding the information.
6. On 24 August 2013, Mr Cowan wrote to Police Scotland requesting a review of their decision. In particular, Mr Cowan drew Police Scotland's attention to certain official publications and expressed the view that the police had certain obligations to co-operate with the voluntary sector. He considered disclosure to be necessary to allow CAP to vindicate its position.
7. Police Scotland notified Mr Cowan of the outcome of their review on 18 September 2013, upholding their previous decision without modification.
8. On 4 October 2013, Mr Cowan wrote to the Commissioner, stating that he was dissatisfied with the outcome of Police Scotland's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Mr Cowan made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

10. On 17 October 2013, Police Scotland were notified in writing that an application had been received from Mr Cowan and were asked to provide the Commissioner with the information withheld from him. Police Scotland responded with the information requested and the case was then allocated to an investigating officer.
11. The investigating officer subsequently contacted Police Scotland, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. They were asked to justify their reliance on section 36(1) of FOISA, and subsequently did so.
12. Mr Cowan also provided submissions on the application of section 36(1) and what he considered to be relevant public interest considerations.



Commissioner's analysis and findings

13. 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 Cowan and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

Section 36(1) of FOISA – Confidentiality

14. 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.
15. Police Scotland stated that they were relying on the exemption in section 36(1) to withhold the information falling within the scope of the request. Police Scotland explained that the information withheld comprised confidential communications between officers of the former Strathclyde Police and, from 1 April 2013, Police Scotland and their legal advisers - namely solicitors within the Legal Services Department and Counsel - in which advice was sought and given.
16. Police Scotland submitted that the communications attracted legal advice privilege, given their nature and content. Further explanation of this was provided, focusing on the content of the withheld information.
17. For legal advice privilege to apply, certain conditions must be fulfilled:
- a) the communication must be with a professional legal adviser, such as a solicitor or advocate.
 - b) 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.
 - c) the information must be confidential between lawyer and client.
18. Police Scotland submitted that communications were imparted by the legal advisers to police officers in circumstances that implied an obligation of confidence. The legal advisers were acting in their professional capacity and the communications occurred in the context of their professional relationship with their clients – officers of Strathclyde Police/Police Scotland. The communications were marked “restricted – legally privileged advice”.
19. In all the circumstances, Police Scotland considered the exemption in section 36(1) to be engaged.



20. Having considered the content of the withheld information and the circumstances under which it was obtained (i.e. in the context of a professional relationship between a legal adviser and their client, in the course of which confidential legal advice was requested and provided), the Commissioner is satisfied that the information meets the conditions set out at paragraph 17 a) and b) above.
21. Information cannot be privileged, however, unless it is also confidential. For the section 36(1) exemption 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: for this to be the case, the information must possess the quality of confidence at that time (i.e. at least up to the point at which the authority carries out its review and communicates the outcome to the applicant).
22. A claim of confidentiality will not be capable of being maintained where information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where the 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.
23. Having considered the contents of the withheld information, and whilst noting that discussions had taken place between Police Scotland and CAP, the Commissioner is satisfied that the legal advice referred to above has not been made public, either in full, or in summary.
24. The Commissioner is satisfied that the withheld information is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, the Commissioner accepts that all of the information sought by Mr Cowan is exempt from disclosure under section 36(1) of FOISA.
25. The exemption in section 36(1) is 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 section 36(1), 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

26. In his application to the Commissioner, Mr Cowan argued that it was in the interests of transparency that the information be disclosed. He highlighted the importance of the Police engaging with, and obtaining support from, the voluntary sector, particularly where voluntary organisations had relevant expertise and equipment. He believed there to be a continuing public interest in the provision of the services offered by his organisation and highlighted the difficulties in challenging the legal advice obtained by the Police if his organisation did not know what that advice was. While acknowledging the importance of maintaining confidentiality of communications on administration of justice grounds, he did not believe this case to have anything to do with the administration of justice.



