



Decision Notice 057/2023

Advice on charitable trusts

Authority: City of Edinburgh Council
Case Ref: 202200052

Summary

The Applicant asked the Authority for workshop meeting material and any recorded matters arising thereafter in relation to external legal advice received on charitable trusts. The Authority disclosed some information but withheld the remainder, arguing that it was subject to legal advice privilege and so exempt from disclosure under FOISA.

The Commissioner investigated and found that the Authority was entitled to withhold some, but not all, of the information from the Applicant. The Commissioner also found that the Authority failed to respond to the Applicant's requirement for review within statutory timescales.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (General entitlement); 10(1) (Time for compliance); 21(1) (Review by Scottish public authority); 36(1) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner)

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 September 2021, the Applicant made a request for information to the Authority. He commented that, during the 20 May meeting of the Finance and Resources Committee, it was disclosed that the Authority received external legal advice on Charitable Trusts and that a workshop meeting of the Finance and Resources Committee would take place. The

Applicant requested a copy of all the workshop meeting material, including recorded discussions and any further recorded matters arising thereafter.

2. The Authority responded on 7 October 2021. It informed the Applicant of the information it held falling within scope of their request. The Authority disclosed certain of the information to the Applicant, and withheld the remainder under the exemption in section 36(1) of FOISA. The Authority argued that the remaining information was legal advice, covered by legal advice privilege.
3. On 8 October 2021, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he considered the Authority had sought legal advice on the basis of its assertion that it was the sole Trustee of Lauriston Castle Trust, not in respect of the administration of the Authority. The Applicant argued that he, along with everyone living in Scotland, was the beneficiary of the Lauriston Castle Trust and as such was entitled to see all material appointing the Trustees, including legal advice. The Applicant asserted that there was unquestionably a public interest in who the Trustees were and how they claimed to be so.
4. The Authority notified the Applicant of the outcome of its review on 21 December 2021. It apologised for the delay in responding and upheld its decision to rely on the exemption in section 36(1) of FOISA for withholding information falling within scope of the Applicant's request.
5. On 12 January 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review for the following reasons:
 - a) they considered the subject matter of the request to cover Trust/Charitable matters and not prime business of the Authority;
 - b) the requested material was, in his view, of the utmost interest to all beneficiaries (everyone living in Scotland) of the Trust;
 - c) the Authority was not a Trustee of Lauriston Castle Trust – no Councillor had been nominated as a Trustee.
6. The Applicant was also dissatisfied with the Authority's response because he did not believe that the Authority had responded to his request or requirement for review promptly.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 8 February 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority 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 Authority was invited to comment on this application and to answer specific questions. These related to why the Authority considered the withheld information to be subject to legal advice privilege and also why it

considered the public interest to favour maintaining the exemption. The Authority was also asked to respond to specific questions about particular parts of the withheld information, and to comment on its compliance with statutory timescales for responding to the Applicant's request and requirement for review.

10. Unfortunately, the Commissioner did not receive any response from the Authority to his requests for submissions.

Commissioner's analysis and findings

11. As the Commissioner did not receive any submissions from the Authority in relation to this application, his decision in what follows is based on the arguments and justifications made by the Authority in its response to the Applicant's request and requirement for review. These, together with the submissions from the Applicant, have been fully considered by the Commissioner.

Section 36(1) - Confidentiality

12. 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. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.

Tests to be applied in the use of the exemption

13. For the exemption to apply to this particular type of communication, certain conditions have to be fulfilled:
 - (i) The information must relate to communications with a professional legal adviser, such as a solicitor or advocate;
 - (ii) The legal adviser must be acting in their professional capacity; and
 - (iii) The communications must occur in the context of the legal adviser's professional relationship with their client.
14. In its response to the Applicant's request, the Authority explained that the advice given to it relating to Lauriston Castle Trust and the trustee position was legal advice covered by legal privilege. The Authority asserted that requests for legal advice were also covered by legal privilege, as communications where legal advice was sought.
15. In response to the Applicant's requirement for review, the Authority argued that details of a matter for which legal advice was sought, and details of each separate legal instruction given by the Authority, were such that a claim of confidentiality of communications could be maintained in legal proceedings in respect of the requested information.

