



Scottish Information
Commissioner

Decision 038/2008 Mr N Stewart and City of Edinburgh Council

Information relating to an individual's care home arrangements

Applicant: Mr N Stewart
Authority: City of Edinburgh Council
Case No: 200700468
Decision Date: 28 February 2008

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
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Decision 038/2008 Mr N Stewart and City of Edinburgh Council

Request for information in relation to a deceased relative's home care arrangements with the Council – information withheld under section 36(1) of the Freedom of Information (Scotland) Act 2002 (confidentiality) – Commissioner upheld the Council's decision to withhold the information requested.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections: 1(1) (General entitlement); 2(1) (Effect of exemptions) 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.

Decision 023/2005 - *Mr David Emslie and Communities Scotland*:
<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2005/200501380.asp>

Facts

Mr Stewart requested information relating to his deceased relative's home care arrangements from City of Edinburgh Council (the Council). The Council responded by providing some of the information requested, but withheld the remaining information on the grounds that it was exempt from disclosure under section 36(1) (Confidentiality) of FOISA. Following a review, the Council maintained its decision to withhold the information under section 36(1), but also applied the exemption in section 26(a) to information relating to payments made. Mr Stewart remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council disclosed the information concerning payments to Mr Stewart, while maintaining its position that it was not obliged to do so under the terms of FOISA. With Mr Stewart's agreement, this information is not considered in this decision. Regarding the remaining information withheld, the Commissioner found that the Council had dealt with Mr Stewart's request for information in accordance with Part 1 of FOISA. He did not require the Council to take any action.



Background

1. On 30 September 2006, Mr Stewart wrote to the Council requesting the following information:
 1. Details of monies paid to the various homes Mr Stewart's deceased relative stayed in and details of any refunds that were made.
 2. Copies of memos between a particular member of staff and others in the Council's Legal Department.
 3. Information relating to the decision that was made as to what level of proof was required when determining the ownership of Mr Stewart's deceased relative's sheltered house.
2. On 27 October 2006, the Council wrote to Mr Stewart in response to his request for information. In its response, the Council supplied some financial information falling under the scope of point 1 above. The Council went on, however, to withhold information pertaining to point 2 of the request on the basis that it was exempt under section 36(1) of FOISA. With respect to point 3 of the request, the Council provided an overview of the process that is followed by it to establish ownership of a property when required.
3. On 3 November 2006, Mr Stewart wrote to the Council requesting a review of its decision. He expressed dissatisfaction with the financial information supplied in response to the first part of his request, indicating that he wished to receive copies of the original payment records. He also challenged the Council's application of section 36(1) and the public interest test, and indicated that he did not believe that the Council had properly addressed the third part of his request.
4. Mr Stewart did not receive a response to his request for a review from the Council and on 9 January 2007, Mr Stewart made an application to my Office for a decision on this specific matter. My decision relating to this specific technical failure by the Council can be viewed using the following link:
<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200700057.asp>



5. On 28 February 2007, the Council wrote to notify Mr Stewart of the outcome of its review. With regard to the part of his request concerning financial information (point 1 of paragraph 1 above), the Council stated that on reflection it should have cited the exemption in section 26(a) (Prohibitions on disclosure) and refused to provide the information already supplied. However, the Council went on to explain that the information had been provided in this instance, because Mr Stewart had already received similar information from the Council in the past. The Council confirmed that it considered the original payment records exempt from disclosure under section 26(a) of FOISA
6. With regard to points 2 and 3 of the request, the Council upheld its application of section 36(1) and reiterated the procedure it uses to establish ownership of a property.
7. On 16 March 2007, Mr Stewart wrote to my Office, stating that he 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.
8. The application was validated by establishing that Mr Stewart 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 Investigation

9. On 29 March 2007, the Council was notified in writing that an application had been received from Mr Stewart and was asked to provide my Office with specified items of information required for the purposes of the investigation. An information notice was issued on 1 May 2007 as the Council had not responded to this request. The Council responded with the information requested on 15 May 2007 and the case was then allocated to an investigating officer.
10. On 25 June 2007, the investigating officer wrote to the Council in terms of section 49(3)(a) of FOISA inviting it to provide my Office with its comments on the case, seeking detailed submissions on the exemptions cited in withholding the information requested by Mr Stewart, and other information to inform my consideration of this case.



11. The Council responded on 18 July 2007, providing additional information and comment in support of its application of sections 26(a) and 36(1) of FOISA. The Council also provided additional background information on how it establishes property ownership, of relevance to my consideration of point three of Mr Stewart's request.
12. The investigating officer wrote to the Council again on 5 December 2007, requesting some additional clarification regarding the submissions received from the Council. The investigating officer also asked the Council to consider whether it would be prepared to release the financial information that was being withheld to Mr Stewart outside of FOISA given the circumstances of this specific case.
13. In response to this request, the Council agreed to supply Mr Stewart with the relevant financial information on the basis that it still maintained that it was exempt from disclosure under FOISA, but it was willing in the circumstances, to supply it to him. A copy of the letter disclosing additional financial information was provided to my Office.
14. In subsequent communications, Mr Stewart confirmed that he was satisfied that the financial information received addressed this part of his application and that he would now like my consideration of this case to focus on points two and three of his initial request (see paragraph 1). I will not consider point 1 of the request any further in this decision.
15. As a consequence, I will only consider the Council's application of the exemption in section 36(1), which is pertinent to both parts two and three of the information request.

