

Decision Notice

Decision 020/2016: Mr Tom Taylor and East Renfrewshire Council

Legal advice

Reference No: 201501782

Decision Date: 2 February 2016



Scottish Information
Commissioner

Summary

On 25 June 2015, Mr Taylor asked East Renfrewshire Council (the Council) for any internal or external legal advice regarding Community Councils, with particular reference to their constitutions and the newly adopted Scheme of Establishment.

The Council withheld the requested information. Following a review, Mr Taylor remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had been entitled to withhold the legal advice under section 36(1) of FOISA.

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 25 June 2015, Mr Taylor made a request for information to the Council. He asked for any internal or external legal advice regarding Community Councils, with particular reference to their constitutions and “the newly adopted scheme” (i.e. the 2015 Scheme of Establishment for Community Councils).
2. The Council responded on 21 July 2015. The Council notified Mr Taylor that the amended scheme had not yet been implemented and that it was therefore withholding the information under sections 30(c) (Prejudice to effective conduct of public affairs) and 36(1) (Confidentiality) of FOISA. The Council explained that once the new scheme was fully implemented the legal advice would be disclosed. The Council indicated that disclosure was likely to happen in either October or November 2015.
3. On 21 July 2015, Mr Taylor wrote to the Council requesting a review of its decision on the basis that the Council had not explained why the exemption contained in section 30(c) of FOISA applied to the requested information. Mr Taylor also argued that even if section 36(1) of FOISA did apply to the requested information, the public interest favoured disclosure. Mr Taylor argued that the Council had failed to demonstrate that it had applied the public interest test.
4. The Council notified Mr Taylor of the outcome of its review on 20 August 2015. In its review outcome, the Council disclosed some of the withheld information to Mr Taylor, but it maintained that the remainder was exempt in terms of section 36(1) of FOISA and that the public interest favoured maintaining the exemption.
5. On 30 September 2015, Mr Taylor wrote to the Commissioner. Mr Taylor applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Taylor submitted that he was dissatisfied with the outcome of the Council’s review because he considered that the

public interest favoured disclosure. Mr Taylor also argued that the exemption in section 36(1) of FOISA had been applied incorrectly.

Investigation

6. 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.
7. On 14 October 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.
8. On 28 October 2015, the Council notified the Commissioner that it had published the withheld information on its website, and it provided the Commissioner with a link to the information.
9. Mr Taylor was asked if he was satisfied that the disclosed information met the terms of his request, and he agreed that it did. However, Mr Taylor asked the Commissioner to investigate the Council's handling of his information request and to issue a decision in relation to his application.
10. The Council was asked if it still sought to rely on the exemptions contained in section 36(1) and 30(c) of FOISA. The Council submitted that both exemptions applied to the requested information, but it did not provide detailed arguments on section 30(c) of FOISA, as it considered that the information would be exempt under section 36(1) of FOISA and so submissions on section 30(c) were not required.
11. 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

12. 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 Taylor and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 36(1) of FOISA - Confidentiality

13. 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 to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
14. 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 an advocate;
 - (ii) The legal adviser must be acting in their professional capacity; and

- (iii) The communications must occur in the context of the legal adviser's professional relationship with their client.
15. The Council submitted that at the time of Mr Taylor's request for review all of the requested information was subject to legal advice privilege. The Council explained that the requested information comprised communications between the Council (the client) and its legal agents. The Council explained that these communications effectively sought and provided legal advice as to the merits and/or appropriateness of particular provisions of draft regulations and incidental matters arising. Furthermore, the Council submitted that the wording of Mr Taylor's initial request for information makes it clear that he was seeking legal advice obtained by the Council.
 16. The Council argued that the requested information was confidential at the time it carried out a review of its response to Mr Taylor. The information was not in the public domain as elections to the new Community Councils had not yet taken place. The Council explained that while various iterations of the new scheme had been released to the public in draft form, the issues, reasoning and conclusions reached around the specific wording and rationale had not been disclosed. The Council stated that in no sense had the entirety of the advice or a comprehensive summary of it been disclosed.
 17. Mr Taylor queried the application of this exemption and argued that there are no proven indications of legal proceedings other than "alleged rumour". In his view, the Council has not demonstrated a genuine link between disclosure and harm, and is simply inferring that there is a hypothetical possibility of legal proceedings.
 18. Having considered the scope of the request, 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 given), the Commissioner is satisfied that the information meets the conditions set out in paragraph 14 above and is subject to legal advice privilege.
 19. The Commissioner cannot accept Mr Taylor's implication that, because there is no litigation involved, legal advice privilege does not apply. Legal professional privilege can be split into two main types - "legal advice privilege" and "litigation privilege". In the present case, the information in question clearly comprises communications where legal advice has been provided by legal advisers acting in their professional capacity. Therefore, it fulfils the criteria required for legal advice privilege to apply: no litigation, active or in prospect, is required.
 20. Information cannot be privileged 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 could be maintained in legal proceedings. In this case, the claim to confidentiality is in the form of legal advice privilege. 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 a review of its response to the information request and communicates the outcome to the requester.
 21. Having considered all relevant submissions and the contents of the withheld information, the Commissioner is satisfied that the legal advice referred to above had not been made public, either in full or in summary, at the time the Council carried out a review of its response to Mr Taylor.