The Commissioner's view about the exemption

16. After considering the content of the withheld information, and the circumstances in which it was created, the Commissioner is not satisfied that all of the information withheld by the Authority meets the conditions for legal advice privilege to apply.
17. The Commissioner does not agree that information contained in slides 1, 2, 3, 10, 11 and 13 of document 1, or any of the information in document 3 or document 11, can be regarded as

legal advice or related to obtaining legal advice. Consequently, this information is not exempt from disclosure under section 36(1) of FOISA.

18. However, the Commissioner does accept that the remaining information in document 1, and all of the information in documents 2, 4 to 10 (inclusive) and 12 and 13 meets the conditions for legal advice privilege to apply.
19. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. The exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption (and withholding it).

The public interest test - section 2(1)(b)

The Applicant's submissions about the public interest

20. In his application to the Commissioner, the Applicant considered there to be strong arguments for disclosing the withheld information.
21. The Applicant commented that the material he sought was of the utmost interest to all beneficiaries of the Trust. It is the Applicant's view that all beneficiaries (everyone living in Scotland, in his view) have a right to know who the legal trustees are and how the trust is being run/operated. As a consequence, the Applicant does not consider confidentiality in this case to be an option, as it is in the public interest that full disclosure is made.
22. The Applicant has also asserted that he is of the view that the Authority are not legal Trustees of the Lauriston Castle Trust, and therefore it is in the public interest that the requested information is disclosed.

The authority's submissions about the public interest

23. In its response to the Applicant's request, the Authority argued that it was entitled to seek legal advice outwith the public glare. Whilst the Authority acknowledged a public interest in the legal advice it sought in relation to Lauriston Castle Trust, it concluded that, on balance, this was outweighed by the need for the Authority to be able to seek legal advice without the inhibiting effect of such advice being made public. The Authority was also of the view that the confidentiality of communications between legal advisers and their clients should be maintained.
24. In seeking to support its arguments, the Authority referred to [the Commissioner's briefing note on section 36\(1\) of FOISA](#)¹. In particular, the Authority commented that this guidance highlights that there will always be a strong public interest in maintaining the right to confidentiality of communications between a legal adviser and their client. The Authority also cited the recognition of this public interest in the court case of [Three Rivers District Council and Others v Governor and Company of the Bank of England](#)².
25. The Authority also quoted comments of the Commissioner in [Decision 023/3005](#)³, where he indicated that there will always be a strong public interest in maintaining the right to confidentiality between a legal adviser and their client and, while each case would be

¹ [BriefingSection36Confidentiality.pdf \(itspublicknowledge.info\)](#)

² [House of Lords - Three Rivers District Council and others \(Respondents\) v. Governor and Company of the Bank of England \(Appellants\) \(2004\) \(parliament.uk\)](#)

³ [Decision 023/2005 | Scottish Information Commissioner \(itspublicknowledge.info\)](#)

considered on its own merits, the Commissioner is only likely to order the release of such communications in highly compelling cases.

26. In response to the Applicant's requirement for review, the Authority again recognised the public interest in legal cases handled by it, as well as the general presumption in favour of disclosure. However, having balanced these interests against a recognition of a strong public interest in maintaining the right of confidentiality of communications between legal adviser and client, and the interests of the public in the Authority being able to receive appropriate legal advice in the performance of its role, the Authority concluded that the public interest lay in favour of withholding the information.

