



**Decision 131/2007 Mr Anthony Cannon and the
Scottish Public Pensions Agency**

*Request for copy of legal advice and identity of individual providing
advice*

**Applicant: Mr Anthony Cannon
Authority: Scottish Public Pensions Agency
Case No: 200600768
Decision Date: 9 August 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 131/2007 Mr Anthony Cannon and the Scottish Public Pensions Agency

Request for copy of legal advice – refusal on the basis that some information not held and other information exempt under FOISA – public interest considered – partial release ordered

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 3(2)(a)(ii) (Scottish public authorities); 18 (Further provision as respects responses to requests); 30(c) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality) and section 38(1)(b) and (2) (Personal information)

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

Facts

Mr Cannon requested a copy of the legal advice that indicated that the existing “Rule of 85” would be incompatible with EC equality legislation and must be removed from the Local Government Pension Scheme (Scotland) Regulations. He also asked for information about who had provided the advice and the costs incurred.

Following an investigation the Commissioner found that the legal advice was correctly withheld by the Scottish Public Pensions Agency (the Pensions Agency) by virtue of section 36(1) but considered that information about who provided the advice and the costs incurred should be released.



Background

1. On 6 February 2006, Mr Cannon made an information request under section 1(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) to the Minister for Finance and Public Service Reform. Mr Cannon indicated that he understood that regulations were to be introduced by government which would remove the Rule of 85 from the Local Government Pension Scheme. Mr Cannon referred to statements made by the Deputy Prime Minister and the Minister for Finance and Public Service Reform in which they had indicated that the regulations were based on legal advice concerning the European Commission Directive 78/2000.
2. Mr Cannon asked:
 - a) To see a copy of the legal advice
 - b) To be advised who provided the legal advice
 - c) Whether the advice was paid for, and if so, how much it had cost
3. The Pensions Agency responded to this request on 3 March 2006 on behalf of the Minister for Finance and Public Service Reform. The Pensions Agency indicated that it had understood Mr Cannon's request to be for the advice received prior to the announcement by the Minister on 17 January 2006 that the existing Rule of 85 would be incompatible with EC equality legislation and must be removed from the Local Government Pensions Scheme (Scotland) Regulations.
4. The Pensions Agency advised that the information was exempt by virtue of a series of exemptions that applied variously and in different combinations to all of the information held by it falling under the terms of Mr Cannon's request. The Executive cited sections 28(1), 29(1)(a), 30(b), 30(c) and 36(1) of FOISA.
5. The Pensions Agency also advised that certain of the information fell under section 3(2)(a)(ii) in that it was information that was held in confidence having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom. As a result, the Pensions Agency advised that it was not information held by the Executive for the purposes of FOISA but held by the UK Government and covered by the terms of the Freedom of Information Act 2000.



6. The Pensions Agency set out the individual exemptions that applied and then went on to consider the public interest test. It advised that it had carefully weighed up whether, in all the circumstances of the case, the public interest in disclosing the information was outweighed by that in maintaining the exemptions. In this case, the Executive advised, it found that the public interest in maintaining the exemptions outweighed that in disclosure of the information.
7. Mr Cannon was dissatisfied with this response and, on 9 March 2006, wrote again to the Pensions Agency requesting a formal review. Mr Cannon made a number of submissions as to why he considered the exemptions cited by the Pensions Agency did not apply. He also asserted that he understood the issue to be a devolved matter.
8. The Pensions Agency responded to the request for review on 4 April 2006. It advised Mr Cannon that pension policy was a reserved matter and that it was only the administration and the regulation of the scheme which was devolved. The Pensions Agency also indicated that in matters relating to European Directives the UK Government retained overall responsibility.
9. The Pensions Agency advised that it had thoroughly investigated the reasons for the original decision and concluded that there was no substantive additional evidence that would cause it to revise its original decision.
10. Mr Cannon was dissatisfied with this response and, on 7 April 2006, applied to the Commissioner for a decision. Mr Cannon indicated that the Minister for Finance and Public Service Reform had stated publicly that the Scottish Executive was following legal advice. Mr Cannon had therefore requested the legal advice, the source of the advice and the cost of the advice. He indicated that the public would be concerned if it was governed by anonymous legal advisors and that it was therefore in the public interest for the information to be made available.
11. The matter was passed to an investigating officer. The application was validated by establishing that Mr Cannon had only applied to the Commissioner after first seeking an internal review from the authority.



