

Decision Notice

Decision 112/2018: X and the Chief Constable of the Police Service of Scotland

Legal advice on police powers to restrict traffic flow at events

Reference No: 201800407

Decision Date: 17 July 2018



Scottish Information
Commissioner

Summary

Police Scotland were asked for legal advice submitted to the Scottish Police Authority about police powers in respect of road closures or traffic restrictions at pre-planned events. Police Scotland refused to disclose the advice on the basis that it was legally privileged and exempt from disclosure. The Commissioner investigated and found that the advice was exempt from disclosure under section 36(1) (Confidentiality) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) 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 26 October 2017, X made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The information requested was:

“...the legal advice and proposed paper that ACC [Assistant Chief Constable] Higgins is submitting to the Scottish Police Authority in regards to a Police officer having no power to close roads or restrict traffic flow at pre-planned events”.
2. Police Scotland responded on 11 January 2018. They apologised for the delay in responding and withheld the legal advice 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 comprised communications between Legal Services (Police Scotland) and Police Scotland staff members in which legal advice was sought and provided. Police Scotland informed X that the public interest favoured withholding the requested information.
3. Police Scotland said that the paper referred to in the request had been published on the Scottish Police Authority’s website and supplied a link.
4. On 24 January 2018, X wrote to Police Scotland requesting a review of their decision.
5. Police Scotland notified X of the outcome of their review on 20 February 2018. They upheld their previous decision without modification.
6. On 26 February 2018, X applied to the Commissioner for a decision in terms of section 47(1) of FOISA. It was dissatisfied with the outcome of Police Scotland’s review because it believed the information would affect many people and organisations and should be disclosed to allow scrutiny of Police Scotland’s powers “in respect of demonstrations, processions, community galas, etc”.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that X 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.
8. On 28 March 2018, Police Scotland were notified in writing that X had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from X. Police Scotland provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Police Scotland were invited to comment on this application and answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

Commissioner's analysis and findings

10. 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 X and Police Scotland. He is satisfied that no matter of relevance has been overlooked.

Identification of information

11. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. This is subject to qualifications, but these are not applicable in this case.
12. During the Commissioner's investigation, Police Scotland accepted that some information that had been withheld did not fall to be considered because it was not held at the time of the request.

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. Police Scotland submitted that the information withheld under this exemption was advice from a professional legal adviser acting in that capacity. The information was therefore subject to legal advice privilege.

16. Having considered the content of the withheld information and the circumstances under which it was obtained, the Commissioner is satisfied that the information meets the conditions, set out above, for legal advice privilege to apply. The advice was from a professional legal adviser (Counsel) and an in-house solicitor. Both were acting in their professional capacity and their communications were in the context of each legal adviser's professional relationship with their client (Police Scotland).
17. Before information can attract legal advice privilege, the document must have been – and must continue to be – confidential between a legal adviser and their client. It is a precondition to a claim for privilege that the information in question is confidential, and therefore loss of confidentiality can accordingly equate to loss of privilege.
18. Police Scotland were asked by the Commissioner whether (and to what extent) Counsel's opinion had been given to any persons outwith Police Scotland. They were also asked about the extent of any internal circulation of the opinion within Police Scotland, and (if the opinion had been circulated) whether that was done with any conditions or indication of confidentiality. Police Scotland were asked to make this clear because the paper published on the SPA's website¹ ("Temporary Traffic Regulation Orders (TTRO)"), to which X referred in its request, states:

"Superintendent Andrew Clark has engaged with Scottish Government (including Transport Scotland and Event Scotland), Local Authorities and members of the event industry and discussed the impact of this opinion. This engagement appears to have generated communication from Mr George Graham, chair of the Policing Committee, Scottish Police Authority in which clarity is sought regarding impact and consultation".
19. Police Scotland provided details of internal and external parties who had seen the content of the opinion, and when this had occurred. Police Scotland made it clear that the information was shared with the express maintenance of legal professional privilege. They could not comment on whether any recipient had further circulated the information, but said that the conditions of circulation had made clear that further sharing of the opinion required approval from Police Scotland. They also referred to the Commissioner's *Decision 020/2008 Mr Robert Henery and the Scottish Ministers*² where the Commissioner held that legal advice privilege had not been waived in respect of information which was shared by a local authority to others with whom it had a common interest and where there was no expectation that the advice would be further shared.
20. Police Scotland were also invited to comment on whether confidentiality has been lost in respect of the opinion of Counsel by the publication of information about or based on the opinion in the paper..
21. Again, Police Scotland were firmly of the view that the confidentiality of the opinion had not been lost by the information disclosed into the public domain through the SPA's website. They explained in detail, with reference to the content of the opinion and the content of the published paper, why they believed privilege was not lost.
22. Having considered the above with care, the Commissioner accepts Police Scotland's submission that legal privilege has not been lost in respect of Counsel's opinion and that the information in the opinion remains confidential. The Commissioner is unable to explain fully