The Commissioner's Analysis and Findings

16. In coming to a decision in this matter, I have considered all the information and the submissions that have been presented to me by both the Council and Mr Stewart and I am satisfied, that no matter of relevance has been overlooked.
17. The Council identified and withheld four documents from Mr Stewart which related to points two and three of his request. The Council cited section 36(1) of FOISA in withholding all four documents.



18. Three of the documents contain email exchanges involving the individual named in point two of the request and others in the Council's legal department. The fourth is a memo from a solicitor providing details of property ownership prepared following a search of the Register of Sasines.
19. I am satisfied that the memo is all information that is held that relates to "the decision that was made as to what level of proof was required when determining the ownership" of Mr Stewart's deceased relative's home. The Council has explained that there is no set procedure for establishing property ownership in cases such as the one relevant in this case. However, the department that needs to identify ownership will ask the legal department to check the title in the public Register.
20. The Council confirmed that this had happened in the case concerning Mr Stewart's deceased relative. The Council also explained that, subsequent to the search revealed in the document under consideration here, documentary evidence had been supplied confirming that the Council's initial understanding of the ownership of one particular property had been incorrect. The Council confirmed that its original assessment of care costs to be paid was modified in response to this.
21. I am satisfied that no further information is held that relates to the decision made concerning the level of proof required when determining ownership. I will now consider whether the Council has correctly withheld these four documents.

Section 36(1) – Confidentiality

22. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings.
23. One type of communication which falls into this category is communications which are subject to legal professional privilege. Legal professional privilege can itself be split into two categories – legal advice privilege and litigation privilege. It is the first of these categories, i.e. legal advice privilege, which has been claimed by the Council in this particular case. This covers communications between lawyers and their clients, where legal advice is sought or given. In this case, the Council sought advice from its in-house lawyers.
24. In its submissions to me, the Council asserted that the four documents under consideration in this case consisted of communications between solicitor and client, which were subject to legal professional privilege.



25. Having considered the information which has been withheld under section 36(1) and the relevant submissions made by the Council, I am of the view that the documents withheld by the Council constitute either legal advice or communications from the client in relation to the obtaining of legal advice. Consequently, I am satisfied that the four documents identified by the Council comprise information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, I accept that this information is exempt in terms of section 36(1) of FOISA.
26. The exemption under 36(1) is subject to the public interest test required under section 2(1)(b) of FOISA. I must now go on to consider the application of the public interest test and to consider whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption.

Public Interest Test

27. In consideration of the public interest test in respect of this information, the Council referred to previous decisions and specifically decision number 023/2005 *Mr David Emslie and Communities Scotland*. The Council argued that local authorities should be able to seek, receive and consider legal advice in private in the knowledge that the legal advice will not be made available to third parties. The Council further added that in its view, there is no highly compelling reason to move away from that principle in this case.
28. As I have stated in previous decisions, the Courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds and there are many judicial comments on the fundamental nature of this confidentiality in our legal system. Many of the arguments in favour of maintaining confidentiality of communications were discussed in *Three Rivers District Council and Others v Governor and Company of the Bank of England* (2004) UK HL 48:
<http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>
29. 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 and therefore, while I will consider each case on an individual basis, I am likely to order the release of such communications in highly compelling cases only. I have reiterated this in a number of subsequent decisions.



30. Mr Stewart has submitted that the public interest in disclosure of the information withheld in this case outweighs that in non disclosure. He has indicated that disclosure would enable him to pursue his complaint about the Council's actions to the Scottish Public Services Ombudsman, and to raise his concerns not only about the handling of his relative's particular case, but also about the funding of care homes and free care for the elderly in general.
31. I acknowledge the arguments put forward by Mr Stewart regarding the public interest in ensuring that the Council is discharging its obligations with respect to care home payments. I accept that disclosure of the information under consideration here would provide some additional insights into the Council's approach to the circumstances of his relative's case. However I do not consider that the disclosure of this information would provide any insights into the funding of care homes or free personal care more generally.
32. Having considered the competing public interest arguments in relation to the specific documents in question, I am of the view that the public interest in allowing legal advice to be requested, received and discussed in confidence, outweighs that in disclosing the information in this case.
33. On balance, therefore, I find that the Council was correct to maintain the exemption in section 36(1) of FOISA for withholding this information from Mr Stewart.

Decision

I find that City of Edinburgh Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), in withholding the four documents withheld from Mr Stewart under section 36(1) of FOISA.



Appeal

Should either Mr Stewart or City of Edinburgh 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.

Signed on behalf of Kevin Dunion, Scottish Information Commissioner, under delegated authority granted on 14 November 2007.

Margaret Keyse
Head of Investigations
28 February 2008



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.