

# Decision Notice



Decision 041/2010 Mr William Lonsdale and Scottish Further and Higher  
Education Funding Council

Legal advice

Reference No: 200901177  
Decision Date: 11 March 2010

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**Kevin Dunion**  
Scottish Information Commissioner

Kinburn Castle  
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## Summary

Mr William Lonsdale requested a copy of legal advice received by Scottish Further and Higher Education Funding Council (the Funding Council). The Funding Council withheld the advice on the grounds that it was exempt from disclosure under section 36(1) of FOISA. Following a review, Mr Lonsdale remained dissatisfied and applied to the Commissioner for a decision.

After investigation, the Commissioner found that the Funding Council had generally dealt with Mr Lonsdale's request for information in accordance with Part 1 of FOISA. The Commissioner accepted that the exemption in section 36(1) had been correctly applied on the basis that the advice was a communication, confidentiality of which would be maintained in legal proceedings. While he recognised that there were reasons why disclosure of the advice would serve the public interest, he found that these were outweighed by the greater public interest in preserving the confidentiality of the legal advice.

The Commissioner identified that the Council had breached the technical requirements of FOISA by failing to provide details of its consideration of the public interest test in its response to Mr Lonsdale's information request. However, he did not require the Funding Council to take any action in response to this breach.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 16(1) and (2) (Refusal of request) and 36(1) (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

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1. On 4 March 2009, Mr Lonsdale wrote to the Funding Council requesting the Funding Council's instructions to its solicitors in respect of a specified report, and the legal opinion which the Funding Council received in return from its solicitors dealing with the report.
2. The Funding Council responded on 12 March 2009. It declined to provide the legal advice to Mr Lonsdale, claiming the exemption in section 36(1) of FOISA.



3. On 26 May 2009, Mr Lonsdale wrote to the Funding Council requesting a review of its decision.
4. The Funding Council notified Mr Lonsdale of the outcome of its review on 18 June 2009. Its original decision not to disclose the information was upheld on the same grounds.
5. On 22 June 2009, Mr Lonsdale wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Funding Council's 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 Mr Lonsdale 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

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7. On 29 June 2009, the Funding Council was notified in writing that Mr Lonsdale's application had been received, and it was asked to provide the Commissioner with any information withheld from Mr Lonsdale. The Funding Council responded on 1 July 2009 with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Funding Council, giving it an opportunity to provide comments on each application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Funding Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested. The Funding Council provided its submissions on 3 August 2009 as requested.
9. The investigating officer also invited Mr Lonsdale to provide submissions on the case, and particularly as to the public interest in the disclosure of the information under consideration.
10. These (and other) submissions received from Mr Lonsdale and the Funding Council are summarised where relevant below.

## Commissioner's analysis and findings

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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 Mr Lonsdale and the Funding Council and is satisfied that no matter of relevance has been overlooked.



### Section 36(1) of FOISA: Confidentiality

12. The Funding Council relied on the exemption in section 36(1) of FOISA to withhold the information requested by Mr Lonsdale, stating that the information attracted legal professional privilege (and so a claim of confidentiality of communications could be maintained in legal proceedings in relation to this information).
13. Section 36(1) of FOISA provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
14. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. The information being withheld must relate to communications with a legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser. The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of the legal adviser's professional relationship with his/her client.
15. The Commissioner notes that the information under consideration in this case is contained in emails (and associated attachments) in which legal advice was sought and provided in relation to the drafting of a report. The Commissioner is satisfied that the information requested by Mr Lonsdale attracts legal advice privilege.
16. Furthermore, he is satisfied that the privilege in the information has not been waived, and that a claim of confidentiality could still be sustained in legal proceedings at the time of the Funding Council's consideration of Mr Lonsdale's request and subsequent review.
17. The Commissioner therefore accepts that the Funding Council correctly applied the exemption in section 36(1) of FOISA to the withheld information.
18. 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 section 36(1), 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.

