



Scottish Information
Commissioner

**Decision 184/2007 - Mr David O'Connor of Unison and
Glasgow City Council**

*Copy of the equal pay audit commissioned in 2005 by
Glasgow City Council*

**Applicant: Mr David O'Connor of Unison
Authority: Glasgow City Council
Case No: 200601314
Decision Date: 10 October 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 184/2007 Mr David O'Connor of Unison and Glasgow City Council

Request for a copy of the equal pay audit commissioned by Glasgow City Council in 2005 – document withheld on basis of sections 30(b) and (c) and 36(1) of the Freedom of Information (Scotland) Act 2002 – Commissioner upheld the Council's decision.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1 (1) (General entitlement); 2(1) (Effect of exemptions) and 36(1) (Confidentiality).

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

Facts

Mr O'Connor requested from Glasgow City Council (the Council) a copy of the equal pay audit carried out on behalf of the Council by Link Group Consultants Ltd (Link HR) in 2005. The Council responded by withholding the information requested, relying on the exemptions in sections 30(b), 30(c) and 36(1) of FOISA. The Council upheld this initial decision following an internal review. Mr O'Connor remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr O'Connor's request for information in accordance with Part 1 of FOISA. In particular, the Commissioner found that the exemption in section 36(1) had been applied correctly, on the basis that the audit had been prepared on behalf of the Council in contemplation of litigation, and a claim of confidentiality of communications could be maintained in legal proceedings. The public interest in maintaining this exemption was found to outweigh the public interest in disclosure of the information.

The Commissioner did not require any steps to be taken in response to this decision.



Background

1. On 11 April 2006, Mr O'Connor, Glasgow City Branch Secretary for Unison, wrote to the Council requesting a copy of the equal pay audit carried out on behalf of Glasgow City Council by Link HR in 2005.
2. On 20 April 2007, the Council wrote to Mr O'Connor about this information request. The Council noted that Trade Unions were taken through the outcomes of the equal pay audit in November 2005 and stated that a joint agreement had been reached that it was not in the best interests of the Trade Unions to have a copy of the audit in their possession. The Council requested additional information in respect of Mr O'Connor's request, in particular "*why the Trade Union view has now changed and the purpose of [the] request.*"
3. On 25 April 2006 Mr O'Connor wrote to the Council stating the following:

"It is Unison's understanding, that there is no agreement joint or otherwise on the provision of the equal pay audit to the trade unions"

Mr O'Connor also pointed out that under FOISA there was no requirement to furnish the Council with reasons for the request, and asked that his request be dealt with under the appropriate timescales with the date of the initial request being 11 April 2006.
4. On 30 May 2006 the Council wrote back to Mr O'Connor in response to his request for information. The Council confirmed that it was withholding the information requested, applying the exemptions in sections 30 and section 36(1). The Council indicated that the audit was legally privileged information because it was commissioned to assist the Council in defending itself at Employment Tribunal. It concluded that it could therefore maintain a claim of confidentiality in legal proceedings in respect to this information and so it is exempt under section 36(1) of FOISA. The Council did not specify which of the exemptions in section 30 were being applied, although the reasons provided suggested that the exemptions 30(b)(i) and (ii), and that in section 30(c) were considered to apply.
5. With respect to the public interest, the Council concluded that in the circumstances the specific public interest in maintaining these exemptions relied upon outweighed the public interest in the disclosure of the audit.
6. On 4 July 2006, Mr O'Connor wrote to the Council requesting a review of its decision.



7. The Council notified Mr O'Connor of the outcome of its review on 28 July 2006. It upheld its previous decision in full.
8. On 4 August 2006, Mr O'Connor wrote to my Office, stating that he was dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Mr O'Connor had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

