

# Decision Notice

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**Decision 194/2015: Mr Andrew Dundas and the Scottish Ministers**

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## **Legal advice**

Reference No: 201501540

Decision Date: 15 December 2015



Scottish Information  
Commissioner

## Summary

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On 15 May 2015, Mr Dundas asked the Scottish Ministers (the Ministers) for the legal advice it had received in relation to the differential fees which could be charged to students from the rest of the UK in the event that Scotland were to become a member state of the European Union (EU).

The Ministers withheld the information on the basis that it was subject to legal professional privilege.

The Commissioner investigated and found that the Ministers were entitled to withhold the information on the basis that it was subject to legal professional privilege and 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 Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 15 May 2015, Mr Dundas made a request for information to the Ministers. The request was for the legal opinion provided to the Scottish Government concerning the ability of Scottish universities to charge differential rates of fees to students from the rest of the UK in the event that Scotland were to become a member state of the EU.
2. The Ministers responded on 15 June 2015. They informed Mr Dundas that the information he sought was exempt from disclosure in terms of section 36(1) of FOISA. This was on the basis that the information comprised legal advice in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The Ministers stated that disclosure of the information would breach legal professional privilege.
3. On 24 June 2015, Mr Dundas wrote to the Ministers requiring a review of their decision. He did not agree that the information attracted legal advice privilege. He also considered the public interest favoured disclosure of the information.
4. The Ministers notified Mr Dundas of the outcome of their review on 17 July 2015. They upheld their previous decision without modification.
5. On 22 August 2015, Mr Dundas wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Dundas stated he was dissatisfied with the outcome of the Ministers' review, as he did not agree that any legal privilege applied to the information and considered the public interest favoured its disclosure.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Dundas made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
7. On 17 September 2015, the Ministers were notified in writing that Mr Dundas had made a valid application. The Ministers were asked to send the Commissioner the information withheld from him. The Ministers provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions, with particular reference to the requirements of section 36(1) of FOISA they considered applicable to the information requested.
9. The Ministers provided submissions in response. Mr Dundas also provided additional submissions during the investigation.

## Commissioner's analysis and findings

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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 her by both Mr Dundas and the Ministers. She is satisfied that no matter of relevance has been overlooked.

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

11. 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.
12. 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.
13. The Ministers submitted that all of the withheld information comprised communications between legal advisers within the Scottish Government Legal Directorate and Scottish Government staff, as their client, in which legal advice was sought and provided. Consequently, they considered the withheld information was subject to legal advice privilege. They submitted that all the necessary conditions applied.
14. Mr Dundas did not agree that any legal advice privilege applied to the information he was seeking. In his view, there was nothing to suggest that the information had anything to do with litigation, whether now or in the future.

15. Having considered the scope of the request, 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 given), the Commissioner is satisfied that the information meets the conditions set out in paragraph 12 above and is subject to legal advice privilege.
16. The Commissioner cannot accept Mr Dundas's view that, because there is no litigation involved, legal advice privilege does not apply. Legal professional privilege can be split into two main types – "legal advice privilege" and "litigation privilege". In the present case, the information in question clearly comprises communications where legal advice has been provided by legal advisers acting in their professional capacity. Therefore, it fulfils the criteria required for legal advice privilege to apply: no litigation, active or in prospect, is required.
17. Information cannot be privileged 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 could be maintained in legal proceedings. In this case, the claim to confidentiality is in the form of legal advice privilege. 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 a review of its response to the information request and communicates the outcome to the requester.
18. Having considered all relevant 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.
19. The Commissioner is satisfied that the withheld information comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, the Commissioner accepts that all of the information sought by Mr Dundas is exempt from disclosure under section 36(1) of FOISA.
20. 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 circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

#### *Public interest test*

21. 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).<sup>1</sup> Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
22. In Mr Dundas's view, the matter considered in the legal advice was an issue of great public interest. He considered that the legal advice held by the Ministers was a vital ingredient in a matter of public controversy. Mr Dundas also submitted that the legal advice on this issue

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<sup>1</sup> <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

was relevant to current issues concerning access to UK benefits by other EU citizens and the free movement of citizens within the EU.

23. The Ministers considered there was a strong public interest in maintaining legal professional privilege and ensuring the confidentiality of communications between legal advisers and their clients. In their view, it was important that lawyers could provide free and frank legal advice which considers and discusses all issues and options without fear that such advice might be disclosed and, as a result, potentially taken out of context.
24. The Ministers submitted that if there was an expectation that such legal advice could be disclosed, this would inevitably lead to similar advice being much more circumspect and therefore less effective.
25. The Ministers argued also that there was a strong public interest in ensuring that the Scottish Government was able to consider legal advice privately and then ensure its fully considered position was consistent with that advice.
26. Additionally, the Ministers considered it was important to maintain legal professional privilege in relation to legal advice which may have a bearing on future negotiations with the EU and the UK Government in the event of any future vote in favour of independence in Scotland. They submitted that disclosure of legal advice, which might be the basis of such future policy discussions, would be likely to have a material bearing on those negotiations.
27. On the other hand, the Ministers questioned whether legal advice obtained in such specific circumstances would be relevant to the wider issues highlighted by Mr Dundas.
28. 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 disclosure of the information.
29. In this case, the Commissioner accepts that there is a general public interest in disclosure of the information under consideration, to allow scrutiny of the actions and public statements of the Ministers and contribute to transparency and public accountability.
30. However, the Commissioner has also considered the strong public interest in ensuring that public authorities, including the Ministers, are able to obtain and consider legal advice on a confidential basis. As noted above, the Commissioner acknowledges that 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.
31. The Commissioner has considered carefully the position that Mr Dundas has advanced, and the arguments he has provided in support of a public interest in disclosure of the information. However, in this instance, and at the time of the Ministers' decision on review, 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. In reaching this conclusion, she has borne in mind that the issues of public interest highlighted by Mr Dundas are not those in respect of which the advice was obtained.
32. On balance, the Commissioner accepts that the greater weight should be attached to the arguments which would favour withholding the information. 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, she finds that the Ministers were entitled to withhold the information in this case under that exemption.

## **Decision**

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The Commissioner finds that the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Dundas.

## **Appeal**

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Should either Mr Dundas or the Scottish Ministers 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**

**15 December 2015**

### 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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