¹ <http://www.spa.police.uk/assets/126884/409451/441181/423061/9.1ttro>

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2008/200600908.aspx>

his reasoning on this point, as to do so may reveal the content of the legal advice. (This factor has been acknowledged by the courts. In the case of *Scottish Ministers v Scottish Information Commissioner (William Alexander's Application)* [2007] CSIH 8³, the Court of Session commented that, in giving reasons, the Commissioner is necessarily restrained by the need to avoid disclosing information which ought not to be disclosed.)

23. The paper provides a summary of the opinion received from Counsel. As would be reasonably expected, such a summary does not provide the detail or nuance of a legal opinion from Counsel. The Commissioner is also mindful that if legal advice has been disclosed to another person for a particular, limited purpose, that advice may still be privileged. The Commissioner accepts that any sharing of the opinion by Police Scotland was done with express reference to the confidential and privileged nature of the advice and with the intention of maintaining confidentiality by importing on any recipient an obligation of confidentiality.
24. The Commissioner therefore accepts that privilege has not been lost and the information falls within the terms of section 36(1). 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.

The public interest

25. Police Scotland acknowledged that, in general terms, the disclosure of legal advice sought by and provided to public authorities could render their decision-making processes more transparent. Police Scotland submitted, however, that the information at issue was of interest only to a small section of the public, namely those involved in parades and demonstrations. While disclosure could assist in demonstrating to those interested parties that the Chief Constable's policy was based on full and reasoned legal advice, it did not follow that disclosure of the legal advice would be in the wider public interest.
26. Police Scotland submitted that if the Commissioner were to require disclosure of such information then there would be significant ramifications for public authorities, which would not serve the public interest. There is concern that disclosure of such communications would reveal the areas where clients are susceptible to attack and prejudice their ability to defend their position going forward. If such communications came to be considered vulnerable to disclosure as a matter of course, legal advisers might refrain from providing candid advice and, consequently, the ability of a client to make sound decisions could be impaired. Indeed, in Police Scotland's opinion, clients may be discouraged from seeking legal advice completely.
27. Similarly, Police Scotland argued that it was in the public interest to ensure police officers were equipped to make fully informed decisions about operational policing matters, and to this end, the legal advice provided to assist them must be as full and frank as possible. They argued that the provision of candid advice and discussion was likely to be frustrated if police officers and their legal advisers are not confident that it would remain confidential.
28. Police Scotland referred to several decisions from the Commissioner which note that the courts have long recognised the strong public interest in protecting legal privilege. In these decisions, the Commissioner affirmed the 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".

³ <http://www.scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

29. Police Scotland considered that the present case was not such a “highly compelling case” that it would outweigh the public interest in maintaining the exemption under section 36(1). Accordingly, Police Scotland submitted that, on balance, the public interest in maintaining the exemption under section 36(1) outweighs that in disclosure of the advice.
30. As noted above, X submitted that the information would affect many people and organisations and that it should be disclosed to allow scrutiny of Police Scotland powers of in respect of demonstrations, processions, community galas, etc.
31. 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 disclosing the information. For example, disclosure may be appropriate where:
 - the privileged material discloses wrongdoing by or within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material discloses an apparently irresponsible and wilful disregard of advice
 - a large number of people are affected by the advice
 - the passage of time is so great that disclosure cannot cause harm.
32. After careful consideration, the Commissioner is satisfied that none of the considerations set out above (or any others of comparable weight) apply here.
33. As stated by Police Scotland – and by the Commissioner in many 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)⁴. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
34. On balance, the Commissioner accepts that greater weight should be attached to the arguments which would favour withholding the information. There is a considerable public interest in protecting legal privilege. In this case, it is also of note that the paper on the SPA website contains information which goes some way towards addressing the public interest in transparency on Police Scotland’s approach to this issue.
35. 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, he finds that Police Scotland were entitled to withhold the legal advice under that exemption.

Decision

⁴ <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

The Commissioner finds that the Chief Constable of the Police Service of Scotland (Police Scotland) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the X.

Appeal

Should either X or Police 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

17 July 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 –

- (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.

...

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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