

Decision Notice

Decision 262/2014: Mr Mark Howarth and the Scottish Ministers

Legal advice – sex offenders and housing applications

Reference No: 201402209

Decision Date: 19 December 2014



Scottish Information
Commissioner

Summary

On 11 June 2014, Mr Howarth asked the Scottish Ministers (the Ministers) for legal advice relating to a recommendation about sex offenders applying for social rented housing.

The Ministers responded by withholding the information under section 36(1) of FOISA (as information subject to legal professional privilege). The Commissioner investigated and found that the Ministers were entitled to withhold the information under this exemption.

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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. It may be helpful to explain the context of Mr Howarth's request. Following the murder of Mark Cummings in Glasgow in 2004 by a registered sex offender (RSO), the Scottish Parliament's Justice 2 Sub-Committee produced a report (in 2006) which made 33 recommendations on how to improve the system of accommodating and monitoring RSOs in the community. Mr Howarth's request concerns recommendation 20 of this report, which stated that:

The Sub-committee recommends that it is made a legal requirement for all application forms for local authority and other social rented housing to require information on whether the applicant is subject to the notification requirements of the Sexual Offences Act 2003, that it be a criminal offence not to provide this information and, if the person applies as homeless, this question should also be part of the homelessness assessment.

2. On 11 June 2014, Mr Howarth submitted his request for information to the Ministers. He requested:

All legal advice received with regard to the implementation or otherwise of recommendation 20 of the Scottish Parliament's Justice 2 Sub-Committee.

3. The Ministers responded on 7 July 2014, withholding the information Mr Howarth asked for. The Ministers contended the information was exempt under section 36(1) of FOISA, on the basis that it was subject to legal professional privilege and the public interest favoured the information being withheld.
4. On 14 July 2014 Mr Howarth wrote to the Ministers, requesting a review of their decision. He pointed out that the Ministers had not explicitly confirmed that any legal advice was held. Assuming it was, he believed the balance of the public interest favoured disclosure.

5. The Ministers notified Mr Howarth of the outcome of their review on 28 August 2014. They confirmed that legal advice was held and upheld the original response.
6. On 9 September 2014, Mr Howarth wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr Howarth stated he was dissatisfied with the outcome of the Ministers' review. He accepted that legal professional privilege should generally be protected, but argued there were exceptional circumstances here which made the public interest in disclosure compelling.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Howarth made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 12 September 2014, the Ministers were notified in writing that Mr Howarth had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr Howarth. They provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and explain in more detail what factors they considered when conducting the public interest test. They were also asked to explain how they had balanced any arguments for and against disclosure of this legal advice.
10. The Ministers provided submissions to the investigating officer, setting out their reasoning in relation to the public interest test.

Commissioner's analysis and findings

11. 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 Howarth and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Section 36(1) - Confidentiality

12. 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. 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.
13. Legal advice privilege applies to communications between legal advisers and their clients in which legal advice is sought or given. The following conditions must be fulfilled for legal advice privilege to apply:
 - (i) 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 authority.
 - (ii) The legal adviser must be acting in his/her professional capacity, and

- (iii) The communications must occur in the context of the legal adviser's professional relationship with his/her client.
14. Mr Howarth made it clear that it was only legal advice he was seeking when he framed his request. He indicated to the Ministers that he was aware this exemption might be cited. It is apparent from his application that he acknowledges any information caught by his request would be privileged. The Commissioner is satisfied that all of the withheld information does fulfil the above conditions. In the circumstances, the Commissioner is satisfied that the Ministers were entitled to claim the exemption in section 36(1) of FOISA.

Public interest test

15. The exemption in section 36(1) is subject to the public interest test in section 2(1)(b) of FOISA, so information can only be withheld under this exemption if, in all the circumstances, the public interest in maintaining the exemption outweighs that in the information being disclosed. In his requirement for review and his application to the Commissioner, the focus of Mr Howarth's dissatisfaction was on the outcome of the public interest test conducted by the Ministers.
16. 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 (see, for example, *Decision 218/2014: UNISON Glasgow City Branch and Glasgow City Council*¹).

Submissions by Mr Howarth

17. Mr Howarth raised arguments relating to public safety, which he believed favoured disclosing the withheld information. In his application to the Commissioner, Mr Howarth submitted that it was a primary duty of government to provide protection of life and property, suggesting that grievous consequences had followed the failure to implement recommendation 20. He referred to a particular subsequent murder and suggested that, in the absence of provision of the kind envisaged by recommendation 20, there remained a loophole in existing legislation, endangering the public.
18. Mr Howarth acknowledged the need for the principle of legal privilege to be maintained and protected in the ordinary course of events, but submitted that the exceptional circumstances present here made the public interest in disclosure compelling.

