

Decision Notice



Decision 137/2009 Unison Scotland and the Scottish Ministers

PFI Hospital Car Parking Charging Schemes

Reference No: 200900146

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Scottish Information Commissioner

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Summary

Unison Scotland (Unison) requested from the Scottish Ministers (the Ministers) information relating to hospital car parking charging schemes under PFI contracts. The Ministers responded by releasing some information in summary form while withholding financial information on the grounds that it was confidential and therefore exempt under sections 36(2) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Unison remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with Unison's request for information in accordance with Part 1 of FOISA, insofar as certain information (identified in the course of the investigation) was subject to legal advice privilege and had been properly withheld under section 36(1). However, the Commissioner also found that the Ministers failed to comply with Part 1 of FOISA by incorrectly informing Unison that the remaining withheld information was exempt under section 36(2) of FOISA. He required the Ministers to release this withheld information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(c) (Effect of exemptions); 15(1) (Duty to provide advice and assistance) and 36(1) and (2) (Confidentiality)

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

Background

1. On 18 August 2008, Unison wrote the following to the Ministers:

“We understand that NHS Boards operating car parking charging schemes under PFI contracts were recently required to review these and provide the Cabinet Secretary for Health and Wellbeing with a report by the end of June 2008. Please would you provide us with these reports, including the financial costs of amending the contracts to reduce/eliminate car parking charges at these hospitals.”



2. The Ministers responded on 23 September 2008 by disclosing certain factual data in summary form, but also applying the exemption under section 36(2) of FOISA to any indicative financial information held.
3. On 30 September 2008, Unison wrote to the Ministers requesting a review of their decision. Unison disagreed that the withheld information was exempt under section 36(2).
4. The Ministers notified Unison of the outcome of their review on 3 November 2008, whereby they upheld their original decision to withhold the information under section 36(2) of FOISA.
5. On 21 January 2009, Unison wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Unison had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 26 January 2009, the Ministers were notified in writing that an application had been received from Unison and were asked to provide the Commissioner with any information withheld from it. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested, with particular reference to section 36(2), and to explain the steps they had taken to identify and locate any relevant information.
9. During the course of the investigation, the Ministers explained the process by which the information deemed relevant to Unison's request was obtained, advising that certain information which might be considered to fall within the scope of Unison's request (that contained in review reports from Scottish NHS Boards, submitted to the Ministers in response to guidance issued in January 2008 – see paragraph 14 below) was already in the public domain at <http://www.pcpd.scot.nhs.uk/Travel.htm> and acknowledging that they should have directed Unison to this web address in applying the section 25(1) exemption (Information otherwise accessible). Having checked the above link, the Commissioner is satisfied that the reports in question are indeed publicly accessible through it. He will consider whether the information in them falls within the scope of the request in his analysis and findings below, together with the Ministers' other submissions in this case.



10. Further correspondence with the Ministers also confirmed that certain information was being withheld under section 36(1) of FOISA, with reasons why this exemption was being claimed.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Unison and the Ministers and is satisfied that no matter of relevance has been overlooked.

Recent Court of Session Opinion

12. The Commissioner notes that part of the information request made by Unison was for specific documents. In the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73, the Court of Session emphasised that FOISA gives a right to information, not documents. However, the Court also said, in paragraph 45 of its Opinion, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. The Court also said that, if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
13. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between Unison and the Ministers that the Ministers questioned the validity of the information request. In addition, there is nothing to suggest from subsequent correspondence between the Ministers and the Commissioner that the Ministers were unclear as to what the information request sought.
14. The Commissioner is satisfied that the request is reasonably clear and that the information request is therefore valid.

Background and scope of request

15. It may be helpful to explain that the Cabinet Secretary for Health and Wellbeing established, in 2007, a group to review existing guidance on car parking and arrangements for car park charging at NHS Scotland hospital sites. The resulting revised guidance was issued to NHS Boards in January 2008 and is published at the weblink provided in paragraph 9 above. This guidance directed NHS Boards to review their car parking policies and submit reports to the Ministers by 30 June 2008. These are the reports referred to in paragraph 9 above.