The investigation

12. In line with agreed procedures for dealing with applications involving Executive Agencies such as the Pensions Agency, the officer formally contacted the Scottish Executive's FOI Unit (the Executive) on 1 June 2006 in terms of section 49(3)(a) of FOISA, asking it to comment on the application as a whole and seeking further information for the purposes of the investigation.
13. The Executive responded on behalf of the Pensions Agency on 26 June 2006. The Executive made submissions in respect of both the scope of Mr Cannon's request and in respect of the exemptions it considered applied to the information. I will address these, where relevant, in my findings and analysis below.

Commissioner's analysis and findings

Background to the request

14. In its submissions to my office the Executive provided some background to Mr Cannon's request for information.
15. The Rule of 85 concerned a provision in the Local Government Pension Scheme in Scotland (and a similar provision in the equivalent scheme for England and Wales) that allowed Scheme members to retire on an unreduced pension before the normal pension age of 65 if their combined age and years of service totalled 85 or over. The Executive had considered the position of the Rule of 85 in relation to the EC Equal Treatment Framework Directive (2000/78/EC) which established a general framework for equal treatment in employment and occupation. The Executive had concluded that the Rule was inconsistent with the Directive, on the grounds that it was age discriminatory, and would therefore be removed from the scheme to ensure compliance by October 2006.
16. The Minister for Finance and Public Service Reform announced that the Rule would have to be removed in answer to a Written Parliamentary Question (S2W-21675) on 17 January 2006.



17. The Executive explained that both the Office of the Deputy Prime Minister (ODPM) and the Executive had independently had to consider the application of the Directive to the Rule of 85. The Executive explained that the Scottish Ministers had executively devolved powers to make the local government pension scheme regulations under the Superannuation Act.
18. The Executive explained that the ODPM and the Executive had therefore dealt with the issue separately but it had proven helpful for the administrations to be able to co-ordinate. The Executive indicated that ODPM had given information regarding their legal advice and political thinking. To that indirect extent ODPM advice had been provided to the Executive.
19. Mr Cannon made three requests for information. I will address each request in turn.

Request for legal advice

20. Mr Cannon requested a copy of the legal advice which had been referred to in statements made by the Minister for Finance and Public Services Reform and the Deputy Prime Minister.

Scope of this request

21. Given that I had recently received an application in respect of the same legal advice from another applicant, the Executive referred me to the documentation that it had supplied in respect of that case. This included information from and correspondence with the UK Government in respect of the Rule of 85. The Executive submitted, however, that Mr Cannon's request for information was more limited in scope.
22. The Executive submitted that from the correspondence at review stage, it seemed clear that Mr Cannon was interested in the advice that influenced the Executive's decision and that he did not wish his request to include the advice received by the UK government in its assessment of the Rule of 85. The Executive pointed out that Mr Cannon made reference in his letter requesting a review that "it is a devolved matter". The Executive indicated that this comment would not make sense had it been Mr Cannon's intention to seek specifically any advice obtained by the UK in its deliberations, as well as the advice obtained by the Scottish Government.



