

Decision Notice

Decision 063/2018: Mr Brian Gourlay and West Dunbartonshire Council

Clarification and legal advice

Reference No: 201800167

Decision Date: 26 April 2018



Scottish Information
Commissioner

Summary

The Council was asked for information held regarding clarification and advice that had been received prior to the Council sending two specific letters.

The Council advised that the information was either not held or, if held, was subject to legal professional privilege. Following investigation, the Commissioner accepted this.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Information not held); 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 11 January 2017, Mr Gourlay made a request for information to West Dunbartonshire Council (the Council). Mr Gourlay made reference to a letter he had received dated 29 May 2015, and asked the Council to confirm the clarifications referred to in that letter. He also asked the Council to confirm who clarified what, when and to whom.
2. Mr Gourlay also made reference to a corporate response letter of 9 April 2014: in relation to that letter, he asked the Council who provided what advice, to whom and when.
3. The Council responded on 7 February 2017. It stated that it confirmed the clarifications contained in the letter of 29 May 2015. In relation to the information requested, the Council responded in terms of section 17(1) of FOISA, stating that the information was not held.
4. On 14 February 2017, Mr Gourlay wrote to the Council, requesting a review of its decision on the basis that he believed the Council was withholding information from him.
5. On 21 June 2017, Mr Gourlay applied to the Commissioner on the basis that the Council had failed to respond to his requirement for review.
6. During consideration of the above application, the Council notified Mr Gourlay of the outcome of its review on 24 July 2017. The Council confirmed that it did not hold information for any part of the letter of 29 May 2015 and maintained a response in terms of section 17(1) of FOISA.
7. In relation to the letter of 9 April 2014, the Council informed Mr Gourlay that it did hold information relating to the advice provided. It advised that this information was considered exempt from disclosure under section 36(1) of FOISA, as it was subject to legal advice privilege, and the public interest favoured maintaining that exemption.
8. On 23 January 2018, Mr Gourlay wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Gourlay stated he was dissatisfied with the outcome of the Council's review because he did not accept the response in terms of section 17(1) of FOISA in relation to the letter of 29 May 2015, and that it was in the public interest for the information withheld under section 36(1) to be disclosed.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Mr Gourlay made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
10. On 29 January 2018, the Council was notified in writing that Mr Gourlay had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Gourlay. The Council provided the information and the case was allocated to an investigating officer.
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, focusing on the searches carried out and the application of section 36(1) of FOISA.
12. The Council responded, maintaining that it did not hold any information requested regarding the letter of 29 May 2015. It further submitted that the information held relative to the letter of 9 April 2014 was exempt from disclosure under section 36(1) of FOISA.
13. Mr Gourlay provided submissions as to why he considered the information should be disclosed.

Commissioner's analysis and findings

14. 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 him by both Mr Gourlay and the Council. He is satisfied that no matter of relevance has been overlooked.

Information held by the Council

15. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
16. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
17. The Commissioner notes the submissions provided by Mr Gourlay, in which he provides reasons why he considers the Council should hold the requested information.
18. In its submissions to the Commissioner, the Council confirmed the position that, prior to sending the letter of 29 May 2015, the clarification referred to in that letter had been provided verbally.
19. The Council confirmed the searches and enquiries it undertook to ascertain whether it held any information falling within the scope of these parts of Mr Gourlay's request (i.e. relating to the 29 May 2015 letter), detailing the places searched. These included searches of relevant email records and consultation with relevant staff. The conclusion of these searches and enquiries was that no information was held.

20. Having considered all relevant submissions and the terms of the request relative to the letter of 29 May 2015, the Commissioner accepts that the Council interpreted Mr Gourlay's request reasonably and took adequate, proportionate steps in the circumstances to establish what information it held. Given the explanations and other submissions provided, he is satisfied that the Council did not hold the information requested by Mr Gourlay and was correct to give him notice, in terms of section 17(1) of FOISA, that it held no information falling within these parts of his request.

Section 36(1) - Confidentiality

21. 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 which are subject to legal professional privilege. An aspect of legal professional privilege is legal advice privilege, which the Council argued applied in this case.
22. Legal advice privilege applies to communications between legal advisers and their clients in the course of 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.
23. Among other points, the Council submitted that this exemption applied to the withheld information because it all related to advice given by or sought from its solicitor. It was given by or sought from the solicitor in their capacity as a professional legal adviser to the Council. It confirmed that the advice was provided in the context of the solicitor's professional relationship with the Council, as client.
24. Having considered the content of all of the information withheld, and while he would not wish to draw the concept of "relating to" legal advice too broadly in this context, the Commissioner is satisfied that all of the information withheld in this case relates directly to seeking, obtaining and considering legal advice from a professional legal adviser, acting in that capacity. Consequently, the Commissioner is satisfied that this information meets the conditions set out in paragraph 22 above and so is subject to legal advice privilege.
25. 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, and so 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 Council responded to Mr Gourlay's information request and requirement for review (and that it remains so now).

26. The exemption in section 36(1) is also a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Having decided that the information is exempt under section 36(1), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

The public interest test – section 36(1)

Submissions by the Council

27. In its correspondence, the Council recognised an argument that all communications between officers in an authority should be open to the public in order to ensure transparency, accepting that this is the underlying presumption behind Freedom of Information Legislation.
28. Against this however, it stated that there is also a strong and competing argument that public interest lies with, and relies heavily on, public bodies being able to take decisions based on strong, free and frank, legal advice and understanding. It stated that it is in the public interest that this free and frank legal advice can be provided in a context in which everyone can be confident that it cannot be misinterpreted, taken out of context or selectively quoted.
29. The Council submitted that the public interest in maintaining legal advice privilege, where it exists, is recognised as being substantial and that this has been recognised by the Commissioner, both in guidance and decisions, quoting the persuasive nature of the relevant case law.
30. The Council concluded that, on balance, the public interest upholding legal advice privilege outweighed the public interest in disclosing this information.

Submissions by Mr Gourlay

31. Mr Gourlay made a number of submissions to the Commissioner and provided correspondence and documentation that he considered relevant to the public interest in disclosure of the information requested, and withheld, in this case.
32. In summary, Mr Gourlay's submissions related to the processes followed by the Council and evidence provided at an Employment Tribunal, raising issues relating to the Council's internal policies regarding, amongst other things, health and safety and other legislative responsibilities of the Council.
33. Mr Gourlay commented that disclosure was in the public interest, to establish whether certain standards were being upheld and maintained in relation to its policies and legislation.

The Commissioner's view

34. The Commissioner has considered carefully the representations made by both Mr Gourlay and the Council when assessing and balancing the public interest in this case. He has also fully considered the information withheld in this case.
35. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities, and that disclosure of the information would go some way towards providing that transparency and accountability.
36. 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.

37. 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. In this particular case, he acknowledges the views of Mr Gourlay regarding the processes followed by the Council in relation to its own policies and legislative duties. Whilst he acknowledges there is a public interest in addressing any perceived breaches of health and safety law, or other perceived failures by an authority, the Commissioner does not see how the disclosure of the information requested would assist in addressing any of the concerns raised by Mr Gourlay in his submissions.
38. Having considered the public interest arguments advanced on both sides, 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. Consequently, he accepts that the Council correctly withheld the information to which it applied section 36(1) of FOISA.

Decision

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

Appeal

Should either Mr Gourlay or West Dunbartonshire 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

26 April 2018

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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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.
- ...

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),
- if it held the information to which the request relates; but
- (b) the authority does not hold that information,
- it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.
- ...

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

www.itspublicknowledge.info