

# Decision Notice

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**Decision 199/2016: Mr Francis Mordaunt and Scottish Borders Council**

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## **Legal advice**

Reference No: 201600866

Decision Date: 19 September 2016



Scottish Information  
Commissioner

## Summary

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On 30 November 2015, Mr Mordaunt asked Scottish Borders Council (the Council) for legal advice sought and received by the Council in connection with a proposed development at Victoria Park, Peebles.

The Council withheld the information under section 36(1) of FOISA.

The Commissioner investigated and found that the Council ought to have responded to Mr Mordaunt's request under the EIRs. However, the Commissioner accepted that the Council was entitled to withhold the information under regulation 10(5)(d) of the EIRs.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(b) (Exceptions from duty to make environmental information available)

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

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1. On 30 November 2015, Mr Mordaunt made a request for information to the Council. The request concerned legal advice obtained by the Council in relation to a proposal to install a synthetic sports pitch at Victoria Park, Peebles. Mr Mordaunt asked to see the memorial sent to Counsel and the legal opinion obtained from Counsel.
2. The Council responded on 4 December 2015. It informed Mr Mordaunt that it did not have permission to share the advice with anyone outwith the Council. The Council did not cite any provision in FOISA to justify withholding the information.
3. On 3 February 2016, solicitors acting on behalf of Mr Mordaunt wrote to the Council, requiring a review of its decision. (In the remainder of this decision, all references to Mr Mordaunt should be read as including Mr Mordaunt's solicitors acting on his behalf.) Mr Mordaunt did not consider the Council required permission to share the legal advice. He submitted that, even if the Council claimed the information was subject to legal professional privilege, the public interest favoured the information being disclosed. Also, in Mr Mordaunt's view, the Council had waived privilege by disclosing parts of the advice in correspondence with Mr Mordaunt and the Peebles Civic Society.
4. The Council notified Mr Mordaunt of the outcome of its review on 24 February 2016. The Council informed Mr Mordaunt that the information requested was exempt from disclosure in terms of section 36(1) of FOISA, on the basis that a claim to confidentiality of

communications could be maintained in legal proceedings. The Council did not agree that legal advice privilege had been waived.

5. On 3 May 2016, Mr Mordaunt wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Mordaunt considered that the Council had waived privilege by disclosing some of the content of the advice it had received.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Mr Mordaunt 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 9 June 2016, the Council was notified in writing that Mr Mordaunt had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Mordaunt. 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, with reference to its claim that the information was subject to legal advice privilege. The investigating officer suggested to the Council that it would have been more appropriate to handle the request under the EIRs and asked the Council to provide submissions on the application of the EIRs and any relevant exceptions.
9. The Council subsequently responded, stating it agreed that the request ought to have been responded to under the EIRs. It considered the information requested was excepted from disclosure under regulation 10(5)(d) of the EIRs and provided submissions supporting its reliance on the exception. It also applied section 39(2) of FOISA.

## **Commissioner's analysis and findings**

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

### **FOISA or EIRs?**

11. The Council responded to Mr Mordaunt's request and her requirement for review solely in terms of FOISA. As noted above, it was asked to consider whether, as the information requested appeared to be environmental, the request ought to have been handled under the EIRs.
12. The Council agreed that the information was environmental and applied the exception in regulation 10(5)(d) of the EIRs (along with the exemption in section 39(2) of FOISA).
13. Having considered the nature of the withheld information, the Commissioner is satisfied that it is environmental information as defined in regulation 2(1) of the EIRs. It relates to relatively significant operations on land. The Commissioner is satisfied that it would fall within paragraphs (c) of the definition (as information on measures and activities affecting or likely to affect the elements and factors listed in paragraphs (a) and (b)).

14. The Commissioner concludes that by initially failing to consider and respond to Mr Mordaunt's request in terms of the EIRs, the Council failed to comply with regulation 5(1) of the EIRs.

### **Section 39(2) of FOISA – environmental information**

15. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. During the investigation, the Council confirmed that it wished apply the exemption in section 39(2) to the information requested by Mr Mordaunt. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the requested information, given her conclusion that it is properly classified as environmental information.
16. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.
17. As the withheld information in this case is all environmental information, the Commissioner will consider the Council's handling of the request in what follows solely in terms of the EIRs.