22. The Commissioner is satisfied that the withheld information comprises 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 Taylor is exempt from disclosure under section 36(1) of FOISA.
23. 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

24. 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)*¹. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
25. Mr Taylor submitted that it was in the interest of the public to be fully aware of the activities of the Council in its attempts to establish a new scheme for Community Councils, and that disclosure of the legal advice was therefore in the public interest. Mr Taylor noted that social media forums and newspapers had communicated public concern about the Council's proposals to change the scheme for Community Councils. Mr Taylor submitted that many people used these channels of communication to suggest that the Council was acting outside its remit.
26. Mr Taylor argued that there was a very legitimate public interest in a particular policy decision which had a significant impact on the public of East Renfrewshire: many people viewed this policy as a draconian alteration to the scheme for Community Councils.
27. Mr Taylor argued that the Council had failed to identify "the public interest argument on each side" and had failed to carry out an exercise to determine where, on balance, the public interest lies. The Council had failed to recognise that there is an in-built presumption in FOISA that it is in the public interest to disclose information unless an authority can show why there is a greater public interest in withholding the information.
28. The Council explained that the requested information relates to the creation of new Community Councils under a revised Scheme of Establishment. The Council acknowledged that the public had an interest in how local democracy was intended to operate at a community level, but it argued that this interest had been satisfied by issuing draft schemes by a formal consultation process as regards review of the old scheme, and by "the individual's ability to take their own legal advice and (if required) challenge using legal means, the scheme as adopted".
29. The Council submitted that the need to firmly establish new Community Councils under the revised scheme, to encourage local participation and to further community representation were considered to be in the greater public interest and believed this would be jeopardised

¹ <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

by release of the legal advice and the by the comment/debate that it anticipated this would cause.

30. The Council explained that it has fiduciary duties to its taxpayers to preserve and utilise public funds to their benefit. It argued that disclosing confidential legal advice into the public domain undermines this duty by prejudicing the Council's ability to seek such advice on a full and frank basis. The Council submitted that when discharging its statutory functions and exercising discretionary powers, it must ensure that it does not act *ultra vires* or in a way which would undermine its ability to function for the greater public good. It argued that there are occasions when it needs to obtain impartial and expert legal advice to ensure the legitimacy of its actions in such matters. As noted above, these matters may be subject to legal challenge by individuals or groups who hold conflicting views, and disclosure of the legal implications of the Council's position may both increase the likelihood of such challenge (with the attendant cost and delay implications for the adoption of policies/processes believed to be in the greater public interest) and prejudice the Council's preparation in meeting the legal challenge.
31. The Council stated that it had always maintained that the legal advice regarding the new Community Council scheme would be published after the Community Councils had been through the first electoral process (October/November 2015). It had received communications evidencing resistance to the concept of a changed scheme and mistrust as to the basis on which the scheme had been reviewed and revised. It noted that the proposed timing of the information release was intended to ensure that the new Community Councils could be established without disruptive public arguments or comments around the advice received, which could have had a deterrent effect on members of the public who would otherwise have been interested in becoming Community Council members. The Council indicated that this was another reason why it considered that it had acted in the public interest by withholding the information at the point at which Mr Taylor requested a review.
32. The Council submitted that it is in the general public interest that an authority, in fulfilment of its public functions, can communicate with its legal advisers freely and frankly in confidence so that it can obtain the most comprehensive legal advice about proposed actions and defend its position adequately as required. The Council maintained that the public interest in disclosure does not overcome the more general benefit in preserving the confidentiality of its communications with its legal advisers.
33. 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 disclosure of the information, but there will always be a strong public interest in maintaining the right to confidentiality of communications between a legal adviser and their client (as recognised by the Courts).
34. In this case, the Commissioner accepts that there is a general public interest in disclosure of the information under consideration, to allow scrutiny of the actions and public statements of the Council and contribute to transparency and public accountability. Community Councils play a vital role in local democracy; accordingly, there is a strong public interest in understanding why new scheme rules were adopted and what discussions the Council had with legal advisers during the process of developing the new scheme, particularly when the proposed changes have proved controversial in some respects.
35. Mr Taylor has pointed out that the development of the new Community Council scheme led to significant negative coverage in newspapers and social media outlets and that this clearly

demonstrated that the public were concerned with the proposals put forward by the Council, reflecting the strong public interest in the matter.

36. However, the Commissioner has also considered the strong public interest in ensuring that public authorities, including the Council, are able to obtain and consider legal advice on a confidential basis. As noted above, 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.
37. The Commissioner has considered carefully the arguments made by Mr Taylor which support disclosure of the information in the public interest. However, at the time the Council reviewed its response to Mr Taylor's request, the Commissioner is not satisfied that the public interest in disclosure of this particular information was sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client. In reaching this decision, the Commissioner has taken into account that the new scheme had not been implemented at this time.
38. On balance, the Commissioner accepts that greater weight should be attached to the arguments which would favour withholding the information. In all the circumstances of this case, therefore, the Commissioner concludes that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 36(1). Consequently, she finds that the Council was entitled to withhold the information in this case under that exemption.
39. As the Council has found the information to be exempt from disclosure under section 36(1) of FOISA, she is not required to consider the application of the exemption contained in section 30(c) of FOISA.

Decision

The Commissioner finds that East Renfrewshire 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 East Renfrewshire 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

2 February 2016

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.

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