



Scottish Information
Commissioner

**Decision 058/2007 The Kyles Residents'
Association and Inverclyde Council**

Request for correspondence between legal adviser and client

**Applicant: The Kyles Residents' Association
Authority: Inverclyde Council
Case No: 200601719
Decision Date: 11 April 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 058/2007 The Kyles Residents' Association and Inverclyde Council

Request for correspondence between legal adviser and client – Inverclyde Council withheld legal advice from the Association on the basis of the exemption in section 36(1) of the Freedom of Information (Scotland) Act 2002 – information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings – decision upheld by the Commissioner

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2(1)(a) and (b) (Effect of exemptions); 36(1) (Confidentiality)

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

The Kyles Residents' Association (the Association) requested a copy of a legal opinion which had been obtained by Inverclyde Council (the Council).

The Council confirmed it held the legal opinion, but was not willing to disclose the opinion to the Association, based on the exemption in section 36(1) of FOISA. Following a review, the Association made an application to the Commissioner. The Commissioner subsequently found that the Council was entitled to withhold the advice from the Association.

Background

1. On 21 August 2006, the Association submitted an information request to the Council seeking access to a copy of the legal opinion obtained by the Council regarding the proposed construction of a pedestrian footbridge over the railway at Inverkip.



2. On 13 September 2006, the Council replied, but refused to provide the Association with the legal opinion that it had requested, relying on the exemption in section 36(1) of FOISA for withholding this information.
3. On 18 September 2006, the Association wrote to the Council requesting a review of its decision. The Association challenged the Council's reliance on the exemption in section 36(1) of FOISA, arguing that since there is no prospect of legal proceedings, the exemption should not apply.
4. The Council carried out a review and, on 29 September 2006, notified the Association of the outcome of the review. The Council upheld its original decision to withhold the legal opinion from the Association and to rely on the exemption in section 36(1) of FOISA for doing so.
5. On 30 October 2006, the Association wrote to me, stating that it was dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of FOISA.
6. The Association's application was validated by establishing that it had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.
7. On 1 December 2006, the Council was notified, in terms of section 49(3)(a) of FOISA, that an application had been received from the Association. The Council was given an opportunity to comment on the application and was asked to provide my Office with specified items of information for the purposes of the investigation. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. Additional comments were subsequently sought from the Council. Submissions were also obtained from the Association.

The Investigation

9. This investigation will consider whether the Council was correct to withhold the legal opinion from the Association in terms of section 36(1) of FOISA.



Submissions from Inverclyde Council

10. The Council has advised that it sought legal advice from external solicitors in relation to its interpretation of the relationship between the Council's planning function and the Disability Discrimination Act.
11. The Council has advised that it communicated its views fully and frankly, in confidence, to its legal advisers. The Council contends that if this legal advice were to be released under FOISA then this would mean that such legal advice would not be sought in future as it might be released under FOISA.
12. I will examine the Council's application of the exemption in section 36(1) in my section on analysis and findings below.

Submissions from the Association

13. In its submission, the Association indicated that it has concerns that the proposed pedestrian footbridge will not be compliant with the requirements under the Disability Discrimination Act. The Association has also expressed concern that the plans for the bridge are contrary to official government policy and guidance from the Department of Transport.
14. The Association has indicated that without access to the legal opinion given to the Council by its external solicitors, it will not be able to mount any challenge to the construction of the footbridge. The Association considers that the Council's decision to withhold this information is effectively denying the members of the Association their basic democratic rights in relation to matters which concern not just their way of life, but which also concern the rights of others.



The Commissioner's Analysis and Findings

15. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communications can be maintained in legal proceedings. One type of communication covered by this exemption is communication between legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. For example, the information being withheld must relate to communications with a legal adviser. The legal adviser must be acting in a professional capacity and the communications must occur in the context of a professional relationship with the client.
16. In this case, the Council sought legal advice from external solicitors on the nature of the relationship between the Council's planning function and Disability Discrimination Act in respect of a planning application it was considering. In requesting this legal advice, the Council set out fully and frankly what it required the solicitors to provide advice and opinion on.
17. The legal opinion the Council has withheld from the Association is the response that it received from its solicitors.
18. Having viewed the information in question, I am satisfied that this correspondence comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result I am satisfied that the legal advice is exempt in terms of section 36(1) of FOISA.
19. The Association has commented that the exemption should not apply, given that there is no prospect of legal proceedings. In response, the Council commented that there is a possibility that the planning decision could be judicially reviewed or that the Council could face a legal challenge under the Disability Discrimination Act. Both parties may be in a better position than I am to know whether a legal challenge is likely. It is important to note, however, that the exemption in section 36(1) is not conditional on legal proceedings taking place, but depends on whether, if legal proceedings were to take place, a claim to confidentiality of communications could be maintained. In this case, I am satisfied that it could.



Public interest test

20. Section 36(1) of FOISA is a qualified exemption and is subject to the public interest test required by section 2(1)(b). Where an authority considers the information to be exempt it must still 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. If the public interest lies in disclosure, the information must be released.
21. As I have said in previous decisions (e.g. 045/2005 and 159/2006), 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 towards the end of 2004 in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48. The Council has referred to this case in its submissions to my Office concerning its application of the public interest test in section 2(1)(b) of FOISA.
22. There will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, I am likely only to order the release of communications in highly compelling cases.
23. The public interest arguments in favour of disclosure of the information might include, greater transparency and accountability on the part of the Council, so that local tax payers can see what factors the Council are taking into consideration in respect of making a decision on planning applications and possible development of the local area.
24. However, I also accept that there is a general public interest in a public authority being able to communicate its position to its legal advisers fully and frankly in confidence, in order to obtain comprehensive legal advice. By doing so, the authority can act with the greatest knowledge of the legality of its actions.
25. In its submissions to my Office, the Council has provided detailed and compelling arguments as to why it is of the view that the public interest in disclosure of the legal opinion in this case would be outweighed by the public interest in maintaining the exemption in section 36(1).



26. Having considered all submissions in this matter, I am of the view, that in this case, the public interest would be better served by the exemption in section 36(1) being maintained. I recognise that there are reasons which might justify disclosure to the Association. However, I do not consider that they outweigh the public interest in the confidentiality of legal communications. Therefore, I am satisfied that on this occasion the Council correctly applied the public interest in withholding the legal opinion and that this information is exempt by virtue of section 36(1) of FOISA.

Decision

I find that Inverclyde Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Kyles Residents' Association.

Appeal

Should either the Association or Inverclyde 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 of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
11 April 2007



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.

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.