

Decision Notice



Decision 184/2010 Mr Alasdair Ross and Aberdeen City Council

Legal advice and correspondence on incremental salary increases

Reference No: 201001731

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Summary

Mr Ross requested from Aberdeen City Council (the Council) legal advice and correspondence on the payment of incremental salary increases. The Council responded by stating that certain information was not held while withholding the remainder in terms of section 36(1) and 30(b)(ii) of FOISA. Following a review, Mr Ross remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Council released some further information, the Commissioner found that while the Council had correctly withheld certain information in terms of section 36(1) of FOISA (that information being subject to legal advice privilege), it partially failed to deal with Mr Ross's requests for information in accordance with Part 1 (and in particular section 1(1)) of FOISA, by incorrectly withholding other information under section 30(b)(ii). He was not satisfied that the disclosure of that information would, or would be likely to, substantially inhibit the free and frank exchange of views for the purposes of deliberation, and required the Council to provide it to Mr Ross.

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); 30(b)(ii) (Conduct of public affairs) 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

1. On 10 June 2010, Mr Ross wrote to the Council requesting the following information:
 - a. *A copy of all legal advice given to Aberdeen City Council by Brodies LLP relating to the incremental salary increases as referred to in the Council report 'Employment Costs' (CG/10/128) written by Mr Stewart Carruth, Director for Corporate Governance.*
 - b. *The date on which this legal advice was first sought from Brodies LLP and the date on which the advice was received by Aberdeen City Council.*



Investigation

7. On 6 September 2010, the Council was notified in writing that an application had been received from Mr Ross and asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested, which consisted of 15 pages of information, each referred to as a separate numbered document. 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. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with particular reference to the requirements of the 2 exemptions it had cited in response to the requests. Specifically, it was asked to consider the effect on confidentiality of references to the withheld legal advice in a committee report.
9. The Council responded with submissions in support of its reliance on the exemptions in sections 30(b)(ii) and 36(1) of FOISA.
10. In the course of the investigation, the Council withdrew its reliance on any exemption in relation to documents 2, 3, 6, 11 and 13. It also considered that confidentiality had been lost in respect of elements of the withheld legal advice reproduced in the relevant committee report (and therefore that this information could not be withheld under section 36(1) of FOISA). The Council released all of this information to Mr Ross, subject to the redaction of personal data (which Mr Ross accepted). In the circumstances, the Commissioner does not find it necessary to consider this information further.
11. The relevant submissions obtained from Mr Ross and the Council will be considered fully in the Commissioner's analysis and findings below.

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 Mr Ross and the Council and is satisfied that no matter of relevance has been overlooked.
13. Having considered the withheld information supplied to him by the Council, the Commissioner is content that the information in documents 10 and 15 does not fall within the scope of any of Mr Ross's requests. In documents 12 and 14, he is satisfied that only the information in points 6 and 8 (the same information in both documents) falls within the scope of any of the requests.



14. Taking account of the information supplied to Mr Ross and the information he considers to fall outwith the scope of the requests, the Commissioner now requires to consider whether, as the Council has claimed, the information contained in documents 1, 4, 5 and 8 (insofar as not disclosed as mentioned above) was correctly withheld in terms of section 36(1) of FOISA, and the information in documents 7 and 9, together with that in points 6 and 8 of documents 12 and 14, was correctly withheld in terms of section 30(b)(ii) of FOISA.

Section 36(1) (Confidentiality)

15. The exemption in 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. Among the types of communication which fall into this category are those which are subject to legal professional privilege, one aspect of which is legal advice privilege. Legal advice privilege covers communications between lawyer and client in the course of which legal advice is sought or given.
16. For legal advice privilege to apply, certain conditions must be fulfilled. The communication must be with a professional legal advisor, such as a solicitor (including an in-house one) 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 or to matters in respect of which there is no reason for secrecy.
17. The Commissioner notes that certain elements of the legal advice originally withheld in this case had been included in the committee report referred to in Mr Ross's request i. Consequently, as the Council accepted in the course of the investigation, this information was no longer confidential between lawyer and client at the time the Council dealt with Mr Ross's requests. He is satisfied that, as noted above, all of this information was released to Mr Ross during the investigation and does not require to be considered further.
18. Having considered the remaining content of the legal advice and the circumstances under which it was obtained (i.e. in the context of a professional relationship between a legal advisor and their client, in the course of which confidential legal advice was provided) the Commissioner is satisfied that the information is subject to legal advice privilege and therefore exempt information under section 36(1) of FOISA.
19. 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.



