

Decision Notice



Decision 112/2008 Christopher McKnight and North Lanarkshire Council

Legal advice provided to the Council

Reference No: 200800306

Decision Date: 16 September 2008

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Kevin Dunion

Scottish Information Commissioner

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



Summary

Mr Christopher McKnight requested a copy of legal advice received by North Lanarkshire Council (the Council) in relation to the implementation of a new pay and grading structure for staff. The Council refused his request, on the grounds that the information was exempt from disclosure under section 36(1) of FOISA. Following a review, Mr McKnight remained dissatisfied and applied to the Commissioner for a decision.

After investigation, the Commissioner found that the Council had dealt with Mr McKnight's request for information in accordance with Part 1 of FOISA, by relying on section 36(1) to withhold the information. The Commissioner accepted that there were valid reasons why disclosure would serve the public interest, but found that these were outweighed by the greater public interest in preserving the confidentiality of the communication between the Council and its legal advisor. 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) (Effect of exemptions) and 36(1) (Confidentiality)

Local Government (Scotland) Act 1973 Schedule 7A Access to information: exempt information (paragraph 12)

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 4 December 2007, Mr Christopher McKnight wrote to the Council asking for a copy of the legal advice provided to the Council in relation to the implementation of a new pay and grading structure for Council employees.



2. The Council replied to Mr McKnight on 8 January 2008, advising him that the legal advice was exempt from disclosure under section 36(1) of FOISA. The Council took the view that the legal advice was information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings, and concluded that, in all the circumstances of the case, the public interest in disclosing the information was outweighed by that in maintaining the exemption.
3. On 11 January 2008 Mr McKnight requested a review of this decision.
4. The Council replied on 19 February 2008. The Council stated that the advice it had received was contained in a report by the Chief Executive dated 15 September 2006, and provided Mr McKnight with a copy of that report. The Council noted that prior to the submission of the Chief Executive's report there were also communications at officer level advising on the legal position. The Council considered these communications constituted information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings, and that they were therefore exempt from disclosure under section 36(1) of FOISA. The Council addressed some of the points made by Mr McKnight in his request for review (relating to the Council's implementation of a revised pay and grading structure), but concluded that, on balance, the public interest lay in withholding the information under the exemption in section 36(1).
5. On 27 February 2008, Mr McKnight wrote to the Commissioner, stating that he 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. Mr McKnight explained why he required to see the legal advice received by the Council, and submitted that the public interest lay in the disclosure of that advice in order to make transparent the process by which implementation of a new pay and grading structure for Council employees had been sanctioned.
7. The application was validated by establishing that Mr McKnight 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

8. On 5 March 2008, the Council was notified in writing that an application had been received from Mr McKnight and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.



9. The investigating officer contacted the Council, inviting comments on the application (as required by section 49(3)(a) of FOISA) and seeking answers to specific questions. In particular, the Council was asked why it was satisfied that confidentiality of the communications had been maintained even though the Council's correspondence with Mr McKnight appeared to suggest that the legal advice was now contained in a published report.
10. The Council replied on 14 April 2008. It explained that Mr McKnight's request was considered to cover advice provided both to the Council itself, and to officers of the Council. The Council indicated that the "legal advice" provided to the Council was given in the Chief Executive's report of 15 September 2006, which had been considered in a public meeting and was available for public inspection. No claim of confidentiality was made for this advice. However, Mr McKnight's request also covered the Opinion of Counsel which had been provided to officers of the Council, and the Council took the view that the confidentiality of this legal advice had been fully maintained. (This advice was described as "communications at officer level" in the Council's letter to Mr McKnight of 19 February 2008.)
11. The Council explained that it was currently engaged in tribunal proceedings on the implementation of the new pay and grading structure, and viewed Mr McKnight as a potential litigant on this matter. The Council argued that it would not be in the public interest for one party to be put at a disadvantage in litigation through being required, by virtue of its status as a public authority, to provide an opponent with confidential advice as to its legal position.
12. In further correspondence the Council clarified that the Chief Executive's report (which was not itself legal advice) was based on the Opinion of Counsel and explained the relationship between that advice and the contents of the Chief Executive's report.
13. The Council was also asked whether it held any record of legal advice provided by its in-house solicitors to (for example) the Chief Executive's office, in relation to the opinion of Counsel or the preparation of the Chief Executive's report to Council. The Council explained that on this occasion the contents of the Counsel's Opinion had been communicated to, and discussed with, the Chief Executive in meetings, and that no written record of such internal legal advice existed.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented to him and is satisfied that no matter of relevance has been overlooked.



Information covered by Mr McKnight's request

15. As noted above, the Commissioner queried whether the Council might hold any additional information covered by the terms of Mr McKnight's request, apart from the Opinion of Counsel obtained by its officers: the Commissioner found it unusual for a public authority to retain no record of legal advice communicated from its legal officers for use by other departments or officers. However, the Commissioner has accepted the Council's explanation of the circumstances which led to the legal advice being communicated verbally within the Council. The Commissioner is satisfied that the only information which is covered by Mr McKnight's request and which has been withheld by the Council is the Counsel's Opinion.

