

# Decision Notice



Decision 125/2009 Mr Andy Wightman and the Scottish Parliamentary  
Corporate Body

Legal advice to a Committee

Reference No: 200900172  
Decision Date: 3 November 2009

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## Summary

Mr Wightman requested from the Scottish Parliamentary Corporate Body (the SPCB) legal advice and certain related information regarding the Crown Estate and Crown Estate Commissioners. The SPCB responded by disclosing some information to Mr Wightman, relying on the exemption in section 36(1) of FOISA for withholding most of the remainder. Following a review, Mr Wightman remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPCB had dealt with Mr Wightman's request for information in accordance with Part 1 of FOISA, the information having been properly withheld under section 36(1) of FOISA as information subject to legal professional privilege. He did not require the SPCB to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 15 (Duty to provide advice and assistance); 36(1) (Confidentiality).

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

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1. On 6 October 2008, Mr Wightman wrote to the SPCB requesting a copy of all of the papers relating to the agenda item where, at its meeting on 1 October 2008, the Scottish Parliament's Rural Affairs and Environment Committee had considered legal advice on the Crown Estate and Crown Estate Commissioners. These papers were to include correspondence with the Scottish Government, the brief prepared for whoever had supplied the advice, a copy of the legal advice considered by the Committee, and any subsequent correspondence relating to the Committee's deliberations in private on that date.



2. The SPCB responded on 31 October 2008, explaining that it did not hold any correspondence with the Scottish Government on this issue, or any subsequent correspondence relating to the Committee's deliberations in private on 1 October 2008. It did disclose some information to Mr Wightman in response to his request, but relied on section 25 of FOISA for withholding other information which it considered to be otherwise accessible to him. However, for withholding the majority of the information which would address his request the SPCB relied on the exemption in section 36(1) of FOISA. The SPCB also advised that there was a quantity of administrative detail within the withheld information, which it was happy to release to Mr Wightman should he require it.
3. Mr Wightman wrote to the SPCB on 10 November 2008, requesting a review of its decision in respect of the draft legal advice and notes made by the legal advisers in the course of its preparation, email correspondence among the legal advisers and between the legal advisers and the client, and the finalised advice provided to the Committee. In his request for a review, Mr Wightman noted that he found it difficult to see what legal proceedings could arise which would involve the requested information, being of the view that a Committee of the Scottish Parliament had no legal personality and was not, in this instance, seeking legal advice for the purposes of pursuing or defending any legal action (and indeed could not be party to any action). He also set out his view that the disclosure of legal advice on the Parliament's legislative competency in relation to the property rights in and administration of large land holdings across Scotland was clearly in the public interest.
4. The SPCB notified Mr Wightman of the outcome of its review on 20 November 2008. In its response, the SPCB upheld its original decision regarding reliance on the exemption in section 36(1) of FOISA for withholding the information. The SPCB explained that it had considered Mr Wightman's comments in relation to the public interest test, however it was upholding its view that the balance of the public interest lay in withholding the information.
5. On 24 January 2009, Mr Wightman wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPCB's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Wightman 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

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7. On 17 February 2009, the SPCB was notified in writing that an application had been received from Mr Wightman and asked to provide the Commissioner with any information withheld from him. The SPCB responded with the information requested and the case was then allocated to an investigating officer.



8. The investigating officer subsequently contacted the SPCB, 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 SPCB was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. In its responses to the investigating officer, the SPCB explained that in addition to section 36(1) of FOISA it would seek to rely on the exemptions in section 30(b)(i) and (ii) if the Commissioner were to disagree that section 36(1) was applicable, particularly with reference to the email correspondence withheld.
10. As Mr Wightman only asked the SPCB to carry out a review of its decision in relation to the information described at paragraph 3 above, this will be the focus of the Commissioner's decision. Mr Wightman has also made it clear in communications with the Commissioner that he is not interested in receiving information which relates purely to administrative matters, and therefore the decision will concern itself with those elements of the withheld information which have something of substance to say about the legal advice sought by the Rural Affairs and Environment Committee.

## **Commissioner's analysis and findings**

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11. 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 Wightman and the SPCB and is satisfied that no matter of relevance has been overlooked.
12. The information withheld by the SPCB has been divided into three categories. These are:
  - (a) The final legal advice provided to the Committee, and drafts of it;
  - (b) Notes made by legal advisers in the course of preparing the legal advice; and
  - (c) Email correspondence between the client (the clerks of the Rural Affairs and Environment Committee) and the legal advisers, and among the legal advisers themselves.
13. The SPCB has relied on the exemption in section 36(1) for withholding all of the information. It has also relied on the exemptions in section 30(b)(i) & (ii) for withholding the information in category (c) above.



