

Decision Notice



Decision 233/2011 Mr John Guthrie and Fife Council

Copy of a claim report

Reference No: 201101864

Decision Date: 21 November 2011

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Kevin Dunion

Scottish Information Commissioner

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Summary

Mr Guthrie requested from Fife Council (the Council) a copy of a report sent by the Council to its claim handlers. The Council refused to disclose the information on the basis that it was exempt from disclosure under section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Guthrie remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Guthrie's request for information in accordance with Part 1 of FOISA, by correctly withholding the requested information under section 36(1) of FOISA. He did not require the Council to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 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

1. On 21 July 2011, Mr Guthrie wrote to the Council requesting a copy of a report the Council had prepared in relation to a claim submitted by Mr Guthrie. This report had been sent to the Council's claim handlers.
2. The Council responded on 24 August 2011. It advised Mr Guthrie that it was withholding the requested information on the basis that it was exempt from disclosure in terms of section 36(1) of FOISA.
3. On 29 August 2011, Mr Guthrie wrote to the Council requesting a review of its decision. In particular, Mr Guthrie considered the wider issues raised by his request were a matter for the public to be made aware of.
4. The Council notified Mr Guthrie of the outcome of its review on 27 September 2011, upholding its previous decision without modification.



5. On 4 October 2011, Mr Guthrie wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council'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 Guthrie 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

7. On 21 October 2011, the Council was notified in writing that an application had been received from Mr Guthrie and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, 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 Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. In response, the Council submitted that it considered the requested information to be exempt from disclosure in terms of section 36(1) of FOISA and provided submissions supporting its application of this exemption including its views on the public interest test.
10. The investigating officer also contacted Mr Guthrie during the investigation seeking his submissions on the matters to be considered in this case. Mr Guthrie's submissions, along with those of the Council are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

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 Guthrie and the Council and is satisfied that no matter of relevance has been overlooked.



Section 36(1) - Confidentiality

12. 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. Among the types of communication which fall into this category are those which are subject to legal professional privilege. One aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*).
13. Communications *post litem motam* are granted confidentiality in order to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent(s) or prospective opponent(s) will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.
14. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation: the communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded.
15. In this case, the Council stated that the withheld information comprised a report prepared by the Council and sent to its claim handlers. This report had been prepared as a result of a claim for reparation made by Mr Guthrie to the Council.
16. The Council stated that the report was prepared for the purposes of its claim handlers after the Council had received Mr Guthrie's claim. The report's purpose was to allow the Council's claim handlers to assess the Council's liability to pay compensation. The Council submitted that, when the report was prepared, it was done in anticipation of possible legal proceedings.
17. Having reviewed the context, content and timing of the report, the Commissioner is satisfied that it was created by the Council in contemplation of litigation. The report was prepared when the Council was facing potential litigation as a result of a claim for reparation being made against it by Mr Guthrie.
18. There is a further matter to be considered, however, before the Commissioner can determine whether, or the extent to which, the section 36(1) exemption is applicable in the circumstances of this case.
19. Information cannot be privileged unless it is also confidential. 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 litigation 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.



20. A claim of confidentiality will not be capable of being maintained where information has (prior to a public authority's consideration of an information request or conducting a review) been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the information. Where the confidentiality has been lost in respect of part or all of the information under consideration, any privilege associated with that information is also effectively lost.
21. Having considered the facts in this case and the information available, the Commissioner accepts that the confidentiality of the information in the report had not been lost in advance of the Council's consideration of Mr Guthrie's information request, or subsequent request for review. In the circumstances, 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.
22. As a result, the Commissioner accepts that this information is exempt from disclosure in terms of section 36(1) of FOISA.
23. The exemption in section 36(1) is a qualified exemption, which means that the application of this exemption is subject to the public interest test set out in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.

The public interest test

24. 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 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*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally, including cases such as this which concerns litigation privilege. Consequently, while he will consider each case on an individual basis, he is likely to order the release of such communications in highly compelling cases only.
25. The Council submitted that the course of justice requires that it be able to fully prepare a case and that releasing the report would prejudice its right to confidentiality of communications with its legal advisors and its legal protection to prepare a case which, it considered, would not be in the public interest.
26. In his submissions, Mr Guthrie expressed dissatisfaction with the Council's response to his claim and associated complaint, and he highlighted the public interest in transparency in relation to these processes.



27. In this case, while accepting that there is a general public interest in authorities being open to scrutiny and being accountable for their actions, the Commissioner recognises that the Council is potentially facing litigation as a result of Mr Guthrie's claim against it. Consequently, he finds that there is a greater public interest in allowing the Council to prepare fully for litigation, without these preparations being open to examination by the other party.
28. On balance, therefore, the Commissioner is satisfied, in all the circumstances of this case, that the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemption in section 36(1).

DECISION

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

Appeal

Should either Mr Guthrie or the Council 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.

Margaret Keyse
Head of Enforcement
21 November 2011



Appendix

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.

...

36 Confidentiality

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

...