

# Decision Notice

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**Decision 038/2016: Mr Stewart and Argyll and Bute Council**

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## **Legal advice**

Reference No: 201502121

Decision Date: 16 February 2016



Scottish Information  
Commissioner

## Summary

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On 23 September 2015, Mr Stewart asked Argyll and Bute Council (the Council) for information relating to legal advice it had obtained in relation to a complaint he had submitted.

The Council disclosed some information, but withheld legal advice under section 36(1) of FOISA. Following a review, Mr Stewart remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had generally complied with Part 1 of FOISA in responding to Mr Stewart's request. However, it had wrongly withheld information from one paragraph under section 36(1) of FOISA after the information had lost its confidential status. The Commissioner required the Council to provide Mr Stewart with the information which had been wrongly withheld.

## 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 Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 23 September 2015, Mr Stewart made a request for information to the Council. In relation to a response he had received from the Council, he asked for:
  - (i) The name of the individual, company or organisation referred to as "external legal advice";
  - (ii) The questions that were asked of this individual, company or organisation in relation to the elements of the complaint;
  - (iii) The responses to those complaints.
2. The Council responded on 13 October 2015. In its response, the Council provided answers to parts (i) and (ii) of Mr Stewart's request, but it withheld information meeting part (iii) of his request under section 36(1) of FOISA, arguing that it was information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.
3. On 13 October 2015, Mr Stewart wrote to the Council requesting a review of its decision on the basis that there was an overwhelming public interest in knowing what the legal advice was.
4. The Council notified Mr Stewart of the outcome of its review on 9 October 2015. In its review, the Council maintained that the legal advice was exempt from disclosure in terms of section 36(1) of FOISA and that the public interest favoured maintaining the exemption.

5. On 10 November 2015, Mr Stewart applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Stewart stated he was dissatisfied with the outcome of the Council's review because he considered that the information should be disclosed.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Mr Stewart made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 24 November 2015, the Council was notified in writing that Mr Stewart had made a valid application. The Council was asked to send the Commissioner the information withheld from him. The Council 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 Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

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

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9. 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 Stewart and the Council. She is satisfied that no matter of relevance has been overlooked.

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

10. 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.
11. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled.
  - (i) The information must relate to communications with a professional legal adviser, such as a solicitor or an advocate;
  - (ii) The legal adviser must be acting in their professional capacity; and
  - (iii) The information must be confidential.
12. The Council submitted that all of the requested information is subject to legal advice privilege. The Council explained that the information is a communication from a legal adviser (Brodies LLP) to its client (the Council) and that Brodies LLP was clearly acting in its capacity as legal adviser to the Council.
13. Mr Stewart queried the application of this exemption and argued that no legal proceedings are taking place. In his view, unless the Chief Executive of the Council considered that her actions have the potential to cause proceedings to commence, there was no reason to withhold the information.

14. The Commissioner does not accept that, because there is no litigation involved, legal advice privilege cannot not apply. Legal professional privilege can be split into two main types - "legal advice privilege" and "litigation privilege". In the present case, the information in question clearly comprises communications where legal advice has been provided by legal advisers acting in their professional capacity. Therefore, it fulfils the criteria required for legal advice privilege to apply: no litigation, active or in prospect, is required.
15. Information cannot be privileged 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 could be maintained in legal proceedings. In this case, the claim to confidentiality is in the form of legal advice privilege.
16. 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.
17. The Council submitted that the entirety of the legal advice is confidential and that no other party (other than Brodies LLP or the Council) has seen or had access to it. The Council also drew attention to the first page of the document, which states that the document constitutes legally privileged advice.

*Is all of the information confidential?*

18. In an email dated 23 September 2015, the Chief Executive of the Council advised Mr Stewart that she had received "external legal advice" which confirmed that it was appropriate for her to investigate and respond to his complaint.
19. Having examined the withheld information the Commissioner is satisfied that the email of 23 September 2015 from the Council to Mr Stewart contained a summary of part of the advice provided to the Council by Brodies LLP, specifically paragraph 9.3 of the legal advice.
20. Consequently, the Commissioner considers that confidentiality and the associated privilege in the information has been lost in relation to the part of the legal advice which has been summarised to Mr Stewart (paragraph 9.3). The Commissioner cannot accept, in respect of that part, that a claim of confidentiality of communications could be maintained in legal proceedings at the time of Mr Stewart's request, as the confidentiality was no longer in place at that time. Therefore, the Commissioner has found that the exemption in section 36(1) of FOISA cannot apply to paragraph 9.3 of the legal advice.
21. The Commissioner accepts that the remaining parts of the legal advice, which have not been summarised and disclosed, retain their confidential (privileged) nature. The Commissioner accepts that the exemption in section 36(1) of FOISA applies to this information.
22. 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 all of the information (apart from paragraph 9.3) is exempt from disclosure 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*

