

Decision Notice



Decision 007/2010 Mrs Patricia Rowan and Fife Council

Incident report

Reference No: 200901849

Decision Date: 20 January 2010

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mrs Patricia Rowan requested from Fife Council (the Council) a copy of an incident report which the Council had sent to its solicitors. The Council withheld the information under section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), on the basis that it was subject to legal professional privilege. The Council upheld its decision upon review.

Following an investigation, the Commissioner found that the Council had dealt with Mrs Rowan's request for information in accordance with Part 1 of FOISA, by withholding the report under section 36(1) of FOISA. He did not require the Council to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 15(1) (Duty to provide advice and assistance) and 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

1. On 29 August 2009, Mrs Rowan wrote to the Council requesting a copy of a report (referred to in what follows as "the incident report") which the Council sent its solicitors regarding an incident which took place on 23 June 2009.
2. The Council responded on 2 September 2009, advising Mrs Rowan that the incident report was exempt in terms of section 36(1) of FOISA. It maintained that this exemption applied because the report had been prepared in anticipation of litigation.
3. On 15 September 2009, Mrs Rowan wrote to the Council requesting a review of its decision. In particular, Mrs Rowan drew the Council's attention to the fact that she needed the information to pursue an action against the Council in relation to the incident.
4. The Council notified Mrs Rowan of the outcome of its review on 9 October 2009, upholding its original decision to withhold the incident report under section 36(1) of FOISA.



5. On 19 October 2009, Mrs Rowan wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mrs Rowan had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 26 October 2009, the Council was notified in writing that an application had been received from Mrs Rowan and was asked to provide the Commissioner with any information withheld from her. The Council provided a copy of the incident report and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, 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. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. During the course of the investigation, the investigating officer also contacted Mrs Rowan inviting her to provide her comments on the public interest in disclosure of the incident report.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mrs Rowan and the Council and is satisfied that no matter of relevance has been overlooked.

Section 36(1) - Confidentiality

11. In withholding the incident report requested by Mrs Rowan, the Council relied upon the exemption in 36(1) of FOISA, on the basis that the report in question was prepared in contemplation of litigation.
12. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. One type of communication which falls into this category is communications which are subject to legal professional privilege. Legal professional privilege can itself be split into two categories – legal advice privilege and litigation privilege (also known as communications post litem motam).



13. The incident report requested by Mrs Rowan, which the Council holds to be exempt under section 36(1), is a report produced by the Council following the receipt of a claim from Mrs Rowan. In its submissions, the Council argued that this document was created in anticipation of possible proceedings by Mrs Rowan and was therefore a communication post litem motam.
14. The Council referred to one of the Commissioner's previous decisions, which it considered to be relevant to this case, i.e. *Decision 053/2008 Mr Ian McKerracher and East Dunbartonshire Council* in which the Commissioner upheld the Council's decision to withhold a similar report which had been requested in similar circumstances.
15. In order to determine whether a claim to confidentiality of communications could be maintained in legal proceedings in relation to the incident report, it must be established whether it was prepared in contemplation of litigation. In this particular case, the Council received a claim from Mrs Rowan on 7 July 2009. The incident report sought by Mrs Rowan was created by the Council on 13 August 2009, after it had received her claim. The Council asserted that the incident report was prepared in anticipation of possible legal proceedings by Mrs Rowan and that therefore the incident report falls under the scope of section 36(1).
16. The Commissioner has considered the timing of the incident report, and it is clear that it was created by the Council after it had received Mrs Rowan's claim, and in contemplation of litigation that could follow from that claim.
17. Before the Commissioner can accept that the incident report is exempt under section 36(1) he must also consider whether privilege has been waived, i.e. that the information is no longer confidential as a result of public disclosure of the information concerned by the Council. Having considered the facts in this case and the information available, he accepts that the privilege in the incident report has not been waived.
18. The Commissioner is satisfied that the incident report was prepared in contemplation of litigation and that it is exempt under section 36(1) of FOISA.
19. The exemption in section 36(1) is a qualified exemption, which means that the application of this exemption is subject to the public interest test set out in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.



Public interest test

20. 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 on administration of justice grounds; see, e.g., the House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*. Consequently, while he will consider each case on an individual basis, the Commissioner is likely to order the release of such communications in highly compelling cases only.
21. The Council submitted that the public interest is clearly in favour of withholding the incident report and that to release the incident report would compromise the operation of this important legal protection to the detriment of the public interest.
22. Mrs Rowan argued that she needed the information to pursue her claim for compensation and that she wanted to know what the Council was doing to rectify the situation which caused the incident in her case. Mrs Rowan was also concerned that similar incidents could occur to other people's property, or to an individual themselves, as she considered that the situation that caused the incident could occur elsewhere in the vicinity. Mrs Rowan did not expand further on her arguments, but the Commissioner understands that she is suggesting that such an incident is a matter of public interest as an individual member of the public could be affected if such an incident occurred again.
23. In this case, while accepting that there is a general public interest in authorities being open to scrutiny and being accountable for their actions, the Commissioner finds that there is a greater public interest in allowing the Council to prepare fully for litigation, without these preparations being open to examination by the other party.
24. On balance, therefore, the Commissioner is satisfied, in all the circumstances of this case, that the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemption in section 36(1).

Recent Court of Session Opinion

25. The Commissioner notes that the information request by Mrs Rowan was for a copy of a document. In the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner [2009] CSIH 73*, the Court of Session emphasised that FOISA provides a right to information, not documents. However, the Court said, in paragraph 45 of its Opinion, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. The Court also said that, if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.



26. In this case, the Commissioner was advised by the Council that it did not question the validity of Mrs Rowan's request as it was clear what information Mrs Rowan wanted.
27. The Commissioner agrees that the request is clear and that the information request is therefore valid.

DECISION

The Commissioner finds that Fife Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to Mrs Rowan's information request.

Appeal

Should either Mrs Rowan or Fife Council wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
20 January 2010



Appendix

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.

...

- (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.

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

36 Confidentiality

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