27. In general terms, Police Scotland acknowledged that disclosure of legal advice sought by and provided to public authorities could render their decision making processes more transparent. They further acknowledged that greater transparency, and the concomitant opportunity for greater public scrutiny, might in turn help to ensure that decisions were made in a fair, just and reasonable manner.
28. Police Scotland acknowledged in this case that Mr Cowan and those involved in volunteer air observation organisations like CAP had a particular interest in obtaining the information - and that disclosure could demonstrate to those interested parties that the Chief Constable's decision to refrain from using their assistance was based on full and reasoned legal advice.
29. Police Scotland went on to argue, however, that it does not follow that disclosure of the communications would be in the wider public interest.
30. Police Scotland considered disclosure would have significant ramifications for public authorities generally, which would not serve the public interest. They considered it important that communications from legal advisers to their public authority clients imparting legal advice were comprehensive and included an assessment of the strengths and weaknesses of their clients' position, and recommendations as to the steps that might be taken to counteract any weaknesses identified. They identified a concern that legal advisers might be less candid should disclosure of their advice be likely (and clients less likely to seek legal advice), to the detriment of sound decision making.
31. In all the circumstances, therefore, Police Scotland considered there to be a significant public interest in protecting the confidentiality of legal communications.
32. Police Scotland submitted that they had regard to a number of the Commissioner's previous Decisions which had noted that the courts recognise the strong public interest in protecting legal privilege. In particular, they noted that in previous decisions the Commissioner took cognisance of the comments of the House of Lords in *Three Rivers District Council and others v Governor and Company of the Bank of England*¹. In these decisions, the Commissioner has affirmed the inherent public interest in maintaining the right to confidentiality of communications between legal advisers and their clients, and observed that the release of such communications is only likely to be ordered in "highly compelling cases".
33. Police Scotland did not consider that, in this case, the reasons for disclosure were so "highly compelling" that they outweighed the public interest in maintaining the exemption under section 36(1), explaining that (for example) there were no claims that the communications were made in the furtherance of any wrongdoing on the part of Police Scotland or its legal advisers.
34. Police Scotland further submitted that both Mr Cowan and CAP had already been apprised of Police Scotland's position on the issue covered by the legal advice and they did not consider that disclosure of the communications would provide them with a fuller understanding of the Chief Constable's decision.

¹ (2004) UKHL 48



35. Police Scotland concluded that any public interest in disclosure was outweighed by the strong public interest in protecting legal professional privilege by maintaining the confidentiality of communications between legal advisers and clients.

The Commissioner's view

36. As noted by Police Scotland, 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 mentioned at paragraph 32 above. The Commissioner will apply the same reasoning to communications attracting legal professional privilege generally: she does not consider it necessary that the administration of justice is directly engaged by the matter under consideration. Consequently, while each case will be considered on its merits, the Commissioner is likely to order the release of such communications in highly compelling cases only.
37. The Commissioner has considered all of the submissions put to her regarding the public interest in this case. She accepts that there is a strong public interest in Police Scotland using all assets available to them to ensure the safety of the public and the protection of life, an example being air assets. In this regard, the Commissioner accepts that this case concerns a matter of public importance and consequence, and therefore there is a public interest in its disclosure.
38. On the other hand, the Commissioner acknowledges that operational decisions regarding the use of air assets provided by a voluntary organisation such as CAP are matters for Police Scotland to determine. She acknowledges that it is in the public interest that such operational decisions are based on sound and comprehensive legal advice, provided in the knowledge that such legal advice has the protection usually afforded to privileged material of this kind.
39. Having considered all of the submissions in this case, the Commissioner is not satisfied that the public interest in disclosure of this particular information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
40. On balance, therefore, the Commissioner is satisfied, in all the circumstances of this case, that the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption in section 36(1). Consequently, the Commissioner accepts that Police Scotland were entitled to withhold the legal advice under section 36(1) of FOISA.



DECISION

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

Appeal

Should either Mr Cowan or the Chief Constable of the Police Service of Scotland 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
18 December 2013



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.

...