

Decision Notice



Decision 056/2010 Mr William Lonsdale and the Scottish Further and Higher Education Funding Council

Request for legal advice

Reference No: 200901030
Decision Date: 19 April 2010

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Kevin Dunion

Scottish Information Commissioner

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Summary

Mr William Lonsdale requested from the Scottish Further and Higher Education Funding Council (the Funding Council) legal advice obtained by the Funding Council.

The Funding Council responded by advising Mr Lonsdale that it considered the information to be exempt from disclosure in terms of section 36(1) of FOISA. Following a review, Mr Lonsdale remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Funding Council had correctly withheld some of the information requested by Mr Lonsdale in terms of section 36(1) of FOISA. However, he also concluded that confidentiality in respect of some parts of the legal advice had been lost and therefore that the exemption in section 36(1) did not apply to that information. The Commissioner required the Funding Council to release this information to Mr Lonsdale, subject to redaction of the personal information relating to Mr Lonsdale, which was found to be exempt in terms of section 38(1)(a) of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(i) (Effect of exemptions); 16(1) and (2) (Refusal of request); 36(1) (Confidentiality) and 38(1)(a) (Personal information)

Data Protection Act 1998 (the DPA): section 1(1) (Basic interpretative provisions) (definition of "personal data")

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 24 November 2008, Mr Lonsdale wrote to the Funding Council requesting legal advice which the Funding Council had obtained, and which was referred to in a letter which the Funding Council had sent to Mr Lonsdale on 14 November 2008.



2. The legal advice requested by Mr Lonsdale related to the SFC's duties and obligations. It was sought by the SFC to establish whether it had complied with these obligations in its handling of a complaint made by Mr Lonsdale.
3. The Funding Council responded on 26 November 2008, refusing to supply the information on the basis that it was exempt in terms of section 36(1) of FOISA.
4. On 27 November 2008, Mr Lonsdale wrote to the Funding Council requesting a review of its decision. In particular, Mr Lonsdale noted that the exemption in section 36(1) would not apply if consent to release was granted.
5. The Funding Council notified Mr Lonsdale of the outcome of its review on 23 December 2008. The Funding Council upheld its previous decision to withhold the information in terms of the exemption in section 36(1) of FOISA.
6. On 28 May 2009, Mr Lonsdale wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Funding Council's review and applying for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Lonsdale 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

8. On 5 June 2009, the Funding Council was notified in writing that Mr Lonsdale's application had been received and was asked to provide the Commissioner with any information withheld from Mr Lonsdale. The Funding Council responded on 9 June 2009 with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Funding 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 Funding Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested. The Funding Council provided its submissions on 8 July 2009.
10. The investigating officer contacted Mr Lonsdale on 24 June 2009, seeking his submissions on the case. Mr Lonsdale was asked in particular to provide comments on the public interest test associated with the exemption in section 36(1) of FOISA. Mr Lonsdale provided his submissions on 27 June 2009.
11. The investigating officer engaged in further communications with both Mr Lonsdale and the Funding Council and further submissions were received on the matters under consideration.



12. These submissions received from Mr Lonsdale and the Funding Council are summarised where relevant below.

Commissioner's analysis and findings

13. 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 Mr Lonsdale and the Funding Council and is satisfied that no matter of relevance has been overlooked.
14. The Funding Council has relied on the exemption in section 36(1) for withholding all of the information.

Section 36(1) - Confidentiality

15. The Funding Council relied on the exemption in section 36(1) of FOISA to withhold the information requested by Mr Lonsdale, stating that the information attracted legal professional privilege (and so a claim of confidentiality of communications could be maintained in legal proceedings in relation to this information).
16. 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.
17. For the exemption in section 36(1) to apply to this particular type of communication, certain conditions must be fulfilled. The information being withheld must relate to communications with a legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser. The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of the legal adviser's professional relationship with his/her client.
18. The Commissioner notes that the information under consideration in this case is legal advice communicated to the Funding Council by an external firm of solicitors in the context of a professional relationship and circumstances in which legal advice privilege could apply.
19. There is a further matter to be considered, however, before the Commissioner can determine whether, or the extent to which, the section 36(1) exemption is applicable in the circumstances of this case.
20. Information cannot be privileged unless it is also confidential. For the 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 professional 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.



21. A claim of confidentiality will not be capable of being maintained where information has (prior to a public authority's consideration of an information request or conducting a review) 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 part or all of the information under consideration, any privilege associated with that information is also effectively lost.
22. In this case, a summary of the withheld legal advice was provided to Mr Lonsdale by the Funding Council in the letter referred to in Mr Lonsdale's information request. The Commissioner has therefore considered whether privilege in relation to the withheld information had been lost at the time the Funding Council carried out its review.