The Investigation

10. On 30 August 2006 my Office wrote to the Council, asking it to provide the information withheld and providing the Council with the opportunity to provide comments in terms of section 49(3)(a) of FOISA. The Council was invited to provide submissions in relation to the matters raised by Mr O'Connor and on the application as a whole.
11. On 11 October 2006, the Council issued a full response in support of its decision not to disclose the information requested by Mr O'Connor. The case was then allocated to an investigating officer.
12. In further correspondence, the investigating officer sought clarification on a number of points and further information to inform my consideration of this case. In particular, the investigator sought to clarify whether the Council had waived any claim to confidentiality with respect to the audit by briefing Trade Unions on its outcomes. Both the Council and Mr O'Connor were contacted to establish the nature of this briefing and the types of information that were made available to Trade Union representatives.
13. The Council was also asked to clarify which exemption/s under section 30(b) it wished to rely on as this was not clear from its correspondence with Mr O'Connor or its initial submissions to my Office. The Council confirmed that with respect to section 30(b), it wished to rely principally on 30(b)(i) although it believed that the differences between 30(b)(i) and (ii) are not clear cut. The Council also maintained, as previously identified, its application of section 30(c).



14. Finally, the investigating officer asked the Council to confirm if the equal pay audit had yet (as was indicated in previous correspondence from the Council to Mr O'Connor) been made publicly available. The Council's response confirmed that it had not to date made the equal pay audit publicly available, and it advised that, given more recent developments, there was no prospect of it being published in the near future.

The Commissioner's Analysis and Findings

15. In coming to a decision on this matter, I have taken into consideration the submissions provided by both Mr O'Connor and the Council and I am satisfied that no matter of relevance has been overlooked.
16. I must decide whether the Council acted in accordance with Part 1 of FOISA in refusing to supply the equal pay audit requested by Mr O'Connor on the basis that it was exempt in terms of sections 30(b)(i) and (ii), section 30(c) and section 36(1) of FOISA.
17. In the course of the investigation, the Council explained that although Mr O'Connor's request asked for a copy of the audit prepared by Link HR, it interpreted this as referring to Link Group Consultants Ltd, the correct name for the consultants appointed to carry out the equal pay audit in question. I will first consider the application of section 36(1) to this audit.

Section 36(1) – Confidentiality

18. The Council has submitted that the information requested by Mr O'Connor was exempt under section 36(1) of FOISA.
19. Section 36(1) exempts information from disclosure if it is 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 are communications which are subject to legal professional privilege. Legal professional privilege can itself be split into two categories – legal advice privilege and litigation privilege, the later often being referred to as communications *post litem motam*.



20. In this case, the Council has asserted that the audit is subject to litigation privilege. This type of privilege applies to documents such as those created by a party to potential litigation in contemplation of the litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation. For litigation privilege to apply litigation need not ever take place – the question of whether any particular document was actually created in contemplation of litigation will therefore be a question of fact. Where litigation does take place, litigation privilege continues to apply after the litigation has ended.
21. Litigation privilege relates to communications at the stage when litigation is pending or in contemplation. It is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try to defeat the other, with the judge or jury determining the successful party. In such a system each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations.
22. Regarding the application of section 36(1), the Council has submitted that the equal pay audit attracts litigation privilege as it was commissioned in order that the Council would be in a position to quantify its potential exposure to equal pay claims. The report was also commissioned by the Council to ascertain whether it was likely to be found liable at Tribunal and again to ascertain any defences which it would be able to deploy.
23. Having examined the equal pay audit and the submissions provided by the Council, I accept that it has been created in contemplation of litigation, and as such might attract litigation privilege.

Waiver of legal professional privilege

24. A claim to confidentiality of communications can only be maintained in legal proceedings if the right to confidentiality is not waived, or has not been waived. In the course of my investigation, it became evident that the Council had arranged an interim presentation to the Trade Unions regarding the findings contained within the equal pay audit. Before concluding whether the exemption in section 36(1) has been correctly applied in this case, I am required to consider whether the Council, in doing this, waived litigation privilege with respect to the equal pay audit.



