

# Decision Notice



Decision 025/2014 Mr Ian Sutherland and the Scottish Criminal Cases Review Commission

Views and opinions on Cadder judgment

Reference No: 201301832  
Decision Date: 13 February 2014

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## Summary

On 18 April 2013, Mr Sutherland asked the Scottish Criminal Cases Review Commission (the SCCRC) for the views and opinions it canvassed on the Cadder judgment. The SCCRC withheld the information on the basis that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs. During the investigation, the SCCRC additionally argued that the information was exempt from disclosure, on the basis that it was subject to legal professional privilege.

The Commissioner found that the SCCRC was entitled to withhold the information on the basis that it was subject to legal professional privilege.

## 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); 36(1) (Confidentiality)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. In *Cadder v HMA*<sup>1</sup> (“the Cadder case”), the Supreme Court found the police practice (at that time supported by the relevant provisions of the Criminal Procedure (Scotland) Act 1995) of detaining a suspect at a police station for questioning without access to a solicitor to be incompatible with the European Convention on Human Rights.
2. On 18 April 2013, solicitors acting on behalf of Mr Sutherland wrote to the SCCRC requesting information which he had initially requested in a letter of 13 February 2012: namely, any written response canvassed from any SCCRC Board Member, legal officer or other employee on the implications of the statutory amendments enacted following the decision of the Supreme Court in the Cadder case, insofar as the amendments may have had implications for determination of the question of “finality” and the public interest in the administration of justice.

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<sup>1</sup> [http://www.supremecourt.gov.uk/docs/UKSC\\_2010\\_0022\\_Judgment.pdf](http://www.supremecourt.gov.uk/docs/UKSC_2010_0022_Judgment.pdf)



3. Within his request, Mr Sutherland noted that the requested information had previously been the subject of *Decision 021/2013 Mr Ian Sutherland and the Scottish Criminal Cases Review Commission*<sup>2</sup> (issued on 19 February 2013) and that the Commissioner had concluded that the information was exempt from disclosure under section 30(b)(i) and (ii) of FOISA. In Mr Sutherland's view, the information could now be disclosed on the basis that the series of Cadder cases had now been concluded.
4. The SCCRC responded on 13 May 2013. The SCCRC informed Mr Sutherland that it still considered the information to be exempt from disclosure under the exemptions in section 30(b) of FOISA. The SCCRC stated that the issues raised in the Cadder case were still ongoing matters of discussion for the SCCRC.
5. On 26 June 2013, Mr Sutherland wrote to the SCCRC requesting a review of its decision. Mr Sutherland considered the SCCRC's decision was incorrect. Mr Sutherland referred to previous correspondence where he had set out his arguments suggesting that the SCCRC could now reach a different conclusion on his application, these being: (1) the timing of the new request and (2) the possibility of disclosing the information in an anonymised format.
6. The SCCRC notified Mr Sutherland of the outcome of its review on 2 July 2013, upholding its previous decision without modification.
7. On 5 August 2013, Mr Sutherland wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SCCRC's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr Sutherland made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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9. On 20 August 2013, the SCCRC was notified in writing that an application had been received from Mr Sutherland and was asked to provide the Commissioner with the information withheld from him. The SCCRC responded with the information requested and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted the SCCRC, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The SCCRC was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
11. The SCCRC responded on 4 October 2013, providing submissions on its application of the exemptions in section 30(b)(i) and (ii) of FOISA to the withheld information.

<sup>2</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2013/201201416.aspx>



12. The investigating officer subsequently asked the SCCRC to provide evidence showing that it was still receiving applications which raised issues arising from the Cadder case. Additionally, the SCCRC was asked to provide evidence to support its view that new legal considerations arising from Cadder cases were still on-going.
13. The SCCRC declined to provide any evidence showing that it was still receiving applications raising issues from the Cadder case. The SCCRC considered that sections 194J and 194K of the Criminal Procedure (Scotland) Act 1995 prohibited it from doing so. The SCCRC also declined to explain why it considered such cases were raising new legal issues.
14. The SCCRC indicated that it wished to apply the exemption in section 36(1) of FOISA to the withheld information on the basis that it comprised communications with its legal advisers and that a claim to confidentiality of communications could be maintained in legal proceedings.
15. The investigating officer asked the SCCRC to provide submissions in support of its application of the exemption in section 36(1). The SCCRC responded on 15 November 2013.
16. The investigating officer informed Mr Sutherland that the SCCRC had applied the exemption in section 36(1) of FOISA and asked if there were any submissions that he wished to make in respect of this exemption. Mr Sutherland responded with his submissions on 9 December 2013. The investigating officer subsequently contacted the SCCRC, giving it an opportunity to comment on the points raised by Mr Sutherland in his submissions.

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

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17. 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 Sutherland and the SCCRC. She is satisfied that no matter of relevance has been overlooked.

### **Section 36(1) of FOISA - confidentiality**

18. 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. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege (LPP), applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
19. In this case, the SCCRC submitted that the exemption in section 36(1) applied to all of the information falling within the scope of Mr Sutherland's request, by virtue of it comprising legal advice provided to the SCCRC by its legal advisers, acting in their respective professional capacities.