23. I have considered the Executive's submissions in this respect. I have also noted that in its response to Mr Cannon's initial request on 3 March 2006 the Pensions Agency indicated that it had understood Mr Cannon's request to be for the advice received prior to the announcement by the Minister for Finance and Public Service Reform on 17 January 2006 that the existing Rule of 85 would be incompatible with EC equality legislation and must be removed from the Local Government Pensions Scheme (Scotland) Regulations. This interpretation of his request was not challenged by Mr Cannon in his request for review. I am also aware that Mr Cannon wrote separately to the ODPM seeking the equivalent information.
24. I have considered the information supplied to me by the Executive and I am satisfied that the information supplied to the Executive from the UK Government was for background information only. Having considered the relevant correspondence between Mr Cannon and the Pensions Agency in this matter I am of the view that Mr Cannon was interested in seeing the legal advice that informed the position taken by the Minister for Finance and Public Service Reform. To this end, I am satisfied that he was interested only in the legal advice sought and obtained by the Scottish Executive. For the sake of completeness, I do not consider that discussions surrounding the obtaining of that legal advice fall within the scope of Mr Cannon's request.
25. As a result, I consider that only the following documents fall within the scope of Mr Cannon's request:

Documents 6, 7, 8 and 10 (paragraph 6 only)

This means that I am not required to consider the application of the exemptions contained in section 28 or 29 of FOISA to the request or, indeed, to consider whether the information is actually held by the Pensions Agency in terms of section 3(2)(a)(ii) of FOISA.

Application of the exemptions

26. The Executive applied a series of exemptions to this information. The key exemption in respect of the provision of legal advice is section 36(1) of FOISA. I will therefore firstly consider the application of this section.

Application of section 36(1) confidentiality of communications

27. The Executive submitted that all papers subject to Mr Cannon's request had been withheld under section 36(1) as they contained information in respect of which a claim to confidentiality of communications in legal proceedings could be maintained. The Executive submitted that the request was, by definition, for legal advice and the Executive indicated that it did not consider that any of that advice could be considered to be outwith the terms of section 36(1).



28. In my briefing on *Section 36: Confidentiality* I accept that one type of communication covered by this exemption is communications between a legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. Firstly, the information being withheld must relate to communications with a legal adviser. In this case the information withheld is the legal advice communicated to the Scottish Ministers. The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of his/her professional relationship with his/her client.
29. I am satisfied that the information I have identified as falling within the terms of Mr Cannon's request (see paragraph 25 above) comprises professional legal advice within a relationship where a lawyer has been asked to provide an opinion in a professional capacity to a client (the Scottish Ministers which, by definition, will include the Pensions Agency). However, section 36(1) requires me to be satisfied that it is information in respect of which a claim to confidentiality of communications **could be maintained in legal proceedings**.

Waiver of confidence

30. In its submissions to my office on the application of the public interest, the Executive referred to public statements that had been made explaining the underlying legal rationale of its position on the Rule of 85. The Executive indicated that Ministers had explained the legal position in broad terms in response to Carolyn Leckie's Parliamentary Question S2W-24591 (answered on 20 April 2006) and also in the remarks made by the Minister for Finance and Public Service Reform and his Deputy Minister in the Parliamentary debate on motion S2W-4253 on local government pensions on 20 April 2006. While these submissions were related to the consideration of the public interest, it seemed to me that these disclosures also raised the possibility of waiver of confidentiality by the Executive. If I concluded that there had been waiver, a claim to confidentiality of communications could **not** be maintained in legal proceedings as required by section 36(1).
31. In relation to confidential communications with lawyers it is established that the client can waive the confidence and can do so implicitly or explicitly. In this case, the issue is whether partial disclosure of, or public reference to, the confidential advice has given rise to an implied waiver of confidentiality in relation to the whole of that material. In its submissions to my office, the Executive accepted that whether or not the client making the disclosure or public reference intended to waive rights of confidentiality in relation to it was not material to that question.