### Section 36(1) - Confidentiality

14. 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. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled.
15. 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.
16. In this case the Directorate of Legal Services of the SPCB was asked by the Scottish Parliament's Rural Affairs and Environment Committee (through the Clerk to that Committee) to provide advice on the legal status of the Crown Estates and its managers, the Crown Estate Commissioners, with particular reference to the legislative competence of the Parliament in relation to both the Estate and the Commissioners.
17. Mr Wightman indicated in both his request for review to the SPCB and his application to the Commissioner that he did not believe that a claim to confidentiality of communications could be maintained in legal proceedings in respect of the withheld information, as a Committee of the Scottish Parliament had no legal personality, and was not in this instance seeking legal advice for the purposes of pursuing or defending any legal action (and indeed could not be party to any action).
18. The SPCB disagreed with Mr Wightman's position, arguing that legal advice privilege (which was what was being claimed here) did not require legal proceedings to be in contemplation. Section 36(1) clearly included situations where legal advice privilege applied and therefore could not require legal proceedings to be in contemplation. While acknowledging that the Scottish Parliament (and by extension a Committee of the Scottish Parliament) was an unincorporated association and had no legal personality of its own, it provided submissions to the effect that each Committee was entitled to seek legal advice from the Directorate of Legal Services, via the relevant Committee Clerk.
19. While the Commissioner accepts that certain of Mr Wightman's points might be of relevance if litigation privilege (another form of legal professional privilege) were under consideration, he cannot accept that they are relevant to the application of legal advice privilege to the withheld information in this particular case. In the circumstances of this case, he is satisfied that legal advice was sought from and given by a solicitor in the context of a professional relationship to which legal advice privilege could apply.



20. As indicated above, the Commissioner considers legal advice privilege to be broad enough to cover all communications made by a client to a legal adviser in the context of a professional relationship, including information passed to the legal adviser indicating that legal advice may be required if certain circumstances arise. He is also satisfied that the privilege would cover any preliminary legal research or draft documentation which is produced with the intention that it contributes to the final legal advice to be given to the client, including records of any relevant internal deliberations among the legal advisers concerned. It will also cover “presentational advice”, i.e. advice on how evidence etc might be presented in the most favourable light. The Commissioner is satisfied that all of the information under consideration here falls into at least one of these categories.
21. There is a further matter to be considered, however, before the Commissioner can determine whether the section 36(1) exemption was applicable in the circumstances of this case. 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 advice 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. This may raise the issue of waiver. In this case, given that the withheld legal advice is referred to in the Official Report of the Rural Affairs and Environment Committee (see below), the Commissioner finds it appropriate to consider whether privilege in relation to the withheld information had been waived at the time the SPCB carried out its review.

#### *Waiver of legal professional privilege*

22. As the Commissioner indicated in *Decision 002/2008 Ms D Cairns and the City of Edinburgh Council*, in certain circumstances, the holder of privilege in particular advice sought or obtained from a legal advisor can be shown to have waived it. Where the content of privileged information has been disclosed in order to evidence, or provide authority for, a position that the party maintained by the holder of the privilege, then privilege in that information will have been waived.
23. The Commissioner considered the question of waiver further in *Decision 079/2009*, involving the same parties as *Decision 002/2008*. There, having considered a range of relevant court and tribunal decisions, the Commissioner concluded that where information which would otherwise be subject to legal advice privilege has been released by a Scottish public authority (which would include the Rural Affairs and Environment Committee, as part of the Scottish Parliament) in support of a particular position it is taking, even in part or in summary and whether in the course of legal proceedings or otherwise, then privilege in the whole of that information will be deemed to have been waived. This will not be the case, however, in respect of undisclosed information which relates to separate issues, or is otherwise clearly severable, from the information which has been disclosed.



24. In its submissions to the Commissioner, the SPCB maintained that privilege in the withheld information had not been waived. The Committee had determined that the legal advice should be considered in private, which was what had happened. While a note had been prepared by the Committee Clerk on the advice, and had been published, the SPCB argued that this did not disclose the content of the advice given. In the SPCB's view, therefore, the advice remained confidential. All related papers (notes and email correspondence) had also been kept confidential.
25. However, the SPCB also confirmed in its submissions that at a meeting of the Rural Affairs and Environment Committee on 8 October 2008, the Convener of the Committee outlined to the Committee members the import of the legal advice provided. This statement by the Convener is recorded in the Official Report for the Committee meeting, which is available in the public domain via the Scottish Parliament website at <http://www.scottish.parliament.uk/s3/committees/rae/or-08/ru08-1802.htm> (column 1097). The SPCB argued that this statement did not disclose the substance of the legal advice and was made on the basis that privilege in the advice was not being waived. The Commissioner still has to consider, however, whether that was in fact the effect of the Committee's actions, whether intended or not.
26. In this case, having considered the information on the withheld legal advice which was disclosed by the Convener of the Rural Affairs and Environment Committee at the meeting held on 8 October 2008 (as contained in the Official Report available on the Scottish Parliament website), together with the context in which the Convener's statement was made and the content of the withheld advice, the Commissioner cannot accept that the requirements of waiver were met by the reference to the advice in the Official Report. In the circumstances, he is not persuaded that this reference could be regarded as reliance on the contents of the withheld advice such as would be required for privilege in it to have been waived. Neither does he consider this to have been the effect of anything in the Committee Clerk's note referred to in paragraph 24 above. As he is not satisfied that privilege was waived, he must conclude that the information under consideration is exempt under section 36(1) of FOISA.
27. The exemption in section 36(1) of FOISA is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore consider whether, in all the circumstances of this case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption (and thereby withholding it).

