

Decision Notice

Decision 168/2015: Mr Peter Cherbi and the Scottish Ministers

Legal advice: Register of Judicial Interests

Reference No: 201501198

Decision Date: 9 November 2015



Scottish Information
Commissioner

Summary

On 1 May 2015, Mr Cherbi asked the Scottish Ministers (the Ministers) for information regarding legal advice taken on calls to create a register of interests for members of Scotland's Judiciary.

The Ministers provided some information, but withheld legal advice, on the basis that disclosure would breach legal professional privilege. The Ministers also withheld the identity of the source of the advice, arguing that disclosure would prejudice the effective conduct of public affairs.

The Commissioner investigated and found that the Ministers had responded to Mr Cherbi's request for information in accordance with FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality)

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 1 May 2015, Mr Cherbi made a request for information to the Ministers. He asked whether the Ministers had taken legal advice on calls to create a register of interests for members of Scotland's Judiciary (as called for in Petition PE1458 at the Scottish Parliament), together with the information contained in such advice and the identity of who provided it.
2. The Ministers responded on 2 June 2015, confirming they had taken legal advice on the subject. They refused to provide the content of the legal advice under section 36(1) of FOISA, on the basis that disclosure would breach legal professional privilege. They also refused to disclose the identity of the source of the legal advice under section 30(c) of FOISA, submitting disclosure of this would likely impair the Government's ability to take forward its work on such issues.
3. On 3 June 2015, Mr Cherbi wrote to the Ministers requesting a review of their decision. He believed there was an overwhelming public interest in this information being disclosed. It would enable the Public Petitions Committee and MSPs to consider it as part of their ongoing investigation into the creation of a register of judicial interests, and also allow the media to report on its content as a matter of transparency.
4. The Ministers notified Mr Cherbi of the outcome of their review on 15 June 2015, upholding their original decision without modification. They did not agree there were compelling reasons to override the strong public interest in withholding the information.
5. On 25 June 2015, Mr Cherbi wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr Cherbi stated he was dissatisfied with the outcome of the Ministers' review, arguing that there was an overriding public interest in disclosure of the legal advice and its source.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Cherbi made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
7. On 15 July 2015, the Ministers were notified in writing that Mr Cherbi had made a valid application and were asked to send the Commissioner the information withheld from him. The Ministers 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 Ministers were invited to comment on this application and answer specific questions, focusing on the application of sections 30(c) and 36(1) of FOISA.
9. The Ministers provided submissions to the investigating officer. Mr Cherbi also provided submissions on why he believed it was in the public interest for the information to be disclosed.

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 relevant submissions, or parts of submissions, made to her by both Mr Cherbi and the Ministers. She is satisfied that no matter of relevance has been overlooked.
11. Having considered the Ministers' submissions, the Commissioner agrees with them on what information fell within the scope of Mr Cherbi's request.

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. This includes communications subject to legal professional privilege. An aspect of legal professional privilege is legal advice privilege, which the Ministers argued applied in this case.
13. Legal advice privilege applies to communications between legal advisers and their clients in which legal advice is sought or given. The following conditions must be fulfilled for legal advice privilege to apply:
 - (i) The communications must involve a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser or an external solicitor engaged by the authority.
 - (ii) The legal adviser must be acting in his/her professional capacity, and
 - (iii) The communications must occur in the context of the legal adviser's professional relationship with his/her client.
14. The Ministers submitted that section 36(1) of FOISA applied to the content of the legal advice, because the advice was provided by a qualified lawyer acting in their professional capacity, in the context of a professional relationship with their client.

15. Having considered the content of the information withheld as legal advice and the circumstances under which it was obtained by the Ministers, the Commissioner is satisfied that this information meets the conditions set out in paragraph 13 above and therefore is subject to legal advice privilege.
16. Information cannot be privileged unless it is also confidential. It must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed: the information must possess the quality of confidence at that time, so it cannot have been made public, either in full or in a summary substantially reflecting the whole. The Commissioner is satisfied that this information remained confidential at the time the Ministers dealt with Mr Cherbi's information request and requirement for review (and that it remains so now).

Public interest test

17. The exemption in section 36(1) is subject to the public interest test in section 2(1)(b) of FOISA.
18. 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)*¹. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
19. Mr Cherbi emphasised what he considered to be the significance in the disclosure of the legal advice and its source. His concerns focussed on the possibility that there might be connections and influence between those who gave legal advice and those upon whom it impacted. This, he believed, might have been a factor in the content of the legal advice provided in this case. Mr Cherbi submitted that disclosure of the legal advice and its source would promote transparency on the Ministers' position with regard to the creation of a register of interests, enabling its content to be debated at Parliament, scrutinised by the public and reported on by the media.
20. The Ministers acknowledged the public interest in disclosure as part of open and transparent government, and to inform public debate. However, they considered this to be outweighed by the significant public interest in maintaining confidentiality of communications between legal advisers and clients.
21. The Ministers emphasised that while they had confirmed they had taken legal advice on the subject, at no time had this been disclosed. Rather, they had focussed on setting out a policy position in response to the petition, as to why they did not agree there should be a register of judicial interests.
22. In conclusion, the Ministers submitted they did not consider any of Mr Cherbi's submissions raised matters sufficient to override the significant weight attached to the public interest in maintaining legal professional privilege.

¹<http://www.itspublicknowledge.info/nmsruntime/logLink.aspx?linkURL=http%3a%2f%2fwww.bailii.org%2few%2fcases%2fEWHC%2fQB%2f2009%2f164.html>

23. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where:
- the privileged material discloses wrongdoing by/within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material discloses an apparently irresponsible and wilful disregard of advice
 - a large number of people are affected by the advice
 - the passage of time is so great that disclosure cannot cause harm.
24. After careful consideration, the Commissioner is satisfied that none of the considerations set out above apply here. She can identify no other compelling reason for disclosure in the public interest.
25. In all the circumstances of the case, therefore, the Commissioner is satisfied that the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption in section 36(1). Consequently, she finds that the Ministers were entitled to withhold the information (the legal advice) under that exemption.