Public interest test

20. 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.
21. In considering the public interest in terms of section 2(1)(b) of FOISA, the Council noted that the advice might be of interest to employees seeking redress against it. It did not follow, however, that the advice was “of concern or benefit to the public”. It considered that it would be prejudiced by having to disclose the advice prior to the Pre Hearing Review in related Employment Tribunal proceedings and concluded, on balance, that the public interest was best served by maintaining the ability to seek advice and rely on that advice in confidence.
22. Mr Ross identified a public interest in knowing on what advice the Council had taken a decision he believed was likely to lead to a substantial number of legal claims against it, and also in knowing whether the Council had heeded advice on which he understood a significant amount of public money to have been spent
23. Having considered the public interest arguments on both sides, and while accepting that there might be reasons which would justify disclosing legal advice of this kind in certain circumstances, in this instance the Commissioner is not satisfied that the public interest in disclosure of this particular legal advice is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal advisor and client. Consequently, he accepts that the Council correctly withheld the remaining information from documents 1, 4, 5 and 8 in terms of section 36(1) of FOISA.

Section 30(b)(ii) (Prejudice to effective conduct of public affairs)

24. In order for the Council to rely on the exemption laid down in section 30(b)(ii) of FOISA, it must show that the disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
25. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the tests contained in the exemptions in section 30(b) of FOISA is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of the information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.



26. The Council considers that the communications to which it has applied the section 30(b)(ii) were focussed on freely and frankly raising and expressing views, with the express intention of creating deliberation. The Council maintains that it was essential that individual officers were free to raise concerns, issues of policy or proposals for savings in confidence. The Council further contends that the correspondence in question was an exchange of views between officers within the Council which permitted an uninhibited discussion on the impact of the cost savings being considered. The Council considers that disclosure of this information would make it less likely that Council officials would engage in discussions of this type with the same degree of frankness and candour in future.
27. In applying these exemptions, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression and whether the timing of disclosure would have any bearing: releasing advice or views whilst a decision is being considered, and for which further views were still being sought, for example, is likely to be more substantially inhibiting than disclosure once advice has been taken.
28. Where advice or views are communicated and received as part of an individual's expected day-to-day professional functions, then the risk of substantial inhibition resulting from the release of that information may well be diminished. In this case, the individuals exchanging the correspondence all appear to be doing so in the course of their expected regular professional functions.
29. Having considered the content of the information remaining withheld under section 30(b)(ii), the context of the relevant communications and the submissions received from the Council (which did not clearly articulate and reason why such inhibition would, or would be likely to, follow from disclosure) the Commissioner is not satisfied that disclosure of this information in response to Mr Ross's requests would have inhibited officials substantially (or would have been likely to inhibit them substantially) from engaging in future discussions of this kind with the requisite degree of frankness and candour. In reaching this conclusion, the Commissioner has noted that the committee report referred to in Mr Ross's request i (the terms of which he has noted) had been circulated by the time he made his requests and considered by the relevant committee (in public) by the time the Council responded to them.
30. The Commissioner therefore finds that the Council incorrectly applied the exemption in section 30(b)(ii) of FOISA to the information contained in documents 7 and 9, and that in points 6 and 8 of documents 12 and 14. Consequently, he is not required to consider the public interest and requires the Council to provide this information to Mr Ross.



DECISION

The Commissioner finds that Aberdeen City Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by Mr Ross.

The Commissioner finds that by withholding certain information in terms of section 36(1) of FOISA, the Council complied with Part 1.

However, the Commissioner also finds that the Council incorrectly applied section 30(b)(ii) of FOISA to the information in documents 7 and 9, and that in points 6 and 8 of documents 12 and 14, and thereby failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Council to provide Mr Ross with the information he has found to be wrongly withheld under section 30(b) of FOISA, by 27 December 2010.

Appeal

Should either Mr Ross or Aberdeen City 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.

Kevin Dunion
Scottish Information Commissioner
9 November 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.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or

...

36 Confidentiality

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