16. The reports provided in response to the January 2008 guidance did not apply to car parking charging schemes under PFI contracts, operating at Edinburgh Royal Infirmary, Glasgow Royal Infirmary and Ninewells Hospital, Dundee. In respect of these schemes, the relevant NHS Boards were sent questionnaires by the Ministers on 5 June 2008: these were also to be returned by 30 June 2008. The completed PFI questionnaires were not published, but certain information extracted from them was provided to Unison in summary form in response to its information request.
17. Having considered the Ministers' submissions in this connection, the Commissioner is satisfied that the January 2008 review reports and the June 2008 survey reports between them contain all of the information which could reasonably be considered to fall within the scope of Unison's request. Having noted the Ministers' acknowledgement that they should have applied section 25(1) of FOISA to the January 2008 reports and directed Unison to where they might be found (along with their apology for not doing so), the Commissioner does not find it necessary to give the information in these reports further consideration in this decision. Consequently, the decision concerns itself with the information withheld from Unison in the completed questionnaires relating to the three PFI schemes.
18. The withheld information is therefore that provided by the relevant NHS Boards in the completed questionnaires, insofar as not contained in the summary response provided to Unison by the Ministers. No information has been disclosed in respect of the sixth, ninth and tenth questions in the questionnaire, or the responses to them. In addition, the information disclosed in respect of the following questionnaire responses cannot be said to reflect fully the information contained in these responses:
- Royal Infirmary of Edinburgh: responses to the fourth and seventh questions
 - Glasgow Royal Infirmary: responses to the eighth and eleventh questions
 - Ninewells Hospital: responses to the seventh, eighth and eleventh questions.

The Commissioner also notes that the start and end dates for the Royal Infirmary of Edinburgh contract, as supplied to Unison, did not form part of the relevant questionnaire response but were obtained from NHS Lothian separately. However, while the relevant questionnaire response did not specify an end date (fifth question), there was a response to the fourth question (in respect of a start date), which has been withheld. Unison was not provided with the remaining information from the questionnaire (heading, footnotes, etc).

Section 36(1) (Confidentiality)

19. The information withheld under section 36(1) is held in three emails from the Central Legal Office for NHS Scotland (the CLO). These were referred to as being attached to the questionnaire response in respect of Ninewells Hospital.
20. The Ministers indicated that the information in the emails, which related to questions 7, 8 and 9 of the response for Ninewells Hospital, constituted communications between client and legal adviser which were exempt in terms of section 36(1) of FOISA, in that a claim of confidentiality in respect of them could be maintained in legal proceedings.



21. The exemption in section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Among the types of communication which fall into this category are those which are subject to legal professional privilege. One aspect of legal professional privilege is legal advice privilege.
22. Legal advice privilege applies to communications between lawyers and their clients in the course of which legal advice is sought or given. For privilege to apply, the communication must be with a professional legal advisor, such as a solicitor (which may include an in-house solicitor) or an advocate. The legal adviser must be acting in their professional capacity as such and the communication must occur in the context of their professional relationship with their client. The information must be confidential between lawyer and client: privilege does not extend to matters known to the legal adviser through sources other than the client.
23. In this case, solicitors from the CLO provided legal advice to colleagues in NHS Tayside when asked to do so, specifically in relation to questions 7, 8 and 9 of the questionnaire in the knowledge that the questionnaire was to be passed by NHS Tayside to the Ministers. This point was addressed by the Ministers, who argued that disclosure of the information to them by the client (NHS Tayside) for a particular, limited purpose (with the implication that confidentiality would be maintained) did not amount to waiver of the privilege in it.
24. In all the circumstances of this case, the Commissioner is satisfied that the withheld comments from the CLO were subject to legal advice privilege. He is also satisfied that the comments were shared with the Ministers for a common purpose and therefore accepts that their disclosure to the Ministers did not have the effect of waiving privilege. Consequently, the Commissioner concludes that the exemption under section 36(1) of FOISA does apply to the information in these comments.
25. The exemption in section 36(1) is, however, a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that the information is exempt under this exemption, the Commissioner must go on to consider whether, in all circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption (and therefore withholding the information).