### Public interest test

19. Mr Lonsdale put forward a number of arguments as to why disclosure of the withheld information would, in his view, be in the public interest. The Commissioner has taken all these points into account where relevant, although they are not summarised in full in this decision. The arguments on the public interest presented by Mr Lonsdale included:
  - (a) Disclosure would enhance scrutiny of decision-making processes and improve accountability and participation, and particularly openness and transparency.



- (b) Disclosure would contribute to ensuring that a public body with regulatory responsibilities is adequately discharging its functions, and to ensuring the effective oversight of expenditure of public funds and that the public is obtaining value for money.
  - (c) Disclosure would potentially reveal malpractice, enabling the correction of misleading claims.
20. The Funding Council argued that the public interest is best served by withholding the information requested by Mr Lonsdale. It highlighted that previous decisions by the Commissioner have accepted that there is a significant public interest in maintaining the exemption in section 36(1) of FOISA.
  21. The Funding Council also emphasised very strongly that to release the legal advice in this case would set what it described as an unjustifiable precedent, and would alter the nature of the engagement between the Funding Council and its legal advisors, which would be contrary to the public interest.
  22. The Commissioner accepts there is some identifiable public interest in disclosure of the information requested in terms of accountability and transparency of its actions, and demonstrating that these were taken in the light of legal advice.
  23. However, having reviewed the actual information under consideration in this case, the Commissioner does not believe that disclosure of this information would contribute significantly to public understanding or scrutiny of the activities of the Funding Council.
  24. The communications under consideration relate to the preparation of a report, and the Commissioner is aware that Mr Lonsdale has received a copy of the report in question. The Commissioner considers that disclosure of the report in large part satisfies the public interest issues raised by Mr Lonsdale.
  25. 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.
  26. In this case, the Commissioner considers that the arguments on public interest presented by Mr Lonsdale, whilst cogent and well-argued, do identify some general public interest in disclosure of the information under consideration, to allow detailed scrutiny of the actions of the Funding Council.



27. Against this, however, the Commissioner has identified a much stronger public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. On balance, the Commissioner is therefore satisfied, in all the circumstances of this case, that the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemption in section 36(1).

### **Content of refusal notice**

28. In his application to the Commissioner, Mr Lonsdale noted that he believed the Funding Council had failed in its obligations with respect to the public interest test. He noted that its refusal notice did not attempt to identify any damage to the public interest that would be done by releasing the information, and so failed to properly weigh any arguments and counter arguments to release under the public interest test.
29. The Commissioner has noted the requirements of section 16(1) of FOISA. This states that where an authority seeks to withhold information by virtue of an exemption in Part 2 of FOISA, it must give the applicant a notice in writing, confirming that it holds the information, specifying which exemption is being applied, and why (if it is not clear) the exemption applies.
30. Under section 16(2), a refusal notice must also state the authority's reason for concluding (for any non-absolute exemption) why, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
31. The Commissioner notes that the Funding Council's refusal notice of 12 March 2009 made no reference to the public interest test, or the reasons for its conclusion that this favoured the maintenance of the exemption in section 36(1) in relation to the information requested by Mr Lonsdale. For this reason, the Commissioner has concluded that the Funding Council failed to comply with Part 1, and in particular section 16(2) of FOISA in its handling of Mr Lonsdale's information request.

## **DECISION**

The Commissioner finds that the Scottish Further and Higher Education Funding Council (the Funding Council) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr Lonsdale's information request. He finds that the information sought by Mr Lonsdale was exempt from disclosure under section 36(1) of FOISA. However, by failing to specify within its refusal notice of 12 March 2009 the reason for its conclusion that the public interest favoured the maintenance of the exemption, the Commissioner finds that the Funding Council failed to comply with Part 1 of FOISA, and, in particular, with section 16(2) of FOISA.

The Commissioner does not require any action to be taken by the Funding Council in response to this decision.



## **Appeal**

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Should either Mr Lonsdale or the Funding 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.

**Margaret Keyse**  
**Head of Enforcement**  
**11 March 2010**



## Appendix

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### 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.

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- (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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

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##### 16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and





- (d) states (if not otherwise apparent) why the exemption applies.
- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.

### **36 Confidentiality**

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

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