

Decision Notice



Decision 078/2010 AXA Insurance plc, Norwich Union Insurance Limited,
Royal & Sun Alliance Insurance plc and Zurich Insurance plc and the Scottish
Ministers

Damages (Asbestos-related Conditions) (Scotland) Bill

Reference No: 200900993
Decision Date: 28 May 2010

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Kevin Dunion
Scottish Information Commissioner

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Summary

AXA Insurance plc, Norwich Union Insurance Limited, Royal & Sun Alliance Insurance plc and Zurich Insurance plc (the Insurance Companies), through their solicitors, requested from the Scottish Ministers (the Ministers) information relating to the Damages (Asbestos-related Conditions) (Scotland) Bill (the Bill). The Ministers responded by providing certain of the information requested, while also withholding other information under various exemptions in FOISA and claiming that they did not hold the remainder. Following a review, the Insurance Companies remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, in the course of which further information was released to the Insurance Companies, the Commissioner found that the Ministers had partially failed to deal with the request for information in accordance with Part 1 of FOISA. While satisfied that the Ministers had been correct in withholding certain of the information requested (as subject to legal professional privilege or otherwise confidential), he also found that they had incorrectly withheld one piece of information on the basis of section 36(2) of FOISA, concluding that the information did not meet the necessary tests for an actionable breach of confidence. He required the Ministers to disclose this particular information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 36 (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 10 and 12 March 2009, Brodies LLP, acting on behalf of the Insurance Companies (hereinafter referred to in that capacity as Brodies), wrote to the Ministers requesting the following information:

Request 1 – 10 March 2009

- a. *The names of all and any law firms who provided to the Scottish Government;*



- i. *drafts of the Damages (Asbestos-related conditions) (Scotland) Bill (“the Bill”), or drafts of provisions of the Bill which is currently before the Scottish Parliament;*
 - ii. *written comments on drafts of the Damages (Asbestos-related conditions) (Scotland) Bill before that Bill’s introduction and since; and*
 - iii. *drafts of any proposed amendments to the Bill (including the amendments proposed by Bill Butler MSP at Stage 2 of the Bill’s passage).*
- b. *Copies of all such drafts, comments and proposed amendments.*
 - c. *Copies of all correspondence between all or any law firms and the Scottish Ministers/Scottish Government regarding the Bill between 17 October 2007 to 10 March 2009.*
 - d. *Copies of all minutes of all meetings between all or any law firms and the Scottish Ministers/Scottish Government regarding the Bill between 17 October 2007 to 10 March 2009.*

Request 2 – 12 March 2009

1. *Drafts of the Damages (Asbestos-related conditions) (Scotland) Bill (“the Bill”), or drafts of provisions of the Bill, which is currently before the Scottish Parliament, provided by Thompsons solicitors to the Scottish Government.*
2. *Written comments on drafts of the Damages (Asbestos-related conditions) (Scotland) Bill before that Bill’s introduction and since provided by Thompsons solicitors to the Scottish Government.*
3. *Drafts of any proposed amendments to the Bill (including the amendments proposed by Bill Butler MSP at Stage 2 of the Bill’s passage) provided by Thompsons solicitors to the Scottish Government.*
4. *Copies of all such drafts, comments and proposed amendments provided by Thompsons solicitors to the Scottish Government.*
5. *Copies of all correspondence between Thompsons solicitors and the Scottish Ministers/Scottish Government regarding the Bill between 17 October 2007 to 12 March 2009.*
6. *Copies of all minutes of all meetings between Thompsons solicitors and the Scottish Ministers/Scottish Government regarding the Bill between 17 October 2007 to 12 March 2009.*



