

Decision Notice



Decision 067/2010 Mr Mark Irvine and South Lanarkshire Council

Two communications

Reference No: 200901273
Decision Date: 17 May 2010

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr Irvine requested from South Lanarkshire Council (the Council) information contained in two communications, which he described. The Council withheld the information on the grounds that it was confidential and therefore exempt under section 36(2) of FOISA. Following a review, Mr Irvine remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Irvine's request for information in accordance with Part 1 of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(c) (Effect of exemptions) and 36(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 20 April 2009, Mr Irvine wrote to the Council requesting copies of two specified communications, received by the Council from a Trade Union and described in earlier correspondence between him and the Council.
2. The Council responded on 18 May 2009, confirming it held the information requested, but withholding it under section 36(2) of FOISA on the grounds of confidentiality.
3. On 19 May 2009, Mr Irvine wrote to the Council requesting a review of its decision. Mr Irvine did not see why the information he had requested was confidential and questioned the reasoning provided by the Council.
4. The Council notified Mr Irvine of the outcome of its review on 17 June 2009, explaining in detail why it was upholding its original arguments relating to confidentiality and adhering to its reliance on section 36(2).



5. On 10 July 2009, Mr Irvine wrote to the Commissioner, stating that he was dissatisfied with the outcome of the 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 Irvine 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 15 July 2009, the Council was notified in writing that an application had been received from Mr Irvine and was asked to provide the Commissioner with the information withheld from Mr Irvine. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. Specifically, the Council was asked to justify (with particular reference to the requirements of section 36(2)) its reliance on any provisions of FOISA it considered applicable to the information requested.
9. The Council responded on 21 September 2009, providing submissions as to why it considered the information requested by Mr Irvine to be exempt in terms of section 36(2) of FOISA. These arguments, insofar as relevant, will be considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered the withheld information and the submissions made to him by both Mr Irvine and the Council, and is satisfied that no matter of relevance has been overlooked.

Section 36(2) - Confidentiality

11. Section 36(2) of FOISA 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.



12. There is, therefore, a two-stage test to be fulfilled for this exemption to apply. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and includes another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
13. The Council indicated that the information in both letters had been supplied to the Council by another person, namely the Trade Union. The Commissioner accepts that the Trade Union would fall within the definition of "another person" for the purposes of section 36(2). Having considered the communications in question, he is also satisfied that one of them was clearly received by the Council from the Trade Union and the other is an internal communication of the Trade Union which could only have been obtained by the Council from another person. In the circumstances, the Commissioner is satisfied that the first part of the section 36(2) test has been met in this case.
14. In considering the second part of the test (that disclosure of the information by the public authority would constitute a breach of confidence actionable either by the person from whom the information was obtained 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. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy this second element to the test. These are:
 - a. the information must have the necessary quality of confidence;
 - b. the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - c. unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

15. Mr Irvine argued that one of the communications would by the nature of its content be widely known to local Union members. The Council argued it was not aware of any of the information in either communication having been made public by either itself or the Trade Union. While acknowledging that the fact of agreement on the matter to which the communications related had been made public, the Council did not believe it followed that the correspondence leading up to that agreement had lost the quality of confidence.
16. To have the necessary quality of confidence the information should not be generally accessible. The information which has been withheld from Mr Irvine does not appear to have been generally accessible at any time. Clearly, it will have been shared to some extent within the Trade Union – an association of members with a common interest – and has been shared with the Council in the context of certain negotiations. The Commissioner does not believe it follows from this limited distribution – or from the publicity given to the agreement reached on conclusion of the negotiations in question – that the information in the communications can be regarded as accessible to world at large.



Obligation to maintain confidentiality

17. The Council must also have received the information in circumstances which imposed an obligation on it to maintain confidentiality. In its submissions, the Council acknowledged that there was no express agreement that the communications in question would be treated confidentially. It went on to argue, however, that the information had been received as part of a process of negotiation and therefore would be subject to an implied duty of confidentiality, which would not be superseded by the final agreement between it and the Trade Union.
18. The Commissioner has considered the reasonable expectations of the Trade Union in relation to these communications, bearing in mind that they date from 1996 and 1998, some years before the coming into force of FOISA. He understands that there would have been a general expectation of confidentiality in relation to negotiations between employers and employees (or their representatives) on most questions of employment, which he accepts would have extended to the withheld information in this case. In the circumstances, he accepts that the withheld information was provided to the Council subject to an implied obligation of confidentiality.

