



Decision Notice 006/2024

Advice relating to Lauriston Castle Trust

Authority: City of Edinburgh Council
Case Ref: 202200048

Summary

The Applicant asked the Authority for information about external legal advice obtained by the Authority regarding Lauriston Castle Trust. The Authority withheld the information on the basis that it was subject to legal advice privilege and therefore exempt from disclosure under FOISA. The Commissioner investigated and found that the Authority was entitled to withhold most, but not all, of the information. The Commissioner also found that the Authority failed to respond to the Applicant's request for review within the statutory timescale.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 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 16 July 2021, the Applicant made a request for information to the Authority:

CEC [the Authority] have stated that the Council [again, the Authority] has taken external legal advice with regard to Lauriston Castle Trust and It remains the CEC position that all the Councillors of the City of Edinburgh are the Trustees.

...

To help me understand the external legal advice, please present me with a full copy of the full facts presented to the external legal profession/advice sought and their full response.

A copy of the request (in full) is reproduced in Appendix 2 to this Decision Notice.

2. The Authority responded on 13 August 2021. It said that the information was subject to legal privilege and, although it acknowledged there was a public interest in the information requested, it considered that the public interest in disclosure of the information 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 submitted that the confidentiality of communications between legal adviser and client should be maintained. The Authority told the Applicant that it was applying an exemption under section 36(1) of FOISA to withhold the requested information.
3. On 15 August 2021 the Applicant wrote to the Authority requesting a review of its decision. The Applicant said he did not consider that the legal advice was given as part of legal proceedings and therefore that the exemption in section 36(1) of FOISA could not apply. He also said that he considered that the legal consultation was made on behalf of Lauriston Castle Trust and that he did not consider the Authority to be, *de facto*, Lauriston Castle Trust.
4. The Authority notified the Applicant of the outcome of its review on 21 December 2023. The Authority upheld the review without modification.
5. On 11 January 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant said he was dissatisfied with the outcome of the Authority's review because he did not consider that the matter fell within the business stream of the Authority and therefore the Authority had no right to claim this exemption. He said that in his view it was a matter for Lauriston Castle Trust, which was administered by the Trustees (of Lauriston Castle Trust) and that no councillor had been nominated as a Trustee. The Applicant said that the information he requested was legal advice; it was not concerning legal proceedings. The Applicant was also dissatisfied at the time taken by the Authority to respond to his requirement for review.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 16 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.
8. 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. Specifically, the Authority was asked to comment on the Applicant's views of the governance arrangements of Lauriston Castle Trust and therefore why it considered itself the relevant public authority with respect to the request. Questions also focused on whether the Authority had identified all the information it held and that fell within the scope of the Applicant's request, and its justification for withholding the information requested under section 36(1) of FOISA. The Authority was also asked to comment on its handling of the Applicant's requirement for review.

Commissioner's analysis and findings

9. The Commissioner has considered all the submissions made to him by the Applicant and the Authority.

Is the Authority entitled to respond under FOISA?

10. The Applicant asserted that the Authority was not in a position to apply an exemption under FOISA because he considered that the matter was not within the business stream of the Authority. He considered that provision of the information he had requested was a matter for the Trustees of Lauriston Castle.
11. The Authority explained that, in its view, it is the sole trustee of Lauriston Castle Trust. It said that delegated responsibility for all charitable trusts presently rests with its Finance and Resources Committee and that the Committee has delegated responsibility to act in the role of trustee for all the Authority's charities, which includes Lauriston Castle Trust. It said that day-to-day management of the Trust was carried out by its officers and oversight of that work was provided by the Finance and Resource Committee. Accordingly, it considered the advice was sought and received within its workstream.
12. The Authority explained that it had sought and received legal advice relating to Lauriston Castle Trust in its capacity as a trustee and therefore it held the information and was entitled to respond in terms of FOISA.
13. The Commissioner has considered these matters in relation to this case and in previous decisions [057/2023](https://www.itspublicknowledge.info/decision-0572023)¹ and [090/2023](https://www.itspublicknowledge.info/decision-0902023)². He is satisfied that the Authority held the information requested (whether acting as trustee or not, it was still a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994, as designated under Schedule 1 to FOISA) and therefore had a duty to respond to the Applicant's request under FOISA.
14. In any event, the Commissioner is not sure of the point the Applicant is trying to make here. It must be presumed, after all, that the Applicant believed the entity he made the request to was covered by FOISA: otherwise he would not have applied to the Commissioner at all. Having accepted that it was covered, the Commissioner can identify no basis on which it could be denied the right to claim exemption under section 36(1), in appropriate circumstances.