2. The Ministers responded to both requests in a single letter on 8 April 2009, providing some of the information requested, but also advising that no drafts of the Bill, or of provisions of the Bill, had been provided by Thompsons or any other legal firm (in effect, giving notice under section 17(1) of FOISA that the information was not held). The Ministers also provided links to relevant information available online and withheld other information under sections 29(1)(a), 30(b)(i) & (ii), 36(1), 36(2) and 38(1)(b) of FOISA.
3. Accepting that both requests were being dealt with together, on 28 April 2009 Brodies wrote to the Ministers requesting a review of their decision. In particular, Brodies asked that the Ministers provide detailed arguments to support their application of the exemptions claimed, including (where relevant) their application of the public interest test.
4. The Ministers notified Brodies of the outcome of their review on 18 May 2009. In their response, the Ministers upheld their application of the exemptions under sections 29(1)(a), 30(b)(i) and (ii), 36(1) and 36(2), providing arguments in relation to the public interest test where applicable.
5. On 26 May 2009, Brodies wrote to the Commissioner, stating that they were 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 Brodies, on behalf of the Insurance Companies, had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests. Although there were subsequent communications with the Ministers regarding the validity of the requests, eventually the Ministers accepted that both of them (and therefore the Insurance Companies' application) were valid.

Investigation

7. On 8 June 2009, the Ministers were notified in writing that an application had been received from Brodies and were asked to provide the Commissioner with any information withheld from the applicants. 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 provide detailed arguments in support of the exemptions cited in withholding information from the applicants.



9. The Ministers response to the investigating officer was delayed pending the outcome of a motion for the production of one of the documents containing withheld information, in the course of a related action for judicial review in the Court of Session. This led to the document in question being released to Brodies, with one redaction. In the light of the Court's decision, the Ministers decided to review their decision to withhold information and the exemptions they were using to support this position. As a result, the Ministers decided that additional information could be released and this was provided to Brodies.
10. Having decided to release the additional information, the Ministers provided the investigating officer with details of the information they were still withholding, confirming the exemptions they were relying upon in doing so. These were the exemptions contained in section 36(1) and 36(2) of FOISA, with information in one document being withheld under section 38(1)(b) and that in another under section 25.
11. Further discussions with Brodies led to confirmation that the Insurance Companies were content not to pursue the withholding of certain information. As a result, this decision will focus on the withholding of a considerably reduced amount of information, as more particularly detailed in the Commissioner's analysis and findings below. The arguments presented by both parties, insofar as relevant, will be considered in that section.

Commissioner's analysis and findings

12. 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 Brodies and the Ministers and is satisfied that no matter of relevance has been overlooked.
13. The information remaining under consideration in this decision has been withheld under the exemptions in either section 36(1) or section 36(2) of FOISA.

Section 36(1) Confidentiality (documents 31 – 36 inclusive)

14. In relation to the exemption in section 36(1), the Ministers stated that the information concerned related to communications between client and legal adviser. It believed that this information was such that a claim of confidentiality could be maintained in legal proceedings.
15. 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.



16. 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.
17. The Commissioner notes that the information identified here comprises legal advice from a solicitor to the Ministers in relation to the Damages (Asbestos-related Conditions) (Scotland) Bill. The Commissioner is therefore satisfied that this is information capable of attracting legal advice privilege.
18. Information cannot be privileged, however, unless it is also confidential. For the section 36(1) exemption to apply, the withheld information must be information in respect of which a claim to confidentiality of communications (in this case in the form of legal professional privilege) could be maintained in legal proceedings. In other words, the claim must be capable of being sustained at the time the exemption is claimed.
19. A claim of confidentiality will not be capable of being maintained where information has (prior to a public authority's decision on an information request, initially or on review) been made public, either fully or in a summary sufficiently detailed to have the effect of disclosing the advice. Where the confidentiality has been lost in respect of all or part of the information under consideration, any privilege associated with that particular information is also effectively lost.
20. After consideration of the specific information in documents 31 – 36, the Commissioner is satisfied that the information under consideration here remained confidential, and therefore that a claim of confidentiality of communications could have been maintained in respect of that information in legal proceedings, at the time of the Ministers' consideration of the request and their subsequent review.
21. The Commissioner therefore accepts that the Ministers correctly applied the exemption in section 36(1) of FOISA to the withheld information in documents 31 - 36.
22. 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 the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Public interest test

23. The Ministers acknowledged a significant public interest in transparency and accountability, but also argued that in this case there was a more significant public interest in enabling Government decisions on legislation to be taken in a fully informed legal context (which required a degree of protected confidentiality) and in ensuring that the Government's ability to defend its legal interest was not prejudiced by inappropriate disclosure of information and legal analysis.