23. 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)<sup>1</sup>. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
24. Mr Stewart explained that his information request stemmed from the Council's response to a complaint he had lodged regarding a community "right to buy" exercise. Mr Stewart explained that the complaint was directed at the three most senior officers of the Council, including the Chief Executive, and that he had specifically requested that the complaint be handled externally due to its serious nature and the seniority of those involved. Mr Stewart submitted that the Council's response to his complaint indicated that the Chief Executive had sought "external legal advice" and considered that it was in order for her to examine the complaint herself.
25. Mr Stewart argued that it is vital that the constituents of Argyll and Bute can view the legal advice in order for them to determine whether the Council followed the advice it received and whether the advice was accurate. Mr Stewart commented that the legal advice was, essentially, paid for by the local community and believed they should be able to view it. Mr Stewart argued that not disclosing this information would fail the public interest test contained in FOISA.
26. Mr Stewart referred to a written response given by an MSP to a local councillor which indicated that, while it is normal for complaints against Council officials to be investigated by a senior member of staff, if the complaint is about a senior member of staff or the chief executive himself or herself, there is clearly potential for a conflict of interest. The MSP noted that the national Code of Conduct for council staff, adopted by the Council, refers to the need to observe the seven principles of public life. The MSP stated that "*it is hard to see how an individual could avoid the risk of being accused of not being objective when dealing with a complaint about themselves*".
27. In light of these comments, Mr Stewart argued that there is considerable public interest in viewing the legal advice obtained and whether the Council's Chief Executive actually followed the advice given. Mr Stewart also noted that he had referred the Council's handling of his complaint to the Scottish Public Services Ombudsman.
28. The Council acknowledged the public interest in transparency and accountability expected of all authorities and accepts that disclosure of the information would go some way to providing that transparency and accountability for Mr Stewart, with regard to the decisions taken by the Council in dealing with his complaint. The Council also recognised a more general public interest in enhancing scrutiny of the actions of public bodies.
29. However, the Council noted that the Commissioner has considered many requests for information which is legal advice and, in a number of previous decisions, she has noted 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

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<sup>1</sup> <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

justice grounds. The Council submitted that confidentiality is necessary to ensure that best advice and best value is obtained. It also argued that it is important that lawyers can provide free and frank legal advice which considers and discusses all issues and options without fear that such advice might be disclosed and, as a result, potentially taken out of context.

30. The Council submitted that both parties (the Council and Brodies LLP) had an expectation that their communication was confidential. It referred to the front page of the document which confirms that it constitutes legally privileged advice. The Council also noted that there is an established means of scrutinising the legality of decisions of public bodies, through judicial review in the courts. The Council maintained that the requested information is legal advice to the Council on a matter of significant contention and it would be seriously harmful to the Council if, in similar circumstances in the future, it could not obtain detailed legal advice without the risk of that advice being put in the public domain.
31. 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 disclosure of the information, but there will always be a strong public interest in maintaining the right to confidentiality of communications between a legal adviser and their client (as recognised by the Courts).
32. In this case, the Commissioner accepts that there is a general public interest in disclosure of the information under consideration, to allow scrutiny of the actions and public statements of the Council and contribute to transparency and public accountability. The Commissioner also recognises that there is also a strong public interest in understanding the decision making in relation to community “right to buy” exercises, and in understanding how authorities process any complaints received as a result.
33. However, the Commissioner has also considered the strong public interest in ensuring that public authorities, including the Council, are able to obtain and consider legal advice on a confidential basis, for the administration of justice.
34. The Commissioner has considered carefully the arguments made by Mr Stewart which support disclosure of the information in the public interest. However, 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.
35. 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, therefore, the Commissioner concludes that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 36(1). Consequently, she finds that the Council was entitled to withhold the information in this case under that exemption.
36. Having concluded that the Council correctly applied section 36(1) of FOISA to all of the withheld legal advice except for the information in paragraph 9.3, the Commissioner now requires the Council to disclose paragraph 9.3 of the legal advice to Mr Stewart.

## **Decision**

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The Commissioner finds that Argyll and Bute Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Stewart.

The Commissioner finds that the Council correctly withheld most of the information under the exemption in section 36(1) of FOISA. However, by wrongly applying this exemption to information which was no longer confidential, the Council failed to comply with Part 1 of FOISA.

The Commissioner therefore requires the Council to disclose paragraph 9.3 of the withheld information to Mr Stewart by 1 April 2016.

## **Appeal**

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Should either Mr Stewart or Argyll and Bute Council 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.

## **Enforcement**

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If Argyll and Bute Council (the Council) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**16 February 2016**

### 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.

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