Public interest test

26. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. Consequently, while he will consider each case on an individual basis, he is likely to order the release of such communications in highly compelling cases only. In this case, the Ministers argued that there were no compelling reasons for disclosure.



27. Unison did not believe it to be in the public interest for the information to be withheld as it believed factual information on how public money was being spent, particularly in an area of strong public concern, should be available to the public.
28. Having considered the public interest arguments on both sides, the Commissioner accepts that there is a public interest in transparency in relation to charges relating to PFI hospital car parking. In this instance, however, having considered the information withheld under legal privilege, the Commissioner does not consider the public interest in disclosure of this particular legal advice to be sufficiently compelling to outweigh the strong public interest in the confidentiality of these particular communications. Consequently, the Commissioner accepts that the Ministers were entitled to withhold the information in the withheld legal advice under the exemption in section 36(1) of FOISA.

Section 36(2) (Confidentiality)

29. The Commissioner must now consider the withheld information set out in paragraph 18 above (other than that contained in the attached comments from the CLO in relation to questions 7, 8 and 9 of the questionnaire response for Ninewells Hospital, which he is satisfied has been correctly withheld under section 36(1) of FOISA).
30. Section 36(2) provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA, but it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest.

Was the information obtained from another person?

31. The Ministers stated that the withheld information had been obtained from other public authorities, namely the three NHS Boards operating the relevant charging schemes. These are clearly persons other than the Ministers themselves.
32. However, while accepting that the information in the responses to the questionnaire were obtained from the relevant NHS Boards, the Commissioner cannot reach the same conclusion in respect of the information in the questionnaire itself, as sent to the Boards. This was clearly created by and originated with the Ministers, and consequently the Commissioner cannot accept that the exemption in section 36(2) can apply to it. He is therefore not required to go on to consider whether its disclosure would constitute a breach of confidence actionable by a third party.
33. Of the information in the questionnaire as issued, those parts remaining undisclosed are the heading, the sixth, ninth and tenth questions, the paragraph following the questions and the footnotes. The Commissioner notes that the Ministers did not cite any other exemptions in respect of this information and therefore must require its disclosure to Unison.



Actionable breach of confidence

34. The second part of the test for the application of section 36(2) is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
35. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
- (i) the information must have the necessary quality of confidence;
 - (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - (iii) unauthorised disclosure must be to the detriment of the person who communicated the information.

First requirement

36. On this point, the Ministers argued that the withheld information was not common knowledge and represented an estimation which could not be definitively finalised until negotiations had taken place with the contractor. Finalisation would depend on the financial climate at the time of any negotiation.
37. The question here is whether the withheld information possessed the necessary quality of confidence at the time the Ministers dealt with Unison's request. In other words, the Commissioner must be satisfied that it was not generally accessible to the public at that time.
38. Along with the Ministers' submissions, the Commissioner has considered the information disclosed to Unison and other information in the public domain at the time of its request and the subsequent response and review by the Ministers, for example evidence on hospital parking charges given to committees of the Scottish Parliament. As regards the Royal Infirmary of Edinburgh, James McCaffery gave such evidence on behalf of NHS Lothian to the Parliament's Health Committee on 6 June 2006 (see that Committee's Official report for that date, available online at <http://www.scottish.parliament.uk/business/committees/health/or-06/he06-1502.htm#Col2868>), while evidence in respect of Glasgow Royal Infirmary and Ninewells Hospital was given to the Public Petitions Committee by Tom Divers (NHS Greater Glasgow and Clyde) and Gerry Marr (NHS Tayside) respectively on 15 April 2008 (transcript available at <http://www.scottish.parliament.uk/s3/committees/petitions/or-08/pu08-0601.htm>).
39. From the information accessible to the public at the relevant time, the Commissioner is satisfied it would have been clear that negotiation in some form would be required to terminate the PFI parking contracts at the three hospitals, and that following termination the financial risk in respect of the provision of parking there would revert to the relevant NHS Boards. As a result, he does not consider there to be a sustainable argument that the more general descriptive elements of the withheld information possessed the necessary quality of confidence.