### **Regulation 10(5)(d)**

18. Regulation 10(5)(d) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to prejudice substantially the confidentiality of proceedings of any public authority where such confidentiality is provided for by law.
19. As with all exceptions in regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
20. The Commissioner must consider, therefore, whether the information relates to proceedings of the Council, the confidentiality of which is protected by law. She must then consider whether disclosure of the information would, or would be likely to, prejudice that confidentiality substantially.
21. In its publication "The Aarhus Convention: an implementation guide"<sup>1</sup>, the Economic Commission for Europe notes (at page 86) that the Convention does not comprehensively define "proceedings of public authorities". However, it suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the authority in its area of competence. The confidentiality under this exception must be provided for under national law.
22. In many cases where this exception applies, there exists a specific statutory provision prohibiting the disclosure of the information. However, there will also be cases where the common law of confidence will protect the confidentiality of the proceedings. One aspect of

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[http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

this is the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege. An aspect of this is legal advice privilege.

23. The Council submitted that the information comprised legal advice which, if disclosed, would reveal the exact content of the advice requested and received. The Council explained that Counsel who provided the legal advice was acting in their professional capacity and the communications occurred in the context of a professional relationship with the Council.
24. The Council submitted that the proceedings of the Council which would be affected by disclosure of the information would be its internal operations in relation to its regulatory and administrative functions.
25. The Council submitted that it was relying on legal advice privilege as the memorial and opinion were confidential and were not in the public domain. The Council argued that the information had been imparted in circumstances where an obligation of confidentiality was implied in the context of its relationship with Counsel.
26. Having considered the content of the withheld information and the circumstances under which it was sought and obtained (i.e. in the context of a professional relationship between a legal adviser and their client, in the course of which confidential legal advice was requested and provided), the Commissioner is satisfied that the information meets all of the conditions set out above and is subject to legal advice privilege.
27. Information cannot be privileged however, unless it is also confidential. For the exception 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 advice privilege) could be maintained in legal proceedings. In other words, the claim must be capable of being sustained at the time the exception is claimed. For this to be the case, the information must possess the necessary quality of confidence at that time (i.e. at least up to the point at which the authority carries out its review and communicates the outcome to the requester).
28. A claim of confidentiality will not be capable of being maintained where information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where that confidentiality has been lost in respect of all or part of the information under consideration, any privilege associated with that information (or the relevant part) is also effectively lost.
29. Mr Mordaunt argued that the Council had effectively provided a summary of parts of the opinion in correspondence to him and to Peebles Civic Society, and consequently privilege could no longer be relied upon as justification for withholding the information. Mr Mordaunt referred to specific correspondence where he considered such a summary had been provided.
30. The Council disagreed that some of the legal advice had been disclosed. The Council submitted that, within the correspondence in question, it had merely answered questions posed to it by stating that Counsel agreed with the legal advice given by its own Chief Legal Officer. In the Council's view, it had not disclosed the content of the legal advice, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice.
31. Having considered both Mr Mordaunt's and the Council's submissions and the content of the withheld information, the Commissioner is satisfied that the substance of the legal advice under consideration has not been made public, either in full, or in summary. The Commissioner accepts that the Council has made reference to the legal advice in the correspondence referenced by Mr Mordaunt. However, these references merely state some

individual conclusions in relation to specific aspects of the matters under consideration; they do not disclose the rationale for these conclusions, the legal issues or precedents taken into consideration or any counter-arguments considered.

32. As the Commissioner is satisfied that the legal advice has not been disclosed and, consequently, confidentiality has been maintained, she will go on to consider whether disclosure of the withheld information would, or would be likely to, prejudice substantially the confidentiality of the proceedings of the Council in terms of regulation 10(5)(d) of the EIRs. In this connection, the Commissioner accepts that the process of obtaining legal advice in this case can be accepted as relevant proceedings for the purposes of regulation 10(5)(d).
33. The Commissioner has made clear in previous decisions that the test of substantial prejudice is a high one, requiring a real risk of actual, significant harm.
34. The Council stated that it needed to be able to obtain external legal advice when required in order to ensure that it was acting lawfully. In the Council's view, not being able to do so would result in it being prejudiced substantially, which would adversely impact on its decision-making.
35. In the circumstances, the Commissioner accepts, given the nature of the legal advice, its inherent confidentiality and the fact that the issues discussed remained live at the time of Mr Mordaunt's requirement for review, the Council's decision-making would be substantially prejudiced were the information to be disclosed. Therefore, the Commissioner accepts that the exception in regulation 10(5)(d) was engaged.
36. The Commissioner must now consider whether the public interest in making the information available was outweighed by that in maintaining this exception.