20. The information being withheld in this case comprises advice and views on legal issues affecting the SCCRC. These were provided by senior SCCRC employees and an external consultant legal adviser. The SCCRC submitted that the information comprised communications with its legal advisers. In the SCCRC's view, the communications attracted legal advice privilege, given their nature and content.
21. For legal advice privilege to apply, certain conditions must be fulfilled:
  - a) the communication must be with a professional legal adviser, such as a solicitor or advocate.
  - b) the legal adviser must be acting in their professional capacity as such and the communication must occur in the context of their professional relationship with their client.
  - c) the information must be confidential between lawyer and client.
22. In his submissions to the Commissioner, Mr Sutherland argued that it was difficult to see how Board members and employees could be said to have been acting in the capacity of legal advisers where there was no evidence of their having been instructed in that context, much less remunerated for their advice. In his view, there would need to be clear evidence of "instruction".
23. Mr Sutherland also argued that, in the case of any Board member who was an advocate at the time of giving the advice, it might be a breach of Faculty of Advocate protocols for that member to provide advice directly to a client without having been instructed by a solicitor.
24. The SCCRC submitted that the information related to communications with its legal advisers. It stated that the information comprised advice which had been received from individuals acting in their respective capacities as legal advisers to the Board of the SCCRC.
25. The SCCRC stated that none of the individuals was a Board member, nor were they practising members of the Faculty of Advocates. The SCCRC explained that three of the individuals who provided the advice were qualified solicitors. Each of them had, at the relevant time, a Law Society of Scotland practising certificate. The other individual was the SCCRC's Consultant Legal Adviser who was a retired Sheriff, former temporary judge at the High Court and editor of two legal journals. The SCCRC stated that this individual's role was to provide advice to the Board and to staff. The SCCRC indicated that this individual was not a solicitor.
26. The SCCRC explained that issues relating to the Cadder case were discussed at a Board meeting and a paper was produced on request by one of its legal advisers, providing views on issues arising from the case.
27. The SCCRC explained that the other individual legal advisers then provided their views on the issues as the papers on the subject developed. The SCCRC stated that this was expected of those individuals, given their respective roles at the SCCRC. The SCCRC submitted that the individuals were remunerated for their advice by way of their respective salaries.



28. Having considered the content of the withheld information and the circumstances under which it was obtained (i.e. in the context of a professional relationship between a legal adviser and their client), the Commissioner is satisfied that the information meets all of the conditions set out in paragraph 21 and is subject to legal advice privilege. Whilst the Commissioner accepts that the SCCRC's Consultant Legal Adviser was not a practicing solicitor, the individual was clearly legally qualified and providing legal advice to the SCCRC.
29. Information cannot be privileged, however, unless it is also confidential. For the section 36(1) exemption 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 exemption is claimed: for this to be the case, the information must possess the 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 applicant).
30. 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 the 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.
31. Having considered the contents of the withheld information, the Commissioner is satisfied that the legal advice referred to above has not been made public, either in full, or in summary.
32. The Commissioner is satisfied that the withheld information comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, the Commissioner accepts that all of the information sought by Mr Sutherland is exempt from disclosure under section 36(1) of FOISA.
33. 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. Therefore, having decided that the information is exempt under section 36(1), the Commissioner must go on to consider whether, in all circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.



*Public interest test*

34. The SCCRC stated that the courts have recognised that there is a strong public interest in maintaining the right to confidentiality of communications between a legal adviser and their client. The SCCRC noted that in previous decisions the Commissioner took cognisance of the comments of the House of Lords in *Three Rivers District Council and others v Governor and Company of the Bank of England*<sup>3</sup>. In these decisions, the Commissioner has affirmed the inherent public interest in maintaining the right to confidentiality of communications between legal advisers and their clients, and observed that the release of such communications is only likely to be ordered in “highly compelling cases.
35. In his application to the Commissioner, Mr Sutherland argued that it was not possible for a member of the public to make a proper application to the SCCRC unless all the information was made available.
36. The Commissioner accepts that this case concerns a matter of considerable public importance and consequence. The issues raised by the Cadder judgment have been the subject of extensive public debate and there has been speculation over its potential consequences for the criminal justice system in Scotland. The Commissioner acknowledges that there would be a significant public interest in the disclosure of information which would allow the public an insight into the SCCRC’s views on the implications of the decision both in terms of its own statutory function and the wider criminal justice system.
37. She has also considered the strong public interest in ensuring that all organisations, including the SCCRC, are able to obtain and consider legal advice on a confidential basis. The Commissioner has pointed out in many decisions 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.
38. In this instance, the Commissioner is not satisfied that the public interest in disclosure of this particular information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client. The ramifications of the Cadder judgment are ongoing and, on balance, the Commissioner considers the public interest lies in allowing the SCCRC to take and consider legal advice in private.
39. On balance, therefore, the Commissioner is satisfied, in all the circumstances of this case, that the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption in section 36(1). Consequently, the Commissioner accepts that the SCCRC was entitled to withhold the legal advice under section 36(1) of FOISA.
40. As the Commissioner has concluded that the information is entirely exempt from disclosure under section 36(1) of FOISA, it is not necessary for her to consider the other exemptions applied by the SCCRC.

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<sup>3</sup> (2004) UKHL 48



### **Additional matter raised by Mr Sutherland**

41. In his application to the Commissioner, Mr Sutherland suggested that the information could be provided to him in an anonymised form which would not reveal the identity of its authors. In his request for review to the SCCRC, Mr Sutherland suggested that the information could be anonymised in such a way that it did not contribute to the impression that the information was representative of a corporate position taken by the SCCRC.
42. The Commissioner has considered whether the information could be disclosed under FOISA in the manner suggested by Mr Sutherland. In her view, it could not. The Commissioner considers that simply anonymising the authors of the information would still result in the actual content of the legal advice being disclosed. In the Commissioner's view, the content of that legal advice remains exempt from disclosure under section 36(1) of FOISA.

### **DECISION**

The Commissioner finds that the Scottish Criminal Cases Review Commission complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Sutherland.

### **Appeal**

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Should either Mr Sutherland or the Scottish Criminal Cases Review Commission 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**  
**13 February 2014**





## Appendix

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### 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.

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- (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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