*The public interest*

28. Mr Wightman has submitted that it is in the public interest – in the interests of the public – to know on what basis of understanding of its powers a Committee of the Parliament is considering an issue of public policy. Mr Wightman also submits that considerable debate surrounds the nature, operation and management of the Crown Estate.



29. Mr Wightman states that it is of particular note that whilst the Crown Estate Commission (CEC) as a body is reserved, the property rights are devolved, as all the land administered by the CEC is public land held by the Scottish Crown. In Mr Wightman's view, this essential distinction is important and how it is interpreted is vital to any meaningful public debate. If the Parliament has a particular interpretation of the scope of its competence, then Mr Wightman believes it to be in the public interest that this is known to all who may wish to engage with the Parliamentary process at whatever level.
30. However, the SPCB has submitted that the courts have confirmed a strong public interest in maintaining the right to confidentiality of communications between legal advisors and clients. In this connection, it has cited the case of *Three Rivers District Council and Others v Governor and Company of the Bank of England (2004) UK HL 48*, with particular reference to comments made by Lords Scott and Carswell regarding the justification for legal professional privilege given by Advocate-General Slynn in *A M & S Europe Ltd v European Commission [1983] QB 878 at 913*:
- "[The privilege] springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks"*.
31. The SPCB has also provided detailed submissions on what it considers to be the public interest lies in allowing the Committees of the Parliament to be able to seek legal advice as to what they can do and what the Parliament itself can do, and on what is within the devolved competence of the Parliament. The SPCB submits that the Committees must be able to seek such advice on a confidential basis, and that the disclosure of this advice would hamper the ability of the Committees to have free and frank communications with their lawyers. It argues that this would occur particularly in relation to advice on reserved and devolved competences, where there are areas where the arguments are finely balanced, and it is essential that these issues can be discussed and debated in a confidential manner.
32. The SPCB has also provided submissions as to why in its view of this legal advice could affect the future provision of legal advice to the Presiding Officer on matters relating to the Crown Estate, in turn affecting the quality of his decision-making, which would not be in the public interest. While acknowledging the public interest arguments put forward by Mr Wightman and accepting that disclosure of the advice would enhance scrutiny of decision making, it concludes on balance that the stronger public interest favours maintaining confidentiality of communications in this case.
33. Having considered the submissions from both Mr Wightman and the SPCB, the Commissioner accepts that there is a particular public interest in knowing and understanding the powers the Scottish Parliament has under devolved legislation to look at the nature, operation and management of the Crown Estate.





34. However, the Commissioner also accepts the arguments advanced by the SPCB that Parliament and its Committees are entitled to receive free, frank and comprehensive legal advice, in confidence, on issues affecting their ability to do their job. There is a clear public interest in this, so that both Committees and Parliament act within their powers when debating issues or preparing bills.
35. The Commissioner recognises that where the matter under consideration is one which goes to the heart of the competency, or otherwise, of Parliament and its Committees, there is a particularly strong public interest in allowing full, free and frank legal advice to be received and considered in confidence. In this connection, the Commissioner would bear in mind the importance of the Presiding Officer being able to make a fully informed decision on questions of legislative competency when required to do so.
36. In this case, having considered and balanced the respective public interests, the Commissioner does not believe the public interest in understanding and engaging with Parliamentary process over this issue to outweigh that in maintaining the right of confidentiality of communications between legal advisers and clients, as recognised in the *Three Rivers* case cited by the SPCB.
37. On balance, therefore, the Commissioner finds that in all the circumstances of this case, the public interest in disclosing the withheld information is outweighed by that in maintaining the exemption in section 36(1).
38. As the Commissioner has found the information under consideration in this case to have been properly withheld under section 36(1) of FOISA, he is not required to go on to consider the application to that information of the exemptions in section 30(b) of FOISA.
39. The Commissioner notes that the information request by Mr Wightman was for a copy of documents. He notes that in the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73, the Court of Session emphasised that FOISA gives a right to information, not documents. However, the Court also said, in paragraph 45 of its Opinion, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. The Court also said that, if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
40. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between Mr Wightman and the SPCB that the SPCB questioned the validity of the information request. In addition, there is nothing to suggest from correspondence which the SPCB have subsequently had with the Commissioner that the SPCB were unclear as to what the information requested sought.



41. The Commissioner is satisfied that the request is reasonably clear and that the request is therefore valid.

## **DECISION**

The Commissioner finds that the Scottish Parliamentary Corporate Body (the SPCB) acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 in dealing with the information request made by Mr Wightman, the SPCB being entitled to withhold the information under section 36(1) of FOISA.

## **Appeal**

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Should either Mr Wightman or the SPCB 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**  
**3 November 2009**



## Appendix

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### 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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

##### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

##### 36 Confidentiality

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

...