Submissions from the Ministers

19. The Ministers acknowledged a significant public interest in enabling people to see the advice, to provide reassurance and contribute to public debate. There was also a public interest in allowing the legal advice to be tested. On the other hand, they highlighted what they considered to be the overriding public interest in maintaining legal professional privilege, referring to previous decisions of the Commissioner in what they considered to be similar cases (for example, *Decision 194/2014: Mr X and the Scottish Ministers*²).
20. In 2009, the Ministers reported to the Justice Committee that it was not possible to implement recommendation 20, as they had concluded it would not be compatible with the Scottish Parliament's duty to ensure that all legislation it passes is compliant with the European Convention on Human Rights (ECHR). The Ministers explained that the then

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201401913.aspx>

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201400794.aspx>

Cabinet Secretary for Justice had made a statement to that effect, which it believed went some way to satisfying the public interest in this case. They did not believe disclosing the legal advice by which this statement was informed would add significantly to satisfying that public interest.

21. On balance, the Ministers concluded that, while the issue of legislative competence might be of some general public interest, it did not follow that it was in the public interest for this legal advice to be disclosed. The Ministers contended there was a significant public interest in protecting the ability of Ministers and officials to seek and receive comprehensive legal advice in confidence, allowing them to make fully informed decisions on the legislative competence of proposed legislation.
22. In the circumstances, the Ministers did not believe the public interest arguments in favour of disclosure to be sufficiently compelling to outweigh what they saw as a very strong interest in protecting the confidentiality of the legal advice in question.

The Commissioner's Conclusions

23. There is no dispute that the exemption used, applies. Both parties recognise and accept that the legal advice is covered by legal advice privilege. The Commissioner confirms this: the withheld information is covered by the exemption. She does not consider that information already in the public domain amounts to disclosure of the advice, so privilege in it cannot be regarded as waived.
24. The issue here is the application of the public interest test. This is a balancing test and, in the circumstances of this case, in essence comes down to the question: does the public interest in withholding the legal advice outweigh the public interest in disclosing it?
25. Mr Howarth makes a compelling argument in favour of knowing why recommendation 20 was not implemented. The Commissioner does not dispute that knowing the reasons why a recommendation that could have an impact on public safety was not implemented is a matter of significant public interest. Mr Howarth claims that if recommendation 20 were adopted it would enable what he considers to be a loophole in existing law to be addressed, and so improve public safety measures. Thus, knowing in detail why recommendation 20 was rejected, would, by inference, enable him to challenge the Minister's decision. The Ministers also made the point that it is in the public interest to allow legal advice to be tested.
26. While the Commissioner accepts these arguments, she questions the extent to which disclosure of the legal advice would further the public interest. It is already a matter of public record that the Ministers had concluded implementation of recommendation 20 would not be compatible with the Scottish Parliament's duty to ensure that all legislation it passes is compliant with the European Convention on Human Rights (ECHR). In committing this to public record, the underlying reason for not implementing the recommendation was made known. It is clear that the rejection of the recommendation has a legal basis. Whether or not the loophole would be addressed by recommendation 20 is not relevant at this point, because the Ministers' statement is effectively saying Parliament cannot pass a law that would enable recommendation 20 to be implemented. To challenge the Minister's position, effectively means challenging the legal basis for it.
27. The Commissioner's view is the Ministers' report to the Justice Committee goes a long way to meeting the public interest in this case: it give the basis for the decision taken by Ministers and does not preclude either challenge or public debate. That the detail of the advice is not known does not alter the fact that the general basis for the decision is.

28. Balanced against this is the argument that the public interest in withholding the advice is predicated on protecting the ability of Ministers and officials to seek and receive comprehensive legal advice in confidence, allowing them to make fully informed decisions on the legislative competence of proposed legislation. In the context of this case, that protection comes from maintaining legal privilege. 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. There must be compelling grounds for the disclosure of legal advice, in the public interest, before the Commissioner can require such disclosure.
29. On this occasion, having considered all relevant arguments and the withheld information, the Commissioner is not satisfied that this particular information, if disclosed, would contribute sufficiently to public debate on the matter to outweigh the necessarily strong public interest in maintaining confidentiality of communications.
30. In all the circumstances of the case, therefore, the Commissioner is satisfied that the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption in section 36(1). Consequently, she finds that the Ministers were entitled to withhold the information under that exemption.

Decision

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

Appeal

Should either Mr Howarth 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

19 December 2014

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.

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