



Scottish Information
Commissioner

**Decision 133/2007 Carolyn Leckie and the Scottish
Public Pensions Agency**

Request for legal advice

**Applicant: Carolyn Leckie
Authority: Scottish Public Pensions Agency
Case No: 200600833
Decision Date: 9 August 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 133/2007 Carolyn Leckie and the Scottish Public Pensions Agency

Request for copy of legal advice – information partly not held and partly withheld on the basis of exemptions in FOISA - public interest considered

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1)(General entitlement); 2(1) (Effect of exemptions); 3(2)(a)(ii) (Scottish public authorities) and 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

Ms Carolyn Leckie requested a copy of the legal advice obtained by the Scottish Public Pensions Agency (the Pensions Agency) in respect of the removal of the Rule of 85 from the Local Government Pension Scheme. The Pensions Agency responded by refusing to supply the information requested citing a series of exemptions in support of this, namely, sections 28(1), 29(1)(a), 30(b) and 36(1) of FOISA. Ms Leckie was not satisfied with this response and asked the Pensions Agency to review its decision. The Pensions Agency upheld its original refusal on review. Ms Leckie remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Pensions Agency had dealt with Ms Leckie's request for information in accordance with Part 1 of FOISA.

Background

1. On 8 February 2006, Ms Leckie wrote to the Executive requesting the following information:



- The legal advice obtained by the Scottish Executive in respect of the removal of the Rule of 85 from the Local Government Pension Scheme

This request was passed to the Pensions Agency.

2. The Pensions Agency responded to this request on 10 March 2006. The Pensions Agency indicated that it had understood this to be a request for the legal advice Mr McCabe, then Minister for Finance and Public Service Reform, had received before making his announcement 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 Pension Scheme (Scotland) Regulations.
3. The Pensions Agency advised that in this instance exemptions under sections 28(1), 29(1)(a), 30(b) and 36(1) of FOISA applied variously and in different combinations to all of the information held by the Pensions Agency falling under the terms of the request. In addition, the Pensions Agency submitted that certain parts of the information requested fell under section 3(2)(a)(ii) of FOISA. That section provides that where information is held in confidence having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom it is not information held by the Pensions Agency for the purposes of FOISA.
4. The Pensions Agency considered the public interest in release of the information but concluded that while there was a public interest in releasing information that would contribute to a debate, such interest was not be outweighed by the factors it had identified (as set out in its response).
5. Ms Leckie was dissatisfied with this response and on 29 March 2006 requested a review from the Pensions Agency. Ms Leckie indicated that the interest of the members of the Local Government Pensions Scheme far outweighed any other concern.
6. The Pensions Agency responded to this request for review on 7 April 2006 and upheld its original decision.
7. On 28 April 2006, Ms Leckie wrote to my Office, stating that she was dissatisfied with the outcome of the Pensions Agency review and applying to me for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Ms Leckie 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. The case was then allocated to an investigating officer.



The Investigation

9. In line with agreed practice when dealing with applications involving Executive Agencies such as the Pensions Agency, the officer formally contacted the Scottish Executive's Freedom of Information Unit on 16 May 2006 in terms of section 49(3)(a) of FOISA, asking it to comments on the application as a whole and seeking further information for the purposes of the investigation.
10. The Executive responded on 15 June 2006. The Executive made submissions in respect of both the scope of Ms Leckie's request and in respect to the exemptions it considered applied to the information. I will address these submissions, where relevant, in my analysis and findings below.

The Commissioner's Analysis and Findings

Scope of the request

11. The Executive indicated that Ms Leckie's request had been interpreted as being for the advice received by Mr Tom McCabe, Minister for Finance and Public Sector Reform, prior to his announcement on 17 January 2006 that the Rule of 85 would have to be removed. The Executive indicated that this interpretation was not contested by Ms Leckie at the review stage.
12. The Executive supplied information to my office covered by the request. It indicated that this included information that had been supplied to it by the UK Government and held in confidence. The Executive indicated that this information was considered to fall outwith FOISA under section 3(2)(a)(ii) and was instead covered by the Freedom of Information Act 2000.
13. The Executive queried, in any event, whether this information fell within the scope of the request. It indicated that some of the information supplied had not been commissioned by or intended for Scottish Ministers. It had been "obtained" by the Executive in the sense of being forwarded for information purposes. The Executive indicated that it had been included for my assessment as it related to the advice which was given to Scottish Ministers, although it was not "obtained" in the sense of being sourced or sought.



14. By way of background, the Rule of 85 concerns a provision in the Local Government Pension Scheme in Scotland (and a similar provision in the equivalent scheme for England and Wales) that allows Scheme members to retire on an unreduced pension before the normal pension age of 65 if their combined age and years of service total 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.
15. The then Minister for Finance and Public Service Reform had announced the Executive's intention that the Rule would have to be removed in answer to a Written Parliamentary Question (S2W-21675) on 17 January 2006. Ms Leckie's request for information regarding the legal advice obtained by the Executive was received on 10 February 2006.
16. I have considered the information supplied to me by the Executive and the wording and timing of Ms Leckie's request. I am satisfied that the information supplied to the Executive from the UK Government was for background information only. Further, given the timing of Ms Leckie's request, I am of the view that she 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 she 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 to fall within the scope of Ms Leckie's request.
17. As a result, I consider that only the following documents fall within the scope of Ms Leckie's request:

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

Application of the exemptions

18. A series of exemptions has been applied 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

19. The Executive submitted that all papers subject to Ms Leckie's request had been withheld under section 36(1) as 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).
20. 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.
21. I am satisfied that the information I have identified as falling within the terms of Ms Leckie's request (see paragraph 17 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). 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

22. 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).



23. 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.
24. 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.
25. 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 29 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.
26. Having considered the statements identified and taking into account the criteria described in paragraph 24 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.
27. For the purposes of this application, I am content that section 36(1) applied to the information requested by Ms Leckie at the time she made her request and subsequent request for review.



Public interest test

28. 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.
29. 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.
30. 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 already been made public. The Executive argued that Ministers had subsequently 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.
31. 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.
32. The Executive argued that this was particularly the case here where the decision had only been recently made and announced when Ms Leckie's request had been received and that many aspects of the policy remained under consideration.
33. 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.



34. 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 Ms Leckie's request for information was made.
35. 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.
36. 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.
37. 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.
38. 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.



39. 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 stated 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 Ms Leckie's request for information nor am I able to take it into account in my assessment of the public interest.
40. 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.
41. 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.

Decision

I find that the Scottish Public Pensions Agency acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Leckie.



Appeal

Should either Ms Leckie or the Pensions Agency 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
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.

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.

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

36 Confidentiality

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