32. Therefore, I need to consider whether by referring to the legal advice in answers to Parliamentary Questions and in other public statements the Scottish Ministers could be considered to have waived their right to confidentiality in this instance. In assessing this matter the key issue is not whether a statement is based on legal advice but rather whether a document (or part of it) protected by client confidentiality is "deployed" in evidence. That is, has the information been disclosed (or summarised) in order to evidence, or provide authority for, the position that party is advancing. If so, the party deploying the summary of the information has waived his or her confidentiality in respect of the rest of the information.
33. I have noted that, despite the Executive's submissions, the response to the Parliamentary Question of 20 April 2006 and, likewise, the Parliamentary debate of the same date post-date the applicant's request for review of 9 March 2006. As such, I am unable to consider these statements in assessing whether confidentiality had been waived for the purposes of this application. However, in correspondence with my office, the Executive identified a number of further examples where it had made public statements on this issue. There have also been several press reports. Some of these statements were made prior to the applicant's request for review and therefore could be considered by me in assessing whether the Executive had waived its right to confidentiality.
34. Having considered the statements identified and taking into account the criteria described in paragraph 32 above, I am of the view that their content and nature is such that it cannot be said that the Executive had, at the time of the applicant's request for review, waived its right to confidentiality. However, I should stress that I have not reached any conclusion as to whether or not the responses to the Parliamentary Question and the contributions to the Parliamentary debate have the effect of waiving confidentiality, as these post-date the applicant's request for review.
35. For the purposes of this application, I am content that section 36(1) applied to the information requested by Mr Cannon at the time he made his request and subsequent request for review.

Application of the public interest test

36. Section 36(1) is a qualified exemption and is subject to the public interest test contained in section 2(1)(b) of FOISA. Therefore, even where an authority considers the information to be exempt it must still go on to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.



37. The Executive submitted that the public interest in withholding legal advice was high and that only in particularly compelling cases should release be considered. The Executive advised that the Ministerial decision was informed by legal advice. The Executive submitted that the danger in disclosure of such advice was twofold; firstly, it would unreasonably expose legal positions to challenge, and secondly, it might diminish the range and quality of that advice which would in turn damage the quality of its decision making.
38. The Executive indicated that it had recognised that there was a public interest in the decision to remove the Rule of 85. However, it argued that much of the explanation, including the underlying legal rationale, had subsequently been made public. The Executive argued that Ministers had explained the legal position in broad terms in response to Carolyn Leckie's Parliamentary Question S2W-24591 (answered 20 April 2006) and also in the remarks made by the Minister for Finance and Public Service Reform and his Deputy Minister in the Parliamentary debate on motion S2W-4253 on local government pensions on 20 April 2006.
39. The Executive argued that these responses provided an explanation on how the Equal Treatment Framework Directive related to the Rule of 85, and that as a result, the public interest in understanding the way in which the Scottish Ministers believed the Directive applied had been satisfied. Any remaining public interest in release of the actual terms of the advice, the Executive argued, was outweighed by the need for Ministers to be able to seek and receive legal advice on a confidential basis, which might be given in less full and frank terms if it were thought likely that it would be disclosed.
40. The Executive argued that this was particularly the case here where the decision had only been recently made and announced when Mr Cannon's request had been received and that many aspects of the policy remained under consideration.
41. The Executive advised that an additional factor was that the trade union Unison had brought judicial review proceedings against the UK Government in respect of its decision to remove the rule. The Executive argued that release of the advice at this stage could have an impact on those proceedings or similar action which could be taken against the Scottish Ministers.
42. I understand that in respect of the judicial review proceedings a substantive hearing took place in September 2006 and that the UK Government's position had been upheld. I understand that there has been no appeal. To that extent, such proceedings have been concluded. Likewise, I understand that no proceedings have been instigated to date against the Scottish Ministers. I recognise, however, that this issue was pertinent at the time Mr Cannon's request for information was made.