40. On the other hand, while such matters may have been the subject of speculation at the relevant time (and while certain conclusions on them might have been inferred, rightly or wrongly, from the evidence referred to at paragraph 38 above), the Commissioner accepts on balance that the majority of the actual figures withheld from Unison were not generally accessible. Therefore, he accepts that they possessed the necessary quality of confidence.
41. Clearly, however, this could not be said to be the case in respect of the maximum daily parking charge of £3 (which derives from the published January 2008 guidance) or the daily charge of £1.60 at Ninewells Hospital (which is referred to in Mr Marr's evidence and would in any event be common knowledge amongst those using the parking facilities there). There could be no basis for regarding either of these figures as having the necessary quality of confidence.

Second requirement

42. The Ministers argued that there was an implied obligation to maintain confidentiality in respect of the withheld information, based on the effect disclosure could have on negotiations if the relevant NHS Boards wanted to negotiate withdrawal from the contracts. They noted that the withheld information was based on knowledge of the contracts and "likely" scenarios, rather than factual information contained within the contracts themselves. They also suggested that the fact that they were not themselves party to the contracts implied a level of confidentiality.
43. The Commissioner has considered these arguments but cannot accept them. No evidence has been provided of any specific undertakings or expectations of confidentiality having been communicated in the course of the withheld information being obtained from the three NHS Boards. The Ministers do not appear to be arguing that any of the information is the subject of an obligation of confidentiality (explicit or implicit) between the relevant NHS Board and the respective contractor. It will be noted (see below) that the Commissioner cannot accept the Ministers' arguments in respect of detriment as a consequence of disclosure. In the circumstances, he can identify nothing intrinsic in either the character of the relationship between the Ministers and each NHS Board, or the nature of the withheld information, from which an obligation to maintain confidentiality could readily be implied – and there is nothing particular in the arguments presented by the Ministers on which he considers such an implicit obligation could reasonably be founded.

Third requirement

44. Unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure, in breach of confidence.
45. The Ministers argued that release of the full documents would prejudice the position of the NHS Boards in negotiating effective settlements with their PFI contractor. Noting that the figures were estimates, they contended that the information would provide the contractor with figures at which the Boards might settle and that disclosure would limit the ability of a Board to seek an acceptable settlement in the best interests and use of the public purse. They stressed the importance of negotiations between the Boards and contractors not being prejudiced.



46. The Commissioner cannot accept the Ministers' contention that disclosure of the withheld information would be capable of undermining the negotiating positions of the Boards. As indicated above, not all of it could be regarded as pertinent to such negotiations, even if they were in reasonably close prospect. There is no evidence that they are and the Commissioner acknowledges the Ministers' own argument that the information relevant to any actual negotiations will depend on the financial climate (and other relevant circumstances) prevalent at the time the negotiations take place: in his view, this diminishes any risk of prejudice from disclosure rather than increasing it. In addition, even to the extent that any of the withheld information might be pertinent to future negotiations with a contractor, the Commissioner does not accept that it is sufficiently specific or detailed to be capable of undermining a prospective negotiating position. For these reasons, the Commissioner is of the view that the third test is not met in relation to the withheld information.
47. Having considered the relevant tests, the Commissioner has reached the conclusion that while the first is met in relation to some of the withheld information, the other two cannot be met in respect of any of it. Therefore, he does not accept that the Ministers were correct to apply the exemption in section 36(2) of FOISA to the withheld information. For the reasons set out in this decision, he requires the withheld information, as described in paragraph 18 above, to be disclosed to Unison.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Unison Scotland, in withholding the information in the comments from the Central Legal Office for NHS Scotland attached to the questionnaire response for Ninewells Hospital. The Commissioner finds that this information is exempt under section 36(1) of FOISA.

However, he also found that the Ministers failed to comply with Part 1 (and specifically section 1(1)) of FOISA by withholding the remaining information under section 36(2) of FOISA.

The Commissioner therefore requires the Ministers to release the withheld information (as detailed in paragraph 18 above, with the exception of the information correctly withheld under section 36(1)) by 15 January 2010.



Appeal

Should either Unison Scotland or the Scottish Ministers 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.

Kevin Dunion
Scottish Information Commissioner
25 November 2009



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (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.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (c) section 36(2);

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...



36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) Information is exempt information if-
 - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.