Was the information confidential?

23. In a letter of 14 November 2008, the Funding Council informed Mr Lonsdale that it had sought legal advice on the extent of its obligations in dealing with a complaint that Mr Lonsdale had made. It provided a summary of some of the points made in that advice.
24. Mr Lonsdale has argued that, by disclosing that summary of the legal advice to him, the Funding Council had in his view waived privilege in the legal advice.
25. Having examined the withheld information and the letter of 14 November 2008 from the Funding Council to Mr Lonsdale, the Commissioner is satisfied that the Funding Council did summarise parts of the advice provided to the Funding Council.
26. Mr Lonsdale argued that this disclosure meant that the Funding Council had effectively waived privilege in relation to the whole of the legal advice. He referred to the Commissioner's decision 002/2008 *Ms D Cairns and the City of Edinburgh Council* in support of this position.
27. In decision 002/2008, the Commissioner found that part of the legal advice under consideration had been publicly summarised. He went on to find that the effect of this disclosure was to waive privilege in the legal advice as a whole. In that case, the Commissioner said:

“... a party cannot "cherry pick" or put part of a privileged document or series of documents [where these relate to the same issue] into the public domain without waiving the privilege in the remainder.”
28. The Commissioner acknowledges consideration of decision 002/2008 might lead Mr Lonsdale to expect that the Funding Council's provision of a summary of parts of the legal advice under consideration would lead the Commissioner to find that privilege had been lost in relation to the whole of that legal advice.
29. However, the Commissioner has been reviewing his position in relation to the issue of waiver or loss of privilege. In particular, he has noted that the rule against “cherry picking” has only been established in Scots case law in the context of court proceedings.



30. In this case, the Commissioner notes that the disclosure of a summary of part of the legal advice did not take place in the context of court proceedings. As a result, the Commissioner (following his reconsideration of this matter) does not consider the rule against “cherry picking” to apply in this case.
31. As a result, the Commissioner considers that confidentiality and the associated privilege in the information under consideration has only been lost in relation to those parts of the legal advice which have been summarised to Mr Lonsdale. Parts which have not been summarised retain their confidential (and, so, privileged) nature.
32. Adopting this approach, the Commissioner has determined that the confidentiality and, as a consequence, the privilege had been lost in relation to the parts of its legal advice which were summarised to Mr Lonsdale. The Commissioner cannot therefore accept, in respect of those parts, that a claim of confidentiality of communications could be maintained in legal proceedings at the time of Mr Lonsdale’s request, as the confidentiality was no longer in place at that time.
33. The Commissioner has found that the Funding Council incorrectly applied the exemption in section 36(1) to the parts of the legal advice that have been summarised to Mr Lonsdale.
34. In relation to the information which remains confidential (and which remains privileged), the Commissioner accepts that the Funding Council correctly applied the exemption in section 36(1) of FOISA.
35. The exemption in section 36(1) is, however, a qualified exemption, which means that it is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that certain 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 that information is outweighed by the public interest in maintaining the exemption. Unless he finds that it is, he must order the information to be disclosed.

Public interest test

36. Mr Lonsdale put forward a number of arguments as to why disclosure of the withheld information would, in his view, be in the public interest. The Commissioner has taken all these points into account where relevant, although they are not summarised in full in this decision. The arguments on the public interest presented by Mr Lonsdale included:
 - (a) Disclosure would enhance scrutiny of decision-making processes and improve accountability and participation, and particularly openness and transparency.
 - (b) Disclosure would contribute to ensuring that a major public body with regulatory responsibilities is adequately discharging its functions, and to ensuring the effective oversight of expenditure of public funds and that the public is obtaining value for money.
 - (c) Disclosure would potentially reveal malpractice, enabling the correction of misleading claims.



37. The Funding Council argued that the public interest would be better served by withholding the information requested by Mr Lonsdale. It highlighted that previous decisions by the Commissioner have accepted that there is a significant public interest in maintaining the exemption in section 36(1) of FOISA.
38. The Funding Council also emphasised very strongly that to release the legal advice in this case would set what it described as an unjustifiable precedent, and would alter the nature of the engagement between the Funding Council and its legal advisors, which would be contrary to the public interest.
39. The Commissioner accepts that Mr Lonsdale has identified a genuine public interest in disclosure of the information under consideration, in terms of accountability and transparency of the Funding Council's governance and the discharge of its statutory responsibilities.
40. Against this, however, the Commissioner has identified a stronger public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds.
41. 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. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
42. On balance, the Commissioner is therefore satisfied, in all the circumstances of this case, that the public interest in disclosure of the information under consideration in this section is outweighed by the public interest in maintaining the exemption in section 36(1).