Unauthorised disclosure which would cause detriment

19. The third matter to be considered is whether the disclosure would be unauthorised *and* would be to the detriment of the person who communicated the information (in this case the Trade Union).
20. The Council asserted that unauthorised disclosure of the withheld information would be to the detriment of the Trade Union, further suggesting that the detriment need not be financial. It referred to Lord Keith's judgement in *Attorney-General v Guardian Newspapers Ltd (No.2)* [1990] 1 AC 109 at page 256 where he decided that it would be "sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way." The Council went on to argue that disclosure of the information was likely to cause detriment to Union in excess of the level described by Lord Keith. It considered it important for the Commissioner to take account of current circumstances relating to the potential effect of disclosure on the Union.
21. The Council illustrated by providing an example, arising from relating to another matter, of the kind of harm it believed was likely to occur here. It submitted that a similar situation might arise if the contents of the withheld letters were released to the public, to the detriment of the Union.
22. The threshold of detriment is not particularly high for this purpose and the Commissioner has considered carefully the arguments presented by the Council. Whilst illustrations from other circumstances can demonstrate a point, it does not necessarily follow that the same outcome would occur in other circumstances. That said, however, the Commissioner accepts the illustration provided by the Council as relevant and also accepts in this particular case that the Council has demonstrated the presence of sufficient potential detriment for the relevant test to be met. He accepts in the circumstances that disclosure would be unauthorised.



23. The Commissioner has also noted Mr Irvine's comment that he was involved in the correspondence in question and had no objection to its disclosure. The Commissioner does not, however, consider this to have any bearing on his decision: that involvement was in the context of Mr Irvine's employment at the time, subject to whatever expectations existed in respect of the information, and in any event he does not consider Mr Irvine to be in a position to waive confidentiality in the information unilaterally.
24. The Commissioner is therefore satisfied that all the tests for an actionable breach of confidence are fulfilled in the particular circumstances of this case.

Public interest defence

25. Whilst, as noted above, the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and therefore is not subject to the public interest test in section 2(1)(b), the law of confidence recognises that in certain circumstances the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of information. This is known as the public interest defence. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance any relevant competing interest arguments, but there is no presumption in favour of disclosure.
26. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.
27. The Council indicated that it could not identify any public interest which would justify the release of the information requested, explaining that it could not see how disclosing the negotiating or consultative position of a Trade Union would advance the public interest. While it acknowledged a public interest in ensuring that the Council acted responsibly and within its relevant obligations, it believed the public interest in question lay in ensuring that the outcome of the negotiations (rather than the negotiations themselves) met those requirements. The adequacy of the outcome in question could be (and was in fact being) examined by an Employment Tribunal.
28. In this case, the Commissioner is satisfied that there is no public interest in disclosure sufficiently strong to outweigh that in maintaining confidentiality. He has considered the withheld information and can identify nothing in it the disclosure of which would appear to be required to secure effective scrutiny of a matter of public concern. Consequently, he is satisfied that the strong public interest in maintaining confidentiality should prevail.



29. In reaching this conclusion, the Commissioner has noted Mr Irvine's concern that in a previous case the Council made what he believed to be false claims to the Commissioner about the significance of the withheld information. The Commissioner cannot accept this as affecting the balance of the public interest to any extent. The communications in question were referred to in the Council's submissions in that previous case by way of background information: whether the views expressed by the Council in referring to the withheld information were justified or not, the Commissioner does not consider them to have had any material effect on the conclusion reached in the relevant decision, which was that the Council did not hold the information requested by the applicant. He has not, to the best of his knowledge, been required to consider that information for any other purpose prior to this present application.
30. Having considered all the arguments, therefore, the Commissioner does not consider there to be sustainable grounds in this case for the release of confidential information in the public interest and therefore cannot conclude that the public interest defence would justify disclosure. Accordingly, he concludes that the Council correctly withheld the information contained within the two communications under section 36(2) of FOISA, for the reasons set out above.

DECISION

The Commissioner finds that South Lanarkshire Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Irvine.

Appeal

Should either Mr Irvine or South Lanarkshire 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
17 May 2010



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

...

- (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);

...

36 Confidentiality

...

- (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.