

Decision Notice



Decision 015/2011 Peebles Civic Society and Scottish Borders Council

Opinion of legal counsel

Reference No: 201001817

Decision Date: 21 January 2011

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Kevin Dunion

Scottish Information Commissioner

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Summary

The Peebles Civic Society (the Society) requested from Scottish Borders Council (the Council) details of the legal opinion provided by Mr Hajducki QC on the subject of the Chambers Institution. The Council responded by advising the Society that it was withholding the requested information in terms of the exemptions contained in sections 30(b)(i) and (ii) and section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, in which the Council no longer applied the exemption contained in section 30(b)(i) of FOISA, the Society remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with the Society's request for information in accordance with Part 1 of FOISA, by correctly applying the exemption contained in section 36(1) of FOISA to the withheld information. 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) 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 5 April 2010, the Peebles Civic Society (the Society) wrote to Scottish Borders Council (the Council) requesting the opinions or advice provided by Mr Andrew Hajducki QC on the subject of the Chambers Institution premises in Peebles.
2. The Council responded on 29 April 2010. It advised the Society that it was withholding the requested information on the basis that it was exempt from disclosure in terms of sections 30(b)(i) and (ii) and 36(1) of FOISA.
3. On 20 May 2010, the Society wrote to the Council requesting a review of its decision. In particular, the Society argued that it found it difficult to accept that the public interest in withholding the requested information outweighed the public interest in its disclosure.



4. The Council notified the Society of the outcome of its review on 17 June 2010. It upheld its original decision not to disclose the information and submitted that it considered the information to be exempt from disclosure in terms of section 30(b)(ii) and 36(1) of FOISA. The Council made no reference to its previous application of section 30(b)(i) of FOISA.
5. On 20 September 2010, the Society wrote to the Commissioner, stating that it 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 the Society 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 23 September 2010, the Council was notified in writing that an application had been received from the Society and was asked to provide the Commissioner with the information withheld from it. The Council responded with the information requested 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 (with particular reference to section 30(b)(ii) and 36(1)). The Council responded with its submissions on 22 November 2010.
9. The Society was then updated on the investigation so far, and invited to comment on the case, and in particular to set out its views on why the public interest favoured the disclosure of the information under consideration. The Society's comments were received on 30 November 2010.
10. The relevant submissions made by both the Society and the Council are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

11. 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 the Society and the Council and is satisfied that no matter of relevance has been overlooked.



Section 36(1) - Confidentiality

12. 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, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
13. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. The information being withheld must relate to communications with a legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser. The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of the legal adviser's professional relationship with his/her client.
14. In this case, Mr Andrew Hajducki QC was asked to provide legal advice to the Council on two separate occasions in connection with the Chambers Institution in Peebles. In both instances, Mr Hajducki was provided with a list of questions and the requested documents contain his legal opinion on each of the questions posed to him by the Council. The withheld information therefore comprises legal advice given within a relationship where the legal adviser (Mr Hajducki) provided his advice in his professional capacity to a client (the Council). The Commissioner is therefore satisfied that the withheld information in this context is communications between legal advisor and client, provided in circumstances in which legal advice privilege could apply.
15. There is a further matter to be considered, however, before the Commissioner can determine whether, or the extent to which, the section 36(1) exemption is applicable in the circumstances of this case.
16. Information cannot be privileged unless it is also confidential. For the 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 professional 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.
17. A claim of confidentiality will not be capable of being maintained where information has (prior to a public authority's consideration of an information request or conducting a review) 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 part or all of the information under consideration, any privilege associated with that information is also effectively lost.
18. Having considered the facts in this case and the information available, the Commissioner accepts that the legal advice under consideration still retained its confidentiality at the time when the Council responded to the Society's request and subsequent request for review.



19. Consequently, 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 this information is exempt in terms of section 36(1) of FOISA.

Public interest test

20. 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.
21. 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. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
22. The Council has highlighted this strong public interest and maintained that disclosure of the withheld information in this case would be detrimental to its position in any future legal challenge. It has also argued that disclosure would suppress the freedom with which options and advice are expressed in future.
23. The Society submitted that the right of confidentiality between a legal advisor and client should not apply in this case, where a publicly accountable body (the Council) is involved. The Society noted that the Council has disclosed an earlier Opinion from another QC, and that it was this QC's opinion which made recommendations about obtaining further legal advice regarding the Chambers Institution. The Society argued that, as its understanding of the matter is that the Opinions from Mr Hajducki provided this further legal advice, it is reasonable for it to ascertain the content of that advice. The Society also referred to previous email communication with the Council in which it was implied that Mr Hajducki's legal Opinions could be disclosed to the Society after they had been reviewed by members of the Council.
24. The Commissioner notes the Society's arguments, and 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 obtain confidential legal advice from its advisors.



25. In this case, as in general, the Commissioner recognises that there is a very significant public interest in the effective administration of justice, and he accordingly considers it to be in the public interest that all organisations, including public authorities, are able to obtain and consider legal advice on a confidential basis. In this case, the Commissioner does not consider there to be any public interest in the disclosure of the information under consideration of equal or greater weight.
26. 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).
27. As the Commissioner has found that the QC's advice was correctly withheld under section 36(i) he did not go onto consider the application of section 30(b)(ii) to the withheld information.

DECISION

The Commissioner finds that Scottish Borders Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Peebles Civic Society.

Appeal

Should either the Peebles Civic Society or Scottish Borders 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
21 January 2011



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.

...

36 Confidentiality

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

...