

Decision Notice



Decision 013/2014 Mr Greig Lamont and the Scottish Ministers

Changes to the Ministerial Code

Reference No: 201300071

Decision Date: 30 January 2014

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

On 6 November 2012, Mr Lamont asked the Scottish Ministers (the Ministers) for information relating to the change in wording of a specific section in the 2011 version of the Scottish Ministerial Code. Following a review, the Ministers withheld information as they considered it exempt because in their view it was subject to legal professional privilege.

During the investigation, the Ministers disclosed some of the withheld information to Mr Lamont. The Commissioner did not accept that the remaining information was privileged and required its release.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 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 6 November 2012, Mr Lamont asked the Scottish Ministers for:
 - a) *All correspondence or documents relating to the change in wording of the then section 2.30 of the Ministerial Code in the June 2008 Edition to its current format as section 2.35 of the 2011 Edition;*
 - b) *All correspondence or documents relating to section 2.35 of the 2011 Edition since 01/01/11.*
2. Having received no response to his request, Mr Lamont requested a review in respect of the Ministers' failure to respond on 5 December 2012.
3. The Ministers notified Mr Lamont of the outcome of their review on 21 December 2012. Among their conclusions was that some of the requested information was subject to legal professional privilege. They applied section 36(1) of FOISA to withhold this from Mr Lamont.



4. On 8 January 2013, Mr Lamont wrote to the Commissioner's office, stating that he was dissatisfied with the outcome of the Ministers' review (in relation to the withholding of information under section 36(1)) and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
5. The application was validated by establishing that Mr Lamont made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

6. On 1 February 2013, the Ministers were notified in writing that an application had been received from Mr Lamont and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
7. 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. These included questions on the application of section 36(1) of FOISA to the withheld information, to which the Ministers responded.
8. During the investigation, the Ministers disclosed some of the withheld information. They continued to rely on section 36(1) of FOISA to withhold the remaining information.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Lamont and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Section 36(1) – Confidentiality

10. The Ministers relied on section 36(1) of FOISA to withhold information redacted from document R20 (the remainder of which has been disclosed).
11. 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. This includes communications subject to legal professional privilege. An aspect of legal professional privilege is legal advice privilege, which the Ministers argued applied in this case. This applies to communications in which legal advice is sought or provided.



12. For legal advice privilege to apply, certain conditions must be fulfilled:
 - a. The communications must involve a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser or an external solicitor engaged by the Ministers.
 - b. The legal adviser must be acting in his/her professional capacity, and
 - c. The communications must occur in the context of the legal adviser's professional relationship with his/her client.
13. The information remaining withheld under section 36(1) is text redacted from Annex A of a covering letter sent by the Permanent Secretary, Sir Peter Housden, to the First Minister, attaching the proposed 2011 edition of the Scottish Ministerial Code for the First Minister's review.
14. In this case, the Ministers explained that the redacted information consisted of references to the provision of legal advice, or the process for seeking such legal advice. Even where they did not involve the direct provision of legal advice, the Ministers submitted the documents in question "were either made or effected for the principal or dominant purpose of seeking or giving legal advice or evidenced the substance of such communications". The material in question covered the process of officials corresponding with solicitors about their advice and seeking legal advice or clearance from solicitors on changes made to the text of the Code. The redactions also covered references informing Ministers or officials that aspects of the Code were being reviewed and that legal advice was being obtained on these aspects.
15. Mr Lamont did not agree that the withheld information was exempt on the basis the Ministers claimed. To him, it seemed clear from the context, author and the surrounding wording that the redacted sections did not constitute "legal advice" or "communication" which, as a matter of law, attracted the common law privilege afforded to legal advice. In the context in which the information appeared, it seemed to him that a client-counsel relationship did not exist.
16. Having considered the information that continues to be withheld from Mr Lamont, the Commissioner does not accept that it can be the subject of legal advice privilege. It does not involve a professional legal adviser directly, a condition essential for legal advice privilege to apply. Privilege may extend to information relating directly to the development of the legal advice provided, but essentially it exists to protect communications between the legal adviser and their client. There is nothing of that kind here, simply identification (in a communication not involving legal advisers) of which offices within the Scottish Government were consulted for the advice. Even if these are offices whose primary business is to provide legal advice to the Ministers, that is not enough to make the communications privileged.
17. The Commissioner has therefore concluded that the information that continues to be withheld from document R20 is not exempt under section 36(1) of FOISA.



18. As the Commissioner finds that this information is not exempt, she is not required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA. The Ministers have applied no other exemption to this information, so the Commissioner must require its disclosure.

DECISION

The Commissioner finds that the Scottish Ministers failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Lamont.

The Commissioner finds that by incorrectly applying section 36(1) of FOISA to withhold information from document R20, the Ministers failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Ministers to provide Mr Lamont with the remaining withheld information from document R20, by 17 March 2014.

Appeal

Should either Mr Lamont or the Scottish Ministers wish to appeal against this decision, they have the right to 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.

Rosemary Agnew
Scottish Information Commissioner
30 January 2014



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.

...