The Commissioner's view on the public interest

27. 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. 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 \(QB\)](#)⁴. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the applicant in section 36(1) of FOISA.
28. The Commissioner accepts that the public as a whole have an interest in the Lauriston Castle Trust. As a consequence, there is clearly a public interest in ensuring that it is managed and governed appropriately.
29. This public interest is also apparent from the article which appeared in The Herald newspaper on 30 July 2021, where concern was raised about the governance of Lauriston Castle Trust and there was a declaration from the Authority that it was reviewing its governance of the Trust and had sought legal advice on the subject.
30. However, it is not clear to the Commissioner, from the arguments given by the Authority to the Applicant in its responses to his request and requirement for review, whether this review was completed, and whether any final position on the matter had been reached by the Authority at the time the Applicant made his request.
31. Furthermore, the Commissioner does not consider that any of the information he has found to be exempt under section 36(1) of FOISA is likely to make any material contribution to addressing the Applicant's concerns usefully. The Authority is subject to both external audit and the scrutiny of the Office of the Scottish Charity Regulator in relation to proper governance of the Trust. In any case, there is nothing to suggest that, by taking external legal advice, the Authority is approaching the Trust's future governance in a manner that is anything other than responsible.
32. On balance, and after careful consideration, the Commissioner does not find the public interest in disclosure of this information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.

⁴ [Department for Business Enterprise & Regulatory Reform v O'Brien & Anor \[2009\] EWHC 164 \(QB\) \(10 February 2009\) \(bailii.org\)](#)

33. The Commissioner is therefore satisfied that the Authority correctly withheld the remaining information under section 36(1) of FOISA.

Handling of the request

Failure to comply with timescales

34. As the [Section 60 Code of Practice](#)⁵ states, under sections 10(1) and 21(1) of FOISA all public authorities are required to respond “promptly” to a request or review (and, in any case, within a statutory 20 working days).
35. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
36. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. Again, this is subject to qualifications which are not relevant in this case.
37. Both of these provisions make it clear that the 20 working day period is a long-stop and that the overriding requirement is to respond promptly.
38. In his application to the Commissioner, the Applicant expressed dissatisfaction with the Authority’s responses as he considered that it had not responded promptly to his request or requirement for review, and that it could have responded earlier in accordance with the legislation.
39. As noted earlier in the Decision, the Authority was invited to provide submissions on its handling of the Applicant’s request and requirement for review. Unfortunately, however, no submissions were received.
40. It is clear from reading the response to the Applicant’s request that it was responded to by the Authority within the statutory timescale of 20 working days – the response was issued on day 17. The Commissioner also notes that the Council reported having received 582 information requests (under FOISA and the Environmental Information (Scotland) Regulations 2004) in the same quarter in which the Applicant made the request. Given that the request was responded to on day 17 and given the number of other requests being dealt with by the Authority around that time, the Commissioner finds, given the lack of evidence from the Applicant as to why the Authority would have been in a position to respond more quickly, that the Authority did respond promptly.
41. It is a matter of fact that the Authority did not respond to the Applicant’s requirement for review within 20 working days. Indeed, the Authority acknowledged this in its response to the requirement for review.
42. The Commissioner therefore finds that the Authority responded neither promptly nor within the statutory timescale to the Applicant’s requirement for review. As such, he finds that the Authority failed to comply with section 21(1) of FOISA.
43. The Commissioner has recorded this procedural failure in his case management database, which is used to inform and monitor FOISA practices by authorities.

⁵ [Code of Practice under section 60 of FOISA \(www.gov.scot\)](#)

Decision

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that, by correctly withholding some information under section 36(1) of FOISA, the Authority complied with Part 1.

However, the Commissioner also finds that, by relying on section 36(1) for other withheld information, the Authority failed to comply with Part 1.

In addition, the Authority failed to comply with the timescale set by section 21(1) of FOISA in responding to the Applicant's requirement for review.

The Commissioner therefore requires the Authority to disclose the information in slides 1, 2, 3, 10, 11 and 13 in document 1, all of the information in document 3 and all information in document 11, by **20 July 2023**.

Given that the Authority did provide a response to the Applicant's requirement for review, the Commissioner does not require the Authority to take any action in respect of its failure to respond timeously, in response to the Applicant's application.

Appeal

Should either the Applicant or the Authority 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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

5 June 2023

Appendix 1: 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
- ...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.
- ...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.
- ...

36 Confidentiality

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

...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).