43. In *Decision 023/2005* I concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, while I will consider each case on an individual basis, I am likely only to order the release of such communications in highly compelling cases.
44. The public interest issues in favour of disclosing this information include enhancing scrutiny of the legality of the actions of a public body. It might also be in the public interest to order disclosure where it would make a significant contribution to debate on a matter of public interest. In this particular case, there has been an understandable high level of interest in the decision by the Executive to remove the Rule of 85 amongst local government workers and amongst members of parliament. Disclosure of this information would make transparent the reasons why the Executive has concluded that the Rule of 85 is contrary to European law.
45. Against any public interest arguments for disclosure, however, must be weighed any consequent harm to the public interest. It is in the public interest that an authority can communicate its position to its advisers fully and frankly in confidence, in order to obtain the most comprehensive legal advice in relation to its projects and defend its position adequately should that become necessary.
46. It is also in the public interest that a public authority can receive the most comprehensive legal advice about its proposed actions. Further, I take the view that there is an established means of scrutinising the legality of the actions of public bodies, through judicial review in the courts. 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.
47. The Executive has submitted that it has already disclosed its general explanation as to why it considers the Rule of 85 to be age discriminatory and therefore has revealed its basis for this conclusion. The Executive has referred to the information supplied in its response to the parliamentary question on 20 April 2006 and during the subsequent parliamentary debate on the same date. However, as I indicate above, the disclosures to which the Executive referred both post-date the applicant's request for information and subsequent request for review. As a result, the Executive cannot rely on this information in justifying the way in which it handled Mr Cannon's request for information nor am I able to take it into account in my assessment of the public interest.



48. I have considered carefully the submissions made by each of the parties. In this case I recognise that there are strong reasons which could justify disclosing the legal advice to the applicant. However, I do not feel that they are so highly compelling as to outweigh the public interest in the confidentiality of legal communications. In particular, I consider that there are more appropriate channels for challenging the legal position taken by a public authority. Therefore, I am satisfied that on this occasion the Executive correctly applied the public interest test in withholding the legal advice and I find that this information is exempt by virtue of section 36(1) of FOISA.
49. Given that I have found the information to be exempt by virtue of section 36(1) of FOISA I have not gone on to consider the application of the other exemptions cited by the Executive.

Request for information about who provided the advice

50. Mr Cannon also asked the Executive to advise who provided the legal advice. In this letter of application to me Mr Cannon argued that the public would be rightly concerned if it was, in effect, governed by anonymous legal advisers.
51. The Executive indicated in its submissions to my office that it had interpreted Mr Cannon's request on an organisational basis. The Executive took the view that Mr Cannon was seeking the source of the legal advice; that is, whether it was provided within the Executive, by Whitehall, by a Law Officer or whether it was privately contracted from Counsel or a private law firm. The Executive had not regarded it as a request for the identities of the individual lawyers.
52. It did not seem to me clear from Mr Cannon's request whether he was seeking this information at an organisational or at an individual level. Further, his letter of application to me had referred to "anonymous lawyers".
53. Mr Cannon confirmed in subsequent correspondence that he was seeking this information at an individual and not at an organisational level. He indicated that he wanted to know the identity of the specific lawyer if it was an individual lawyer or the agency or firm who provided the advice if there was no identifiable individual to whom the advice could be attributed.
54. The Executive applied a number of exemptions to this information. I will address each exemption in turn.

Application of section 30(c) prejudice the effective conduct of public affairs

55. The Executive considered that it would be likely to substantially prejudice the effective conduct of public affairs if it were to disclose routinely who had provided particular legal advice and, in particular, whether the advice had come from internal or external legal advisors or the Law Officers.