Section 36(1) - Confidentiality

15. Section 36(1) of FOISA states that information in respect of which a claim to confidentiality of communication could be maintained in legal proceedings is exempt information. In most cases, assessing whether a claim to confidentiality of communications can be maintained in legal proceedings will mean considering whether the information is subject to legal professional privilege.
16. For the exemption to apply to this particular type of communication, certain conditions have to be fulfilled:

¹ <https://www.itspublicknowledge.info/decision-0572023>

² <https://www.itspublicknowledge.info/decision-0902023>

- (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.

Is the information subject to legal professional privilege?

17. The Authority said that its in-house legal services team sought and received the advice regarding Lauriston Castle Trust, and did so from a firm of solicitors with specialist knowledge in legal matters relating to charities and trusts.
18. The Authority confirmed that the legal matters within the scope of the request were confidential and remained under discussion.
19. In his application to the Commissioner the Applicant argued that the information he sought "...is advice. Any legal proceedings would be based on action, not advice."
20. The Commissioner's [briefing on section 36](#)³ explains that legal professional privilege can be split into two main types – "legal advice privilege" and "litigation privilege". Litigation privilege (also known as "communications *post litem motam*") is a distinct aspect of legal professional privilege. It is wider than communications between solicitor and client. It applies to documents created in contemplation of litigation (legal action) and to communications when litigation is either pending or being considered. This is not the type of legal professional privilege that the Authority sought to rely on here. In this instance, the Authority relied on legal advice privilege. Legal advice privilege covers communications between lawyers and their clients where legal advice is sought or given. The communications do not have to be connected with litigation (legal action).
21. The withheld information in this case was previously considered by the Commissioner in Decisions 057/2023 and 090/2023 (see also paragraph 13, above). Document 2 in this case corresponds to document 3 as referred to in Decision 057/2023. The Commissioner determined in Decision 057/2023 that this document was not subject to legal advice privilege and required the Authority to disclose it to the Applicant. The Commissioner confirmed that the Authority had done so on 25 July 2023.
22. The Commissioner is, however, satisfied that the remaining information sought by the Applicant – and withheld by the Authority - is covered by legal advice privilege. Consequently, he considers that the exemption in section 36(1) of FOISA can be engaged for this remaining information.
23. 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 the information).

The public interest test

24. The Applicant argued that all beneficiaries of Lauriston Castle Trust are entitled to the information he has asked for, and that everyone living in Scotland is a beneficiary.

³ https://www.itspublicknowledge.info/sites/default/files/2023-07/BriefingSection36Confidentiality_2023.pdf

25. The Authority acknowledged that there is public interest in ensuring that it acts legally, and takes decisions based on sound legal advice, whether it is acting in its capacity as trustee of a site that is required to be open to the public, or otherwise.
26. The Authority submitted that the information was legally privileged and argued that withholding the information ensured frankness between the external legal advisors and their client (the Authority) and served the wider administration of justice.
27. The Authority also considered that withholding the information allowed officers and elected members to consider the legal advice in private, which in turn allowed free expression of potentially differing views and open discussion. It argued that, on balance, the public interest was better served by having a private space to obtain, receive and consider legal advice.

The Commissioner's views on the public interest test

28. 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 application of section 36(1) of FOISA.
29. The Commissioner accepts the Applicant's argument and recognises that Lauriston Castle, along with its contents and grounds, is a place of historical significance and recreational value to the general public. He considers there is a clear and obvious public interest in the governance of the site and in ensuring accountability and transparency in the actions of those entrusted with looking after it, and therefore that there is a public interest argument for disclosure of legal advice pertaining to these matters.
30. In paragraph 44 of Decision 090/2023, the Commissioner noted that the matters to which the legal advice pertain remained live and confidential. This continues to be the case, as further evidenced by the report on the Trust considered, in private, by the Authority in August 2023. The Commissioner remains of the view that, given the nature of this issue, the legal advice sought and obtained will continue to be relevant to the Authority's consideration of the matter in a legal context. He therefore recognises the requirement to maintain the confidentiality of the relevant communications and advice between legal adviser and client, particularly given the matter in question is still a "live" issue.
31. On balance, and after careful consideration, the Commissioner finds, as he did in Decisions 057/2023 and 090/2023, that the public interest in maintaining confidentiality of communications between legal adviser and client (and thus maintaining the section 36(1) exemption) outweighs the public interest in disclosing the information.
32. Consequently, the Commissioner is satisfied that the Authority correctly withheld the remaining information under section 36(1) of FOISA.

