

# Decision Notice



Decision 127/2013 Mr James Macfarlane and the Police Investigations and Review Commissioner

Legal advice

Reference No: 201300651  
Decision Date: 03 July 2013

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**Rosemary Agnew**  
Scottish Information Commissioner

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## Summary

On 14 June 2012, Mr Macfarlane asked the Police Complaints Commissioner for Scotland (PCCS) for any legal advice it had obtained in relation to a specified complaint handling review. The information was withheld on the basis that it was exempt from disclosure under section 36(1) of FOISA.

Following an investigation, the Commissioner was satisfied that the information was exempt from disclosure under section 36(1) of FOISA.

## Relevant statutory provisions

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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 the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. Since 1 April 2013, the PCCS has been known as the Police Investigations and Review Commissioner (PIRC).
2. On 14 June 2012, Mr Macfarlane emailed PIRC requesting (among other information not the subject of this decision) legal advice obtained by PIRC, in its original form, in relation to a complaint handling review conducted by PIRC in a specified case.
3. PIRC responded on 12 July 2012. PIRC withheld the information in its entirety on the basis that it was exempt from disclosure under section 36(1) of FOISA, as it comprised information to which a claim of confidentiality of communications in legal proceedings could be maintained.
4. On 14 August 2012, Mr Macfarlane emailed PIRC requesting a review of its decision. Mr Macfarlane considered the public interest favoured disclosure of the information. He also believed PIRC had waived any right to confidentiality by summarising the advice in a letter published on its website.



5. PIRC notified Mr Macfarlane of the outcome of its review on 10 September 2012, upholding its previous decision without modification.
6. On 6 March 2013, Mr Macfarlane wrote to the Commissioner, stating that he was dissatisfied with the outcome of PIRC's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Macfarlane 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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8. On 3 April 2013, PIRC was notified in writing that an application had been received from Mr Macfarlane and was asked to provide the Commissioner with any information withheld from him. PIRC responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted PIRC, 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. PIRC was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
10. PIRC responded on 28 May 2013, providing submissions on the application of the exemption in section 36(1) of FOISA to the withheld information.

## 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 her by both Mr Macfarlane and PIRC. She is satisfied that no matter of relevance has been overlooked.

### Section 36(1) of FOISA - Confidentiality

12. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. Among the types of communication which fall into this category are those covered by legal advice privilege, which covers communications between lawyer and client in which legal advice is sought or given.

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13. PIRC stated that it was relying on the exemption in section 36(1) of FOISA to withhold the legal advice that it had obtained from its legal adviser on the basis that the information was subject to legal advice privilege.
14. For legal advice privilege to apply, certain conditions must be fulfilled. The communication must be with a professional legal adviser, such as a solicitor or advocate. The legal adviser must be acting in their professional capacity as such and the communication must occur in the context of their professional relationship with their client. The information must be confidential between lawyer and client. Privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy.
15. The information being withheld under this exemption is legal advice obtained by PIRC from its legal adviser. Having considered 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 provided), the Commissioner is satisfied that the information meets all of the conditions set out in the above paragraph and is subject to legal advice privilege.
16. Information cannot be privileged, however, 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 (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. 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 its review and communicates the outcome to the applicant).
17. A claim of confidentiality will not be capable of being maintained where information has 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 all or part of the information under consideration, any privilege associated with that information (or the relevant part) is also effectively lost.
18. In his submissions to the Commissioner, Mr Macfarlane argued that PIRC had waived any claim to confidentiality by summarising the advice it had received from its legal adviser in a letter to Strathclyde Police. This letter had been published on PIRC's website.
19. PIRC submitted that there had been no loss of confidentiality through publication of the letter to Strathclyde Police. PIRC stated that the legal advice contained significant detail, including examples of relevant case law and judgements, as well as opinions expressed by its legal adviser. In PIRC's view, the information contained within the letter to Strathclyde Police merely stated the conclusion reached by PIRC in the light of the legal advice received, but did not disclose the content and nature of that advice.
20. Having considered PIRC's submissions and the contents of the withheld information, the Commissioner is satisfied that the legal advice referred to above has not been made public, either in full, or in summary.



21. The Commissioner is therefore satisfied that the information withheld under section 36(1) is (and was at the time relevant for this decision) information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings, and is therefore exempt from disclosure under section 36(1) of FOISA.
22. 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 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*

23. 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*<sup>1</sup>, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
24. PIRC acknowledged that there was a clear public interest in members of the public knowing what information PIRC receives in order to base its outcomes and decisions, and in the transparency and accountability of public bodies.
25. PIRC submitted, however, that it was vital to the successful working of any solicitor and client relationship that both parties were confident that information passing between them should be treated confidentially. PIRC considered it crucial that it should be able to seek and receive legal advice in a confidential setting to enable it to make fully informed decisions. PIRC considered it harmful to the public interest if solicitors and clients could not discuss relevant issues and receive legal advice in confidence. PIRC did not consider this case to be a highly compelling one where disclosure could be justified in the public interest.
26. In Mr Macfarlane's view, the advice provided to PIRC was generic and was merely the opinion of a legal adviser on a particular legal question and not advice on how PIRC should deal with a particular situation. Mr Macfarlane considered the advice could have been commissioned by anyone without knowledge of the case being reviewed by PIRC. Mr Macfarlane did not consider there were any active legal proceedings connected with the advice which could be prejudiced by its disclosure.
27. The Commissioner has considered the submissions put forward by both PIRC and Mr Macfarlane. She accepts that there is a general public interest in authorities being open to scrutiny and being accountable for their actions. She also considers that this extends to scrutiny of the disbursement of public funds in purchasing legal advice.

<sup>1</sup> <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>

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28. The Commissioner has considered the public interest arguments advanced on both sides. She has found the arguments made by PIRC to be more persuasive than those made by Mr Macfarlane. She accepts that there might be reasons which would justify disclosing legal advice of this kind in certain circumstances. However, in this instance, regardless of the absence of active legal proceedings, 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 advisor and client. Consequently, she accepts that PIRC correctly withheld the information to which it applied section 36(1) of FOISA.

## DECISION

The Commissioner finds that the Police Investigations and Review Commissioner complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Macfarlane.

## Appeal

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Should either Mr Macfarlane or the Police Investigations and Review Commissioner 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.

**Margaret Keyse**  
**Head of Enforcement**  
**03 July 2013**



## 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.

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- (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.

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##### 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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