56. The Executive made a number of detailed submissions in respect of the application of this exemption. Its main argument was that the authority of legal analysis relied upon by the Executive depended on its content rather than the organisation or individual who provided it. The Executive argued that disclosure of who provided legal advice in a particular case would tend to shift the focus of the debate from the correctness of the overall decision reached by the Ministers to the status and authority of the advice itself.
57. The Executive argued that indicating the source of the legal advice in any given case might be thought to provide a guide to the relative importance attached by the Executive to particular issues. If the source of the legal advice became an issue that was routinely made public this could create a pressure to seek advice from Counsel whenever a challenge was expected.
58. The Executive also pointed to a Convention that the Government did not reveal whether or not the Law Officers had advised in a particular case. The Executive argued that if it was disclosed that the Law Officers had given advice in particular cases, this would lead to questions about why they had not advised in other cases, and could lead to political pressure for them to do so in cases where their involvement was not justified. Disclosure of the source of legal advice, the Executive submitted, would undermine this convention.
59. In respect of the identity of an individual lawyer, the Executive argued that revealing the names of advisors and, by inference, their relative seniority, could give a misleading impression of the importance attached by the Executive to an issue.
60. I do not accept the Executive's submissions in respect of section 30(c). There are a whole range of factors governing the choice of lawyer when seeking legal advice. These will include the complexity of the matter, the certainty of the law on that issue, the availability of in-house expertise, the relative urgency of the matter and the level of research required. Furthermore, members of the public understand that the relative costs of legal advice must also be taken into account when deciding who to approach and recognise that it would not be appropriate to seek the opinion of Counsel in every single instance, nor would it be desirable. There may be difficult and important cases where in-house expertise is such that it is not necessary to seek external advice. In other cases, the matter may be unusual and therefore outwith the normal expertise of the authority's own lawyers but be a relatively straightforward matter to an external lawyer who specialises in that area.
61. Further I do not accept that release of the identity of the lawyer will automatically detract from the content of the advice. Naturally, the relative seniority and expertise of the lawyer may become an issue in cases where an organisation or individual seeks to challenge the stance taken by an authority but this is to be expected and is not a reason, in my view, for withholding the identity of the lawyer in every single case.



62. As I said, an authority will take into account a whole range of factors when deciding who should be approached to provide legal advice and I do not accept that this process will be distorted by disclosure of the identity of the lawyer(s) in this case. Section 30(c) requires an authority to demonstrate that disclosure, or would be likely to, substantially prejudice the effective conduct of public affairs. As I have said in previous cases, the harm test in section 30(c) is high and an authority must demonstrate that the harm is real, significant and substantial. I do not consider that the Executive has demonstrated that level harm in this case and therefore I do not uphold the application of section 30(c) in respect of information about who provided the legal advice.
63. Regardless of my ultimate decision as to whether the source of the legal advice should be disclosed, this decision notice cannot disclose whether the source of the advice can be identified at an organisational or at an individual level. In the circumstances, I am obliged to consider the application of section 38(1)(b) as cited by the Executive even if it is not relevant to this particular request.

Application of section 38(1)(b) Third party personal data

64. The Executive submitted that the identities of individual lawyers was exempt from disclosure as it is personal data of third parties and disclosure would breach the first data protection principle of the Data Protection Act 1998 (DPA).
65. Section 38(1)(b) of FOISA states that information is exempt information if it constitutes personal data and the disclosure of the information to a member of the public would contravene any of the data protection principles.
66. “Personal data” is defined in section 1(1) of the DPA as:
- “data which relate to a living individual who can be identified –
 - a) from those data, or
 - b) from those data and from other information which is in the possession of or is likely to come into the possession of, the data controller
- and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”



67. The definition is subject to the interpretation contained in *Durant v Financial Services Authority* [2003] EWCA Civ 1746 (*Durant case*). In this decision, the (English) Court of Appeal held that if information is to be viewed as personal data, the information has to be biographical in a significant sense, i.e. go beyond the recording of the individual's involvement in a matter or event that has no personal connotations. The individual also has to be the focus of the information, rather than some other person with whom that individual may have been involved. The Court of Appeal summarised these two aspects as information affecting a person's privacy, whether in his personal or family life, business or professional capacity.
68. I am satisfied that given the definition contained in section 1(1) of the DPA and the discussion provided in the *Durant case* that the identity of an individual lawyer is their personal data.
69. However, FOISA does not protect information simply because it relates to a third party. Personal data is exempt from release under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or (b)) if the disclosure of the information to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. The Executive has argued that, in this case, to disclose the personal data of a third party would breach the first principle of the DPA.
70. The first data protection principle states that the processing of personal data (such as the release of data in response to a request made under FOISA), must be fair and lawful and, in particular, shall not be processed unless:
- a) at least one of the conditions in Schedule 2 is met and
 - b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
71. I am satisfied that the information requested in this case would not constitute sensitive personal data and so do not need to consider whether any conditions in Schedule 3 can be met. However, I must consider whether any of the conditions in Schedule 2 are met. Condition 6 of Schedule 2 to the DPA allows information to be processed where:
- “The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”