24. The Ministers asserted that any public interest in seeing the information in question was outweighed by the public interest in ensuring that legal advisers and their clients could discuss relevant issues and give and receive legal advice in confidence. It was also in the public interest, they argued, for the Government to receive the most comprehensive legal advice about its proposed actions. It considered the danger in disclosure of such advice to be two-fold: firstly, by unreasonably exposing legal positions to challenge, and secondly by potentially diminishing the range and quality of that advice – which would in turn damage the quality of their decision making.
25. In conclusion, the Ministers submitted that, given the importance the courts placed on the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds (as recognised by the Commissioner in a number of previous decisions), such communications, should only be released in highly compelling cases.
26. As the Commissioner has recognised in a number of previous decisions (and as the Ministers have noted), 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 generally apply the same reasoning to communications attracting legal professional privilege.
27. The Bill, which subsequently became an Act of the Scottish Parliament, was intended to provide that certain asbestos-related conditions remained actionable in the Scottish courts, following a decision of the House of Lords on corresponding aspects of English Law in 2007. The Act is the subject of legal challenge by the Insurance Companies, in an action which remains ongoing in the Court of Session. In the circumstances, the Commissioner accepts that there is a public interest in the legality of this legislation, and by extension in the considerations taken into account in its drafting and subsequent passage through Parliament. More particularly, Brodies and the Insurance Companies appear to consider the withheld information to be of relevance to the Court of Session proceedings referred to above, although no more specific submissions have been provided on this point.
28. Having considered the public interest arguments in favour of disclosure, and while accepting that these are of some substance, the Commissioner cannot accept in this case that they are sufficiently compelling to outweigh the strong public interest in maintaining confidentiality in the withheld information. On balance, therefore, the Commissioner is satisfied, in all the circumstances of this case, that the public interest in disclosure of the information withheld under section 36(1) of FOISA is outweighed by the public interest in maintaining that exemption. He therefore concludes that the Ministers were entitled to withhold the information under section 36(1).



Section 36(2) Confidentiality (documents 18, 24 and 25)

29. The Ministers asserted that the information withheld under this exemption had been obtained from another person and that its disclosure to the public would constitute an actionable breach of confidence. They believed that the information had the necessary quality of confidence, had been communicated in circumstances imposing a duty of confidence and that unauthorised disclosure would cause harm to the supplier of the information (in particular, by compromising its ability to pursue a certain course of action).
30. 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 by 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.
31. Section 36(2), therefore, contains a two-stage test, both elements of which must be fulfilled before the exemption can be relied upon. Firstly, 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. The second part of the test is that disclosure of the information by the public authority would constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person.
32. The Commissioner is satisfied that the information contained in documents 18, 24 and 25 was obtained from another person and consequently that the first part of the section 36(2) test has been fulfilled.
33. The second test is that disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person or persons from whom the authority obtained the information 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.
34. 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.



Necessary quality of confidence

35. The Commissioner must first consider whether the information withheld had the necessary quality of confidence; that is, whether it had the basic attribute of inaccessibility, and was not common knowledge or able to be produced by a member of the public without the investment of skill and labour.
36. Having considered the information in question and the arguments put forward by the Ministers, the Commissioner is satisfied that the withheld information from documents 18, 24 and 25 (and remaining under consideration here) fulfils the criterion of having the necessary quality of confidence. The content withheld from these documents has not been made available and the Commissioner finds that this information is not common knowledge and could not readily be obtained by members of the general public through any other means.

