

Decision Notice

Decision 151/2015: Mr Phil Cavan and West Lothian Council

Correspondence with Queen's Counsel

Reference No: 201501130

Decision Date: 29 September 2015



Summary

On 14 April 2015, Mr Cavan asked West Lothian Council (the Council) for information provided to Queens Counsel and advice received in relation to a specific housing estate.

The Council withheld the information as it was subject to legal professional privilege. Following investigation, the Commissioner accepted this.

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. On 14 April 2015, Mr Cavan made a request for information to the Council. He asked for:
 - a) *A copy of all information (by electronic means or hard copy) submitted for consideration to Queen's Counsel specifically regarding the Deans South Estate from 2002 until present day.*
 - b) *A copy of the Queens Counsel advice received on these submissions.*
2. The Council responded on 12 May 2015. It informed Mr Cavan that it considered the information to be exempt from disclosure under section 36(1) of FOISA, on the basis that it was information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings.
3. On 13 May 2015, Mr Cavan wrote to the Council requesting a review of its decision. He provided reasons why he believed the public interest favoured disclosure.
4. The Council notified Mr Cavan of the outcome of its review on 9 June 2015. The Council listed the relevant information it held and provided some of that information to Mr Cavan. The Council continued to withhold the remainder of the under section 36(1) of FOISA: it expanded on its reasons for doing so.
5. On 15 June 2015, Mr Cavan wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Cavan stated he was dissatisfied with the outcome of the Council's review. He disagreed with the Council withholding the information under section 36(1) of FOISA, explaining why he considered disclosure to be in the public interest.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Cavan 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.
7. On 1 July 2015, the Council was notified in writing that Mr Cavan had made a valid application. The Council was asked to send the Commissioner the information withheld from him. The Council provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions, focusing on its application of section 36(1) of FOISA.
9. The Council responded with submissions in support of its application of section 36(1).

Commissioner's analysis and findings

10. 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 Cavan and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 36(1) - Confidentiality

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 Council argued applied in this case.
12. 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.
13. The Council submitted that this exemption applied to the information withheld as it consisted of correspondence between the Council and its Queen's Counsel (QC), relating to the provision of legal advice. The QC was acting as an Advocate and thus was legally qualified to provide advice. It further submitted that the Opinions received comprised professional legal advice, given within a relationship where the QC was asked to provide an Opinion in his professional capacity, to the Council as his client. It confirmed that the advice was sought and provided in relation to an indication that an action for judicial review might be commenced against the Council.

14. Having considered the content of the information withheld, the Commissioner is satisfied that all of it relates to seeking, obtaining and considering legal advice, within the context described in the Council's submissions. In the circumstances, she is satisfied that this information meets the all the conditions set out above for it to be subject to legal advice privilege.
15. Information cannot be privileged unless it is also confidential. It must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed: the information must possess the quality of confidence at that time, so it cannot have been made public, either in full or in a summary substantially reflecting the whole.
16. The Council provided submissions to the effect that the advice contained in the Opinions maintained the quality of confidence. Considering the submissions made by the Council on this point, the Commissioner is satisfied that the information remained confidential at the time the Council responded to Mr Cavan's information request (and that it remains so now).
17. The exemption in section 36(1) is also a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. 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.

The public interest test

Submissions by Mr Cavan

18. In his requirement for review, Mr Cavan submitted that it was in the public interest for the information to be disclosed, as he believed the information held by the Council and the resulting advice had caused serious problems to residents of the area over a number of years.
19. In his application to the Commissioner, Mr Cavan reaffirmed his view that it was in the public interest for the information to be disclosed. He commented that the QC's opinion would have been given on the evidence supplied by the Council and he strongly believed that all of the information available to the Council had not been provided to the QC.

Submissions by the Council.

20. The Council recognised a public interest in disclosure, as this would assist public understanding of the Council's actions in relation to the Deans South estate. It recognised a more general public interest in enhancing scrutiny of the actions of public bodies.
21. The Council also submitted, however, that the Courts have long recognised the strong public interest in maintaining the right of confidentiality of communications between legal adviser and client on administration of justice grounds.
22. The Council made reference to previous decisions by the Commissioner, where the Commissioner noted there was an established means of scrutinising the legality of decisions of public bodies, through judicial review in courts. In this case, the Council highlighted another method of scrutiny as being the public inquiry which was held in relation to the Council's proposed compulsory purchase of Deans South.

23. The Council also made reference to the *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 482*¹, where Lord Roger had commented. “...if the advice given by lawyers is to be sound, their clients must make them aware of all of the relevant circumstances of the problem. Clients will be reluctant to do so, however, unless they can be sure what they say about any potential damaging or embarrassing circumstances will not be revealed later.”
24. The Council also highlighted Baroness Hale’s comments in the same case, that “...it is in the interest of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct...there is little or no chance of the client taking the right or sensible course if the lawyer’s advice is inaccurate or unsound because the lawyer had been given an incomplete or inaccurate picture of the client’s position.”
25. The Council maintained there was a need to ensure the Council and its legal advisers could exchange full and frank information and advice without concern about such communications being made available to members of the public. It submitted that both the Council and its legal adviser had an expectation that such communications would be confidential, and that confidentiality was necessary to ensure that best advice and best value was obtained.

The Commissioner’s view

26. The Commissioner has considered carefully the representations made by both Mr Cavan and the Council when balancing the public interest both for and against disclosure of the withheld information.
27. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities and accepts that disclosure of the information would go some way to providing that transparency and accountability.
28. As the Commissioner has noted in a number of previous decisions, and as submitted by the Council, 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. In a Freedom of Information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O’Brien [2009] EWHC 164 (QB)*. Generally, the Commissioner will consider the High Court’s reasoning to be relevant to the application of section 36(1) of FOISA.
29. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a compelling public interest in disclosing the information. A parallel might be drawn with the wider law of confidentiality, where the courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, or where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.
30. Having considered the public interest arguments advanced on both sides, and while accepting that there might be reasons which would justify disclosing legal advice of this kind in certain circumstances, the Commissioner is not satisfied that the public interest in disclosure of this particular information is sufficiently compelling to outweigh the strong public

¹ <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>

interest in maintaining the confidentiality of communications between legal adviser and client. Consequently, she accepts that the Commission correctly withheld the information to which it applied section 36(1) of FOISA.

Decision

The Commissioner finds that West Lothian Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Cavan.

Appeal

Should either Mr Cavan or West Lothian Council 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.

Margaret Keyse
Head of Enforcement

29 September 2015

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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