



Scottish Information
Commissioner
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Decision Notice 275/2024

Legal opinion about the use of specific libraries

Authority: Aberdeen City Council

Case Ref: 202400507

Summary

The Applicant asked the Authority for information relating to the use of Ferryhill and Woodside Libraries especially relating to the legal interpretation of use restrictions. The Authority withheld the information on the basis that it was legally privileged and that the public interest favoured withholding the information. The Commissioner investigated and found that the Authority had complied with FOISA in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 36(1) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 31 December 2023, the Applicant requested access to all documentation generated by Legal Officers during their review of historic deeds, minutes and ancillary Council records related to the purported use restrictions on Ferryhill and Woodside Libraries. The Applicant sought legal interpretations regarding the validity and enforceability of these use restrictions.
2. On 30 January 2024, the Authority responded, stating that the requested documentation was exempt from disclosure under Regulation 10(4)(e) (internal communications) of the Environmental Information (Scotland) Regulations 2004 (EIRs).
3. The Authority confirmed that it possessed legal notes on Council Blue Books related to Ferryhill and Woodside Libraries as well as information from in-house discussions between solicitors and various service areas within the Authority.

4. The Authority refused the request under Regulation 10(4)(e) of the EIRs, arguing that the legal advice and interpretations given by in-house solicitors are internal communications and thus excepted from disclosure.
5. The Authority acknowledged the public interest in decisions about the libraries but believed maintaining the confidentiality of legal advice to be more important. It claimed disclosing this information could undermine the ability of solicitors to provide candid advice.
6. The Authority provided guidance on accessing related information, as well as images from its Blue Books.
7. On 2 February 2024, the Applicant submitted a requirement for review to the Authority as he was of the view that it was in the public interest for the Authority to disclose legal advice, paid for by the public purse, which was used to defend the closure of two libraries which had been opposed by the local community.
8. The Authority provided a response to the Applicant's requirement for review on 29 February 2024, overturning its initial response and informing the Applicant, in line with section 16 of FOISA, that it was applying the exemption under Section 36(1) of FOISA citing Confidentiality – Legal Advice Privilege.
9. On 9 April 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because they did not agree with the application of the exemption, and considered the public interest to lie in disclosure of the legal information requested (which had been financed from public funds).

Investigation

10. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
11. On 18 April 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These focused on the Authority's reasons for withholding the requested information, and why it did not consider the public interest favoured disclosure.
13. The Applicant was also provided with an opportunity to provide further comments on why he considered the public interest favoured disclosure of the withheld information.
14. During the investigation, the Authority informed the Commissioner that it considered some of the information contained in the documents that had been withheld to fall out with scope of the Applicant's request. Having considered this information the Commissioner is not satisfied that all of this information does fall outwith scope of the request.
15. For the information that the Commissioner is satisfied falls outwith scope of the request he will not consider this any further in his Decision Notice.

Commissioner's analysis and findings

16. The Commissioner has considered all submissions made to him by the Applicant and the Authority.

Section 36(1) - Confidentiality

17. 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. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies.
18. The Authority confirmed that it was relying on legal advice privilege to withhold the requested information.
19. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled:
 - (i) the information must relate to communications with a professional legal adviser, such as a solicitor or advocate
 - (ii) the legal adviser must be acting in their professional capacity
 - (iii) the communications must occur in the context of the legal adviser's professional relationship with their client.

The Authority's submissions

20. The Authority submitted that each piece of withheld information consisted of legal knowledge used to formulate the advice provided by its in-house solicitors, concerning the interpretation of the enforceability of historic use restrictions on the libraries.
21. The Authority explained that the authors of the withheld information were its own in-house solicitors, and the recipients were the various officials within the Authority responsible for the decision-making process.
22. It is the Authority's view that disclosure of the requested information would compromise the confidentiality of legal communications and undermine reliance on legally privileged information.
23. The Commissioner has considered the content of the information and the circumstances in which it was created, and is satisfied that the information meets the conditions for legal advice privilege to apply. All conditions stated above, apply; the information involves communications with a legal adviser (in-house solicitor), who is acting in their professional capacity, and the communications occur in the context of the legal adviser's professional relationship with their client.
24. The exemption in section 36(1) is a qualified exemption, which means that it is subject to the public interest test set out in section 2(1)(b) of FOISA. This means that the exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

The public interest test - section 36(1)

The Authority's submissions

25. The Authority argued that maintaining the exemption allowed it to obtain and consider legal advice confidentially which it states is essential for making informed decisions.
26. In its submissions, the Authority acknowledged that disclosure would enhance transparency and allow the public to understand the legal basis for its decisions regarding the libraries.
27. The Authority however believed that maintaining the exemption ensures that it can receive candid legal advice, which is vital for sound decision-making and upholding the integrity of legal communications. A principle, it noted, which had been upheld and recognised by the Courts.
28. The Authority contended that releasing legal advice in this instance would set a precedent that would negatively impact decision-making going forward and significantly reduce its capacity to rely on legal advice.
29. The Authority found that, on balance, the public interest was in favour in maintaining the exemption and preserving the confidentiality of legal advice thus outweighing the public interest in disclosure.

The Applicant's submissions

30. The Applicant believed the public interest in disclosing the legal information outweighed the Authority's interest in keeping it confidential. They argued that it was vital that the legal interpretations provided to the Authority regarding the use of Woodside and Ferryhill Libraries should be shared with the public, as it involved public funds and decisions that affected the community.

Commissioner's consideration of the public interest test

31. As the Commissioner has noted in several 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 \(QB\)](#).¹ Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
32. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a compelling public interest in disclosing the information. For example, disclosure may be appropriate where (the list is not exhaustive):
 - the privileged material discloses a wrongdoing by/within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material discloses an apparent irresponsible and wilful disregard of advice

¹ [Department for Business Enterprise & Regulatory Reform v O'Brien & Anor \[2009\] EWHC 164 \(QB\) \(10 February 2009\)](#)

- the passage of time is so great that disclosure cannot cause harm.
33. While the Commissioner accepts, having examined the withheld information, that the contents of the advice would be of interest to the Applicant and the general public, he does not consider that any of the above categories would apply (or that the information would contribute materially to any other compelling public interest in disclosure).
 34. The Commissioner appreciates that a decision to close libraries is a highly emotive one, particularly given the important function they fulfil at a time of growing concern around literacy levels amongst young people, together with a reduction in community facilities within local areas. He also recognises that this public interest would extend to understanding the factors taken into account by the Authority in its decision making.
 35. However, the Commissioner must take account of the important public interest in legal professional privilege itself and the public interest in allowing public authorities to obtain confidential legal advice.
 36. The Commissioner accepts that there is a strong public interest in a Scottish public authority being able to receive full, unhindered legal advice. Without such comprehensive advice being available to the Authority, its ability to come to fully informed decisions would be restricted, which would not be in the public interest.
 37. Having considered the substance of the withheld information, together with the statement made in the report referred to by the Applicant in his information request, the Commissioner is not satisfied that the public interest in disclosure of the withheld information is significant enough to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
 38. In conclusion, after careful consideration, the Commissioner is satisfied that the Authority correctly withheld all of the information falling within scope of the Applicant's request under section 36(1).

Decision

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

Appeal

Should either the Applicant or the Authority 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.

Euan McCulloch
Head of Enforcement

26 November 2024