25. Much of the case law on privilege relates to the question of whether privilege in a document has been waived by the party to whom the privilege belongs. The general rule on waiver of privilege can be taken from the case law: if a party gives evidence in court on the content of a privileged document, or on the terms of privileged advice, he will have waived the privilege in that document or advice. He will also have waived the privilege if he discloses that document, or the terms of the advice, to an opposing party, or has made the document or advice publicly available (or available to a section of the public).
26. To establish whether the Council had waived its privilege in relation to the report on the equal pay audit, I sought details of the content of the presentation on this, documentary evidence of materials used or issued at the time, and I also sought the views and recollections of the presentation from both the Council and Mr O'Connor.
27. The presentation on the equal pay audit appears to have been mostly verbal and informal in nature with no material provided to the delegates before, during or after the presentation itself. The content of the presentation apparently focussed on the methodology used in conducting the research for the report, the data collected and how the software was used to interrogate the data. I understand, however that some job-specific examples from the full audit, were used in the presentation.
28. In assessing whether there has been a waiver of privilege, the key question to consider is whether a privileged document (in this case the equal pay audit) has been "deployed". That is, has the information been disclosed (or summarised) in order to evidence, or provide authority for, the position that party is advancing. If so, the party deploying the summary of the information, it can be argued has waived privilege in respect of the rest of the information.
29. Having considered the submissions presented to me with respect to the content of the presentation provided by the Council to the Trade Unions, I am satisfied that the Council has not waived privilege with respect to the equal pay audit. Although some information about this audit has been provided, I do not believe that in this case it amounts to "deployment" of this information to support the position of the Council with respect to contemplated litigation.
30. As such, I am satisfied that a claim to confidentiality of communications could be maintained with respect to the equal pay audit, and that the exemption in section 36(1) has been correctly applied to this information by the Council.



Public interest test

31. The exemption in section 36(1) is a qualified exemption and as such the application of this exemption is subject to the public interest test set out in section 2(1)(b) of FOISA. Where a public authority finds that this exemption applies to the information that has been requested, it must 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.
32. As I have noted in previous decision notices (such as 096/2006 Mr G Waddell and South Lanarkshire Council), 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. I would apply the same reasoning when considering litigation privilege also. 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. I would also note that I am likely only to order the release of such communications in highly compelling cases.
33. The Council's submissions with respect to the public interest insofar as it relates to the exemption in section 36(1) of FOISA have emphasised *inter alia* the strong public interest in the maintenance of the doctrine of confidentiality of communications.
34. In his submissions on the public interest, Mr O'Connor asserted that the Council has a clear legal obligation to eliminate discrimination in pay between women and men and to promote equality of opportunity as regards pay between women and men. He indicated that it was in the public interest to disclose the Council's equal pay audit as this would allow him and others to determine whether these obligations were being met. He submitted that the interests of the public are best served by the eradication of pay discrimination and, to that end, the promotion of openness and transparency in matters of pay discrimination. Conversely, he submitted that it would be a clear contravention of the public interest to restrict access to this information.
35. I have considered the arguments presented by both parties in relation to the public interest and on balance I have found that the public interest in upholding the exemption in section 36(1) outweighs the public interest in disclosure of the information.



36. It is a matter of considerable public interest that the Council (like any other party to adversarial proceedings) is able to prepare for anticipated litigation, and to defend its position. It should also be noted that there is an established means of scrutinising the legality of the decisions of public bodies through judicial review in the courts.
37. I acknowledge the arguments presented by Mr O'Connor, including his views on increased scrutiny of the Council's policies in relation to equal pay between men and women. I agree with him that disclosure would enable greater scrutiny of the Council's steps to comply with its equality obligations, and this would be in the public interest. However, in this case, I have concluded that the competing public interest in the effective administration of justice with respect to adversarial proceedings is greater.
38. Therefore, I am satisfied on this occasion the Council has applied the public interest test correctly in withholding the information from Mr O'Connor.
39. Given that I have found the equal pay audit to be exempt by virtue of section 36(1) of FOISA (and have found, having considered the public interest test that the exemption should be maintained), I have not gone on to consider the application of the other exemptions contained in sections 30(b) and (c) of FOISA that were also relied upon by the Council in this case.

Decision

I find that Glasgow City Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with Mr O'Connor's information request. In particular, I have found the information he requested to have been exempt from disclosure under section 36(1) of FOISA.



Appeal

Should either Mr O'Connor or Glasgow City 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 notice.

Kevin Dunion
Scottish Information Commissioner
10 October 2007



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.

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 –
 - (a) the provision does not confer absolute exemption; and
 - (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.