72. I must apply a number of tests to establish whether condition 6 supports disclosure of personal data in this case. The first test is whether it can be established that the third party or parties to whom the data would be disclosed has/have a legitimate interest in the processing of the personal data (in this case by disclosure to a member of the public) to which the request relates. The second is whether the processing is necessary for the purposes of those legitimate interests. The third is whether that processing can be seen to be unwarranted in this particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. Both competing interests must then be balanced.
73. In considering the first test, it seems to me that there is a legitimate and significant interest in disclosing information which reveals the source of legal advice obtained by a public authority. I am of the view that even in cases where an authority does not wish to disclose the detail of advice received, it should aim to release as much information as possible relating to that advice. In this case, Mr Cannon considers that a key political decision has been made on the basis of legal advice. Therefore, he wishes to know the source of the advice and who or what body, in effect, gave the advice which led to this decision being made. It seems to me that providing this level of accountability is reasonable. As mentioned above, the source of legal advice may be particularly pertinent to any body or individual wishing to challenge the legal position taken by an authority.
74. With regard to whether disclosure is necessary for the purposes of the legitimate interests identified in paragraph 73 above, I have considered whether these interests might be met equally effectively by any alternative means. In all the circumstances, I have concluded that the legitimate interests in question cannot be met without disclosure of the source of the legal advice and, if appropriate in this case, the actual name of the lawyer.
75. As mentioned above, I am required to balance Mr Cannon's legitimate interests against those of the data subject (if there is a data subject in this case).
76. The Information Commissioner, who is responsible for enforcing the DPA, has provided guidance (*Freedom of Information Act Awareness Guidance No 1*) on the consideration of the data protection principles within the context of freedom of information legislation. This guidance recommends that public authorities should consider the following questions when deciding if release of information would breach the first data protection principle:
- a) would disclosure cause unnecessary or unjustified distress or damage to the data subject?
 - b) would the data subject expect that his or her information might be disclosed to others?



- c) has the person been led to believe that his or her information would be kept secret?
77. A lawyer providing advice to a public authority, whether or not they are employed by that authority, is acting in a professional capacity. Disclosing the identity of that lawyer would reveal information only about activities they have carried out in a professional capacity. I accept, however, that disclosure of this information might lead to information about their relative experience to be ascertained. The Freedom of Information (Scotland) Act received Royal Assent in May 2002 and from that date onwards public authorities and those who do work for those authorities were on notice that they might in future be identified in connection with the work they carry out in a professional capacity. In this case, legal advice was being provided in a high profile matter which the Executive was aware might become the subject of subsequent legal challenge. In these circumstances, I do not accept that a lawyer providing such advice would never have expected that they might be identified in connection with that advice in circumstances where that information could be publicly accessible.
78. In conclusion, therefore, I do not consider that the disclosure of this information (if it exists) would be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. In the circumstances, I find that Condition 6 of Schedule 2 of the DPA permits disclosure of this personal data provided disclosure is in all other respects fair and lawful.
79. The first data protection principle also requires me to be satisfied that processing of the data (in this disclosure) would be both fair and lawful. Given the circumstances in which this advice was sought I am satisfied that disclosure of the identity of the lawyer would not be unlawful. However, I must also be satisfied that disclosure of this information would be fair. In paragraphs 76 to 77 above I have set out my thinking in connection the legitimate interests of the data subject in this matter. Given that the information was supplied in a professional capacity, the high profile nature of this matter and the circumstances in which the advice was sought I do not accept that a lawyer would never have expected their name to have been released. In all the circumstances, I am satisfied that disclosure of this information would be fair.
80. In all the circumstances, I do not accept the Executive's submissions that the identity of the lawyer in this case (if an individual can be identified) would breach the first data protection principle. I therefore do not uphold the application of section 38(1)(b) to the identity of the lawyer.