Obligation to maintain confidentiality

37. Although the relevant information withheld from documents 18 and 24, along with the signature withheld from document 25, does not contain an express obligation of confidentiality, the Commissioner is satisfied that there would have been a reasonable expectation on the part of the authors at the time the documents in question were put together that this withheld information would be treated as confidential and would not be put into the public domain. He has reached this conclusion having considered the content of the withheld information and the circumstances in which it was imparted, and accordingly is satisfied that it was provided to the Ministers in circumstances which imposed an obligation to maintain confidentiality.
38. The Commissioner has been unable to reach the same conclusion, however, in respect of the name withheld from document 25. This is simply the name of an individual providing legal advice in relation to the Bill. The comments on the Bill comprising the rest of document 25 have been released to the applicants in full. Having considered this withheld information, the Commissioner is of the view that the individual identified clearly provided the advice in a professional capacity and that disclosing their identity would reveal information only about activities they had carried out in that capacity (although he accepts that this might lead to information about their relevant experience being ascertained).
39. FOISA came into effect on 1 January 2005. The advice from which the name has been withheld here was provided on 18 August 2008. Consequently, the Commissioner considers it reasonable to conclude that (by that date, at least) those involved in providing advice to, or which was likely to be shared with, a Scottish public authority (in this case regarding a Bill going through the Scottish Parliament, and clearly intended to inform submissions to be made to the Ministers on that Bill) should have had a reasonable expectation that they might in the future be identified in connection with work of this kind carried out in a professional capacity. The comments provided by the individual in question relate to a high profile matter which had the potential to become the subject of legal challenge, and in the circumstances the Commissioner does not accept that a lawyer providing such advice (and particularly the individual under consideration here, given their background and experience) would have entertained a reasonable expectation that they could not in future be identified in connection with it.



40. The Commissioner is therefore not satisfied that the Ministers were correct to withhold the name of the provider of the advice from document 25 in terms of section 36(2) of FOISA, and consequently he requires its disclosure.

Unauthorised disclosure which could cause detriment

41. The third part of this test requires that disclosure of the information must be unauthorised by, and cause damage to, the person who communicated it.
42. Having considered the relevant information withheld from documents 18 and 24 (along with the signature withheld from document 25), the context in which that information was provided to the Ministers and their subsequent consultations with the providers, the Commissioner is satisfied that its disclosure would be unauthorised. Given the nature and specific content of the information, he is further satisfied that its disclosure would have been capable of causing damage to the persons who communicated it.
43. Consequently, having considered the applicable tests, the Commissioner is satisfied in all the circumstances that disclosure of the relevant withheld information from documents 18 and 24, and of the signature withheld from document 25, would constitute a breach of confidence actionable by the persons who provided the information.
44. If the conditions of section 36(2) are fulfilled an absolute exemption is created. However, 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.
45. The exemption in section 36(2) is not, however, subject to the public interest test in section 2(1) of FOISA. The law of confidence recognises that there is a strong public interest in ensuring that confidences are respected, and the burden of showing that a failure to maintain confidentiality would be in the public interest is therefore a heavy one. However, in certain circumstances, the public interest in maintaining confidences may be outweighed by the public interest in disclosure of information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure (*Decision 056/2006 MacRoberts and the City of Edinburgh Council*).
46. The courts have considered that there may be a public interest defence to actions of breach of confidentiality where to enforce an obligation of confidence would, for example, cover up wrongdoing, allow the public to be misled or unjustifiably inhibit public scrutiny of matters of genuine public concern. In this case, the Commissioner has considered whether disclosure of the information in question would be necessary to secure effective scrutiny of legislative or related processes, but sees no reasonable basis for concluding that the Ministers would have a sustainable defence to an action of breach of confidence on public interest grounds should they disclose this information.
47. The Commissioner therefore concludes that the Ministers' were correct in their application of section 36(2) of FOISA to the relevant information withheld from documents 18 and 24, together with the signature withheld from document 25.



DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Axa Insurance plc, Norwich Union Insurance Limited, Royal & Sun Alliance Insurance plc and Zurich Insurance plc.

The Commissioner finds that the Ministers were entitled to withhold the information contained in documents 31 to 36 (inclusive) in terms of section 36(1) of FOISA, along with certain information from documents 18, 24 and 25 in terms of section 36(2) of FOISA.

However, the Commissioner also finds that the Ministers failed to comply with Part 1 (and in particular section 1(1)) of FOISA by incorrectly withholding information from document 25 under section 36(2) of FOISA.

The Commissioner therefore requires the Scottish Ministers to provide Brodies LLP with the name withheld from document 25, by 12 July 2010.

Appeal

Should either the Insurance Companies 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.

Margaret Keyse
Head of Enforcement
28 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 –

...

- (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.

- (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.