#### *Public interest test*

37. Mr Mordaunt argued that it was in the public interest to disclose the information. Mr Mordaunt stated that there had been a great deal of public interest in the proposals, which were locally controversial. He stated that there had been public debate as to whether the Council's proposed plan would be lawful.
38. In Mr Mordaunt's view, disclosure of the information would help inform the debate. He submitted that the Council was responsible for ensuring all of its actions were legally justifiable and disclosure of the information would increase transparency in the process. Mr Mordaunt argued that this in turn would increase the quality and level of public debate and would likely increase trust in the decision-making process.
39. The Council argued that it has long been recognised in case law that there is a strong public interest in not disclosing communications between legal advisers and their clients due to confidentiality. The Council referred to the judgment of the court in *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 482*<sup>2</sup> as a noteworthy example of the principle.
40. The Council submitted that the public interest in allowing it to obtain full and frank confidential legal advice, to allow it to make comprehensive decisions, outweighed that in disclosing the information. In the Council's view, this was not a highly compelling case for disclosure.

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<sup>2</sup> <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>



41. Additionally, the Council stated that legal action had been threatened against it in relation to the proposal, so it was all the more important that it was able to obtain full, proper legal advice in contemplation of potential litigation.
42. The Council submitted that the legal advice was obtained in order to allow it to test the viability of the project and it was intended that this would be used internally to allow it to make a fully informed decision. It was not intended that this information be used for public means. The Council submitted that it must be free to fully investigate and consider all issues relating to its decision making.

#### Public interest – the Commissioner's view

43. The Commissioner has considered carefully the representations made by both Mr Mordaunt and the Council. She acknowledges that there is a public interest in the transparency and accountability expected of all authorities, and that making the information available would go some way to promoting transparency and accountability in this case.
44. The Commissioner agrees with the Council that 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)<sup>3</sup>. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of regulation 10(5)(d) of the EIRs.
45. Consequently, while she will consider each case individually, the Commissioner is likely to order the disclosure of privileged communications (and confidential communications generally) in highly compelling cases only.
46. The Commissioner acknowledges that there may be occasions on which the significant public interest in withholding legally privileged communications will be outweighed by a compelling public interest in making the information available. In this particular case, she acknowledges the views of Mr Mordaunt regarding the public debate and local controversy surrounding the proposed development taking place in a public park. There is a clear public interest in the community in understanding how a particular development proposal has been handled by the Council.
47. On the other hand, the Commissioner must consider any information which is the subject of legal professional privilege in the light of the established, inherent public interest in maintaining the confidentiality of communications between legal adviser and client. Any countervailing public interest would need to be compelling.
48. Having considered the public interest arguments advanced on both sides, the Commissioner is not satisfied that the public interest in making this particular information available outweighs the public interest in maintaining the confidentiality of communications between legal adviser and client. It is in the public interest that reasonable expectations of confidentiality be maintained, and in particular that (where necessary) an authority can communicate with its legal advisers freely and frankly in confidence, with a view to performing its statutory functions effectively.

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<sup>3</sup> [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o'brien+\)\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o'brien+)))

49. In all the circumstances, therefore, the Commissioner concludes that the strong public interest in maintaining the exception outweighs such public interest as exists in making the information available. She is, therefore, satisfied that the Council was entitled to withhold the information requested under regulation 10(5)(d) of the EIRs.

## Decision

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The Commissioner finds that Scottish Borders Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Mordaunt.

The Commissioner finds that the Council breached regulation 5(1) of the EIRs by failing to identify and respond to Mr Mordaunt's request as one seeking environmental information, as defined in regulation 2(1) of the EIRs.

However, the Commissioner accepts that the Council was entitled to withhold the information requested under the exception in regulation 10(5)(d) of the EIRs.

## Appeal

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Should either Mr Mordaunt or Scottish Borders 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**19 September 2016**



### 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.

...

#### 39 Health, safety and the environment

...

(2) Information is exempt information if a Scottish public authority-

(a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or

(b) would be so obliged but for any exemption contained in the regulations.

...

# The Environmental Information (Scotland) Regulations 2004

## 2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

## 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

## 10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if-

- (a) there is an exception to disclosure under paragraphs (4) or (5); and
- (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-

- (a) interpret those paragraphs in a restrictive way; and
- (b) apply a presumption in favour of disclosure.

...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;

...

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**