Costs of the legal advice

81. Finally, Mr Cannon asked the Executive to advise whether the advice was paid for and, if so, how much it had cost.
82. In its submissions to my office (but not in response to Mr Cannon), the Executive relied on section 18(1) on the basis that to reveal whether or not fees were paid would imply what sources of legal advice had been used.
83. Where a public authority has chosen to rely on section 18(1), I must establish whether the authority is justified in issuing a refusal notice on the basis that to reveal whether the information exists or is held would be contrary to the public interest; and also to establish that if the information existed and was held, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions provided for by sections 28 to 35, 39(1) or 41 of FOISA.
84. In so doing, I must ensure that my decision notice does not confirm one way or the other whether the information requested actually exists or is held by the public authority. This means that I will be unable to comment in any depth on the reliance by the public authority on one of the exemptions listed in section 18(1), as to do so could have the effect of indicating whether the information exists or is held by the public authority.
85. In general, however, the application of section 18 can be explained as, colloquially, a “Neither Confirm Nor Deny” (NCND) policy where the public interest would be harmed if the authority were to confirm or deny that certain information was held.
86. There is a two step process in assessing the application of the section 18(1). In order to rely on section 18(1), an authority must first demonstrate that if the information existed it would be exempt information. Section 18(1) permits reliance on only certain exemptions listed in Part 2 of FOISA (see paragraph 83 above). Only if I uphold the application of an exemption to the information must I go on to consider whether to reveal whether the information existed or not would be contrary to the public interest.
87. Therefore, I will firstly consider whether any of the exemptions relied on by the Executive apply. The Executive submitted that section 30(c) applied to this information in the same way as it did to information about who supplied the advice. That is, the Executive considered the source of the legal advice to be exempt information and, likewise, considered that information about whether costs were incurred were exempt, given that to disclose the latter could disclose the former.



88. As I have not upheld the application of section 30(c) in respect of the source of the legal advice and consider that this information should be disclosed to Mr Cannon there are no further reasons why the Executive should withhold information about any costs incurred. In the circumstances, I do not uphold the application of section 30(c) to information about any costs incurred.
89. Given that I have not upheld the exemption cited by the Executive in respect of this information (if it did exist) I am not required to consider whether revealing whether the information exists or is held would be contrary to the public interest.
90. In the circumstances, information about whether any costs incurred should be supplied by the Executive to Mr Cannon. Where costs have been incurred by the Executive, information about these costs should also be supplied to Mr Cannon.

Decision

I find that the Scottish Public Pensions Agency (the Pensions Agency) complied with Part 1 of FOISA in withholding the legal advice requested by Mr Cannon in that this information is exempt by virtue of section 36(1).

I find that the Pensions Agency failed to comply with Part 1 of FOISA in withholding information about who provided the advice and whether it held information relating to the costs of the legal advice. In failing to do this, it failed to comply with section 1(1) of FOISA.

I require the Pensions Agency to supply to Mr Cannon information about who provided the legal advice. This should indicate the name of the law firm, Executive department, Counsel or Law Officer, as appropriate. Where this information can be provided at an individual level the name of that individual should also be supplied to Mr Cannon.

I require the Pensions Agency to provide Mr Cannon with information about the costs of the legal advice. The Pensions Agency should either advise that:

- a) there were no legal costs; or
- b) provide the total costs of the legal advice



Appeal

Should either Mr Cannon or the Pensions Agency wish to appeal against this decision, there is a right to 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 notice.

Kevin Dunion
Scottish Information Commissioner
9 August 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.

3 Scottish public authorities

- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-
 - (a) by the authority otherwise than-
 - (...)
 - (ii) in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom

18 Further provision as respects responses to requests

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.



36 Confidentiality

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

38 Personal information

- (1) Information is exempt information if it constitutes-
 - (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;
- (2) The first condition is-
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles; or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and
 - (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.