Section 30(c) – Prejudice to effective conduct of public affairs

26. Section 30(c) exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from such disclosure.
27. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question must be of real and demonstrable significance. The authority must be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some point in the near (certainly foreseeable) future, not simply that the harm is a remote possibility.
28. The Commissioner takes the view that it is important for public authorities to treat each request for information on a case-by-case basis. Release of information in one case should not be taken to imply that information of a particular type will routinely be released in future. The circumstances of each case, including the content of the information under consideration and the timing of the request, must be taken into consideration.
29. The Ministers submitted that disclosure of the identity of the source of the legal advice would be likely to prejudice substantially the effective conduct of public affairs.
30. They believed disclosure of the source of the legal advice would be likely to lead to conclusions being drawn from the fact that any particular lawyer, or group of lawyers, had (or had not) been asked for advice on a particular matter, which would in turn be likely to impair their ability to take forward work on issues relating to a register of judicial interests.

31. The Ministers submitted that disclosing from whom they sought legal advice would significantly harm the conduct of public affairs by breaching the Law Officer Convention. It would reveal whether or not advice on this particular topic had been sought from the Law Officers, which would in turn encourage people to draw conclusions regarding the importance placed by Government on the subject matter of the request. It would also reveal whether or not there were uncertainties regarding the Scottish Government's position. As a result, the Ministers believed undue pressure would be placed on Ministers and officials to consider these factors in the future before deciding whether or not to consult Law Officers.
32. The Ministers argued that all of these factors would be likely to significantly harm the effective conduct of government business, by dissuading officials and/or Ministers from requesting legal advice as and when they needed it, for fear of the source of that advice being disclosed and subjected to public and media speculation.
33. The Commissioner has considered these submissions carefully. As in *Decision 103/2014 Mr Alisdair MacPherson and the Scottish Ministers*², and *Decision 190/2014 Mr Andrew Dundas and the Scottish Ministers*³, she finds elements of them to be somewhat over-stated. That said, she acknowledges the importance of the Law Officer Convention and the real risk of prejudice to that Convention in revealing whether or not the Law Officers have been consulted in relation to any particular matter.
34. Having considered the arguments in relation to the particular information under consideration in this case, taken in context, she finds that the conclusions of those decisions (in relation to the Law Officer Convention, at least) apply equally in this particular case. However, she would emphasise that she has reached this conclusion in the circumstances of this particular case and is not suggesting that any particular class of information automatically engages the exemption in section 30(c).

Public interest test

35. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. In other words, even where the exemption applies, the information must be disclosed unless, in all the circumstances, the public interest in maintaining the exemption outweighs that in disclosure.
36. Mr Cherbi's public interest arguments are summarised at paragraph 19 above.
37. The Ministers acknowledged a general public interest in disclosure to promote transparency and inform public debate, but did not believe disclosure of the particular information withheld under section 30(c) would add significantly to the public's understanding of issues relevant to the creation of a register of judicial interests. These issues, the Ministers explained, had been set out in full in published correspondence from the Ministers to the Public Petitions Committee⁴, and they did not consider disclosure of the source of the legal advice would further inform public debate on this matter.
38. The Ministers considered there to be a strong public interest in enabling them to determine from whom they sought legal advice, without having to face external pressure or concerns that particular conclusions might be drawn from the fact that any particular lawyer, or group of lawyers, had (or had not) been asked to provide legal advice on a particular matter.

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201400129.aspx>

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201400789.aspx>

⁴ <http://www.scottish.parliament.uk/gettinginvolved/petitions/registerofjudicialinterests>

39. With reference to Mr Cherbi's concerns regarding connections and influence in the provision of legal advice, the Ministers responded that the position taken by any external body on the legal position surrounding any particular topic was not a matter that would influence the legal advice provided to the Scottish Government. The Ministers believed it would be damaging to the public interest if it were possible to use the identity and status of any individual legal adviser to suggest this was relevant to the advice the Government received.
40. The Ministers also highlighted the effects of disclosure on the Law Officer Convention, as detailed above. They submitted that there was no public interest in breaching that Convention by divulging which lawyer or lawyers were asked to provide advice on any particular issue: there was a strong public interest in maintaining the Convention, endorsed by the courts in the interests of good governance and the maintenance of the rule of law.
41. In conclusion, while the Ministers acknowledged there was some public interest in disclosing the source of the legal advice, they considered this to be limited. It was outweighed, in their view, by the strong public interest in allowing them to decide from whom they sought advice, and in upholding the Law Officer Convention.
42. Having considered the matter thoroughly, the Commissioner accepts that there is a general public interest in transparency in the conduct of public affairs. In the particular circumstances of this case, she has identified no more specific public interest in disclosure of the source of the legal advice. She accepts that there are public interest arguments of substance which support maintaining the position advanced by the Ministers (and arguments of particular strength in relation to the Law Officer Convention).
43. On balance, the Commissioner accepts that greater weight should be attached to the arguments which would favour withholding the information. In all the circumstances of this case, the Commissioner concludes that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 30(c) of FOISA. Consequently, the Commissioner finds that the Ministers were entitled to withhold the information (the source of the legal advice) to which they applied this exemption.

Decision

The Commissioner finds that the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Cherbi.

Appeal

Should either Mr Cherbi or the Scottish Ministers 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

9 November 2015

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.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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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