Handling of the request

⁴ [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o%27brien+\)\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o%27brien+)))

Failure to comply with timescales

33. Section 21(1) of FOISA is clear that public authorities must respond “promptly” to a request for review (and, in any event, not later than the twentieth working day following receipt). This is subject to qualifications which are not relevant in this case.
34. The provision is clear that the 20 working day period is a long-stop and that the overriding requirement is to respond promptly.
35. In his application to the Commissioner, the Applicant expressed dissatisfaction with the Authority’s review as he considered that it had not responded promptly to his request for review, and that it could have responded earlier in accordance with the legislation.
36. The Authority was invited to provide submissions on its handling of the Applicant’s request for review.
37. In response, the Authority submitted that it endeavoured to respond to requests for information under FOISA within the statutory timeframes but, unfortunately, there were occasions when that did not happen. The Authority said this was sometimes the case when multiple requests were received from the same applicant with similar wording. It said, equally, there were occasions when input was required from multiple sources within the Authority, which could take more time to co-ordinate. The Authority stated that its resources were not infinite and occasionally, regrettably, deadlines could sometimes be missed.
38. It is a matter of fact, however, that the Authority did not respond to the Applicant’s request for review within 20 working days. Indeed, the Authority acknowledged this in its review and apologised for the delay in responding.
39. The Commissioner therefore finds that the Authority did not respond to the Applicant’s request for review promptly or within the statutory timescale. As such, he finds that the Authority failed to comply with section 21(1) of FOISA.
40. The Commissioner has recorded this procedural failure in his case management database, which is used to inform and monitor FOI practice by authorities.
41. The Commissioner notes that this issue has also been recorded in Decision 057/2023 and Decision 90/2023.

Decision

The Commissioner finds that the Authority largely 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 most of the 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. It also failed to comply with section 21(1) of FOISA in failing to issue a response to the Applicant’s requirement for review within the required timescale.

Given that the Authority has disclosed the information in document 2 as required by Decision 057/2023, the Commissioner does not require the Authority to take any action in respect of this failure in respect of this application.

Furthermore, as the Authority did issue the Applicant with a review outcome, the Commissioner does not require the Authority to take any action in respect of its failure to do so timeously.

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.

Euan McCulloch
Head of Enforcement

10 January 2024

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.

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).

Appendix 2: The Request for information

CEC have stated that the Council has taken external legal advice with regard to Lauriston Castle Trust and It remains the CEC position that all the Councillors of the City of Edinburgh are the Trustees.

Lauriston Castle Trust came into being in 1930.

The perpetual Trustees appointed were the Lord Provost, Magistrates and Council of the City of Edinburgh.

The City of Edinburgh Council, CEC. that was in 1930 ceased to exist on a number of occasions between then and today. Edinburgh was administered by the single tier "Edinburgh Corporation", which covered the "City and Royal Burgh of Edinburgh.

In 1975, Edinburgh Corporation was abolished. Provision was made in the Local Government (Scotland) Act 1973 Section 223 whereby: (1) All property held on trust immediately before 16th May 1975 by (a) an existing local authority, or (b) a councillor and a specified officer of an existing local authority, shall on that day be transferred to and vest (subject to the same trust) in the appropriate islands or district council. (2) The council in whom property is vested by virtue of subsection (1) above shall nominate a sufficient number of their councillors to act as trustees of that property and in so doing shall have regard to the terms of the trust deed; and where the property is held immediately before 16th May 1975 by the persons mentioned in subsection (1)(b) above, the council shall nominate the proper officer as one of the trustees. In 1996. The City of Edinburgh became a single-tier council area, under the Local Government etc (Scotland) Act 1994. Provision was made in the Local Government etc (Scotland) Act 1994 Section 16 whereby: (1) All property held on trust immediately before 1st April 1996 by— (a) an existing local authority; or (b) a councillor and the proper officer or a specified officer of such an authority, shall on that day be transferred to and vest (subject to the same trust) in the appropriate new authority. (2) The authority in whom property is vested by virtue of subsection (1) above shall nominate a sufficient number of their councillors to act as trustees of that property and in so doing shall have regard to the terms of the trust deed; and where the property is held immediately before 1st April 1996 by the persons mentioned in subsection (1)(b) above, the authority shall nominate the proper officer as one of the trustees.

Under both acts the power to nominate Trustees is provided under the word "shall nominate" Under both acts the number of Trustees has been defined as "sufficient number of their councillors." 63 Councillors cannot in any sense be considered sufficient. It is excessive. To help me understand the external legal advice, please present me with a full copy of the full facts presented to the external legal profession/advice sought and their full response. As you are aware the question of Charity Status is being investigated by the Scottish Charity Regulator.