The exemption in section 38(1)(a)

43. Having reviewed the information to which the exemption in section 36(1) was found not to apply, the Commissioner noted that this contained some information relating to Mr Lonsdale.
44. The Funding Council was asked whether it considered this information to be exempt from disclosure under section 38(1)(a) of FOISA. The Funding Council indicated that (irrespective of whether it was willing to disclose Mr Lonsdale's own personal data to him), it did consider certain information within the document to be Mr Lonsdale's own personal data, and so exempt from disclosure to the general public in terms of FOISA.
45. Section 38(1)(a) of FOISA contains an absolute exemption from disclosure in relation to personal data of which the applicant (in this case, Mr Lonsdale) is the data subject. This means that it is not subject to the public interest test set out in section 2(1) of FOISA.



46. This exemption exists under FOISA because individuals have a separate right make a request for their own personal information (commonly known as a subject access request) under section 7 of the Data Protection Act 1998 (the DPA). The DPA will therefore usually determine whether a person has a right to information about themselves. Therefore, the effect of the exemption in section 38(1)(a) of FOISA is not to deny individuals a right of access to information about themselves, but to ensure that the right is exercised under the DPA and not under FOISA.
47. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
48. The Commissioner notes that the Funding Council has not sought to argue that the legal advice as a whole is personal data.
49. However, the Commissioner has determined that there is contained within the parts of the legal advice which have been found not to be exempt in terms of section 36(1) a small amount of information which relates to Mr Lonsdale and from which (and in conjunction with other information held by the Funding Council) he can be identified. He is therefore satisfied that that information is Mr Lonsdale's personal data as defined in section 1(1) of the DPA, and as such, is exempt from disclosure under section 38(1)(a) of FOISA.
50. The Commissioner therefore requires the Funding Council to disclose the information found to have been wrongly withheld by the Funding Council in terms of section 36(1) of FOISA, subject to the removal of information which has been found to be exempt in terms of section 38(1)(a) of FOISA.
51. The Commissioner notes that the Funding Council may choose to disclose Mr Lonsdale's own personal data to him in pursuit of his rights under the DPA, but the effect of this decision is that it is not required to do so in terms of FOISA, which would have the effect of disclosing Mr Lonsdale's personal information into the public domain.
52. The Commissioner will provide the Funding Council with a marked-up copy of the legal advice showing which information is to be disclosed to Mr Lonsdale and which information has been found to be exempt from disclosure.

Content of refusal notice

53. In his application to the Commissioner, Mr Lonsdale noted that he believed the Funding Council had failed in its obligations with respect to the public interest test. He noted that its refusal notice did not attempt to identify any damage to the public interest that would be done by releasing the information, and so failed to properly weigh any arguments and counter arguments to release under the public interest test.



54. The Commissioner has noted the requirements of section 16(1) of FOISA. This states that where an authority seeks to withhold information by virtue of an exemption in Part 2 of FOISA, it must give the applicant a notice in writing, confirming that it holds the information, specifying which exemption is being applied, and why (if it is not clear) the exemption applies.
55. Under section 16(2), a refusal notice must also state the authority's reason for concluding (for any non-absolute exemption) why, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
56. The Commissioner notes that the Funding Council's refusal notice of 23 December 2008 made no reference to the public interest test, or the reasons for its conclusion that, having considered the public interest test, the public interest lay in maintaining the exemption in section 36(1). For this reason, the Commissioner has concluded that the Funding Council failed to comply with Part 1, and in particular with section 16(2) of FOISA, in its handling of Mr Lonsdale's information request. However, the Commissioner does not require the Funding Council to take any remedial action in response to the breach in this instance.

DECISION

The Commissioner finds that the Scottish Further and Higher Education Funding Council (the Funding Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Lonsdale.

The Commissioner finds that the Funding Council was entitled to rely on the exemptions in section 36(1) and 38(1)(a) of FOISA to withhold some of the information contained in the legal advice.

However, the Commissioner finds that the Funding Council failed to comply with Part 1 of FOISA by: (1) withholding other information which was not exempt under section 36(1) of FOISA and (2) failing to comply with section 16(2) of FOISA.

The Commissioner requires the Funding Council to disclose to Mr Lonsdale the information referred to in paragraph 50 (the details of which will be issued separately to the Funding Council) by 3 June 2010.



Appeal

Should either Mr Lonsdale or the Funding 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
19 April 2010



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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and

...



16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
 - (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.
- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.

...

36 Confidentiality

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

...

38 Personal information

- (1) Information is exempt information if it constitutes-
 - (a) personal data of which the applicant is the data subject;

...



Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...