Section 36(1)

16. The Council has relied on the exemption in section 36(1) of FOISA to withhold the Opinion of Counsel in relation to the implementation of a new pay and grading structure.
17. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Communications which are subject to legal professional privilege are one such type of communication. Legal professional privilege can itself be divided into two categories – legal advice privilege and litigation privilege.
18. The Commissioner is satisfied that the Opinion of Counsel is a communication which is subject to legal professional privilege, being legal advice sought by the Council (the client).
19. The Council has described the Counsel's Opinion as "the legal advice on which the Chief Executive's report was based". It was therefore important for the Commissioner to establish whether the confidentiality of that advice had been compromised by the publication of the Chief Executive's report to Council of 15 September 2006; that is, whether the legal professional privilege attached to the Counsel's Opinion had been waived by disclosure of the advice in a published report.
20. The Commissioner did not find that the Chief Executive's report closely replicated the advice provided by Counsel, although he accepts that Counsel's legal advice provided the basis for the options presented in the report. However, the Counsel's Opinion provides detailed analysis at a level which is not substantially replicated in the wording of the Chief Executive's report, and considers issues which may have informed the contents of the report but which are not directly considered in the report.
21. The Commissioner has not found that the principle of collateral waiver of privilege affects the privileged status of the Counsel's opinion in this case. The Chief Executive's report does not amount to a substantial disclosure of that advice, and the fact that it makes reference to the legal advice upon which it is based, and presents options which were formulated after consideration of that legal advice, does not, in the Commissioner's view, affect the confidential status of the legal advice from Counsel. The Commissioner therefore accepts that the information withheld falls within the exemption in section 36(1) of FOISA.



22. The exemption in section 36(1) is subject to the public interest test, and can only be upheld if the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
23. In his correspondence with the Council and his application to the Commissioner, Mr McKnight put forward a number of reasons why disclosure of the legal advice would be in the public interest. These may be summarised as follows:
- (a) disclosure would clarify the legal basis upon which the Council made its decision to implement the new pay and grading structure, after failing to secure agreement with its workforce through a ballot. Mr McKnight noted that the report to Council does not include the actual legal advice obtained, but rather states that legal advice suggested that the implementation of the new structure could legally be achieved by notification.
 - (b) the pay model will cost the Council £30 million over 5 years, and there is a public interest in allowing scrutiny of the legal advice informing the decision to implement the new pay structure so that the public can be satisfied that the Council has acted legally in a matter of public expenditure.
 - (c) the Council's Chief Executive has described the process of implementing the new pay structure as "transparent, robust and objective". Mr McKnight queried how transparency could truly be achieved without disclosure of the legal advice received by the Council.
 - (d) the new pay structure would have life changing consequences for himself and his fellow employees, and this change had been imposed without agreement from Council workers. In these circumstances Mr McKnight argued there was a public interest in disclosure of information which would explain the legal basis for the Council's decision.
24. The Council argued that the public interest was best served by withholding the information. As noted previously, it regarded Mr McKnight as a potential litigant and argued that it could not be in the public interest to disadvantage the Council in tribunal proceedings by requiring it to publish confidential advice on its legal position. The Council referred to the provisions of Schedule 7A of the Local Government (Scotland) Act 1973¹, which recognise the confidential nature of Counsel's Opinion in connection with the determination of any matter affecting the authority: the Council considered that the inclusion of this provision within the 1973 Act supported its contention that there is a general public interest in preserving the confidentiality of legal advice.
25. The Council also noted that in previous decisions the Commissioner has recognised the public interest in maintaining the exemption in section 36(1).

¹ Local Government (Scotland) Act 1973, Schedule 7A, paragraph 12



26. The Commissioner has always acknowledged 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 justice grounds and there are many judicial comments on the fundamental nature of this confidentiality in our legal system. Many of the arguments in favour of maintaining confidentiality of such communications were discussed in *Three Rivers District Council and Others v Governor and Company of the Bank of England* (2004) UK HL 48.²
27. In Decision 023/2005, the Commissioner concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client and therefore, while he will consider each case on an individual basis, he is likely to order the release of such communications in highly compelling cases only. He has reiterated this in a number of subsequent decisions.
28. In this case, the Commissioner recognises that Mr McKnight has strong reasons for believing that disclosure of the legal advice in question would be in the public interest. The Commissioner accepts that disclosure would add to the general understanding of the basis for a decision by the Council which has significant implications for its workforce. However, the Commissioner takes the view that disclosure of the Counsel's Opinion would not resolve the particular issues and questions raised by Mr McKnight, by nature of the information withheld and how it has been deployed by the Council.
29. Against the public interest in disclosure, the Commissioner has weighed the public interest in maintaining confidentiality of communications between legal adviser and client, as recognised by the courts. He has taken into account the fact that the Council is engaged in tribunal proceedings and that disclosure of the legal advice may prejudice the Council's position in relation to those proceedings.
30. On balance, the Commissioner finds that the public interest in withholding the legal advice and preserving its confidential status outweighs the public interest in disclosure. Accordingly, the Commissioner finds that the Council was justified in withholding the information under section 36(1) of FOISA.

DECISION

The Commissioner finds that North Lanarkshire Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding the information requested by Mr McKnight under section 36(1) of FOISA.

² <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>



Appeal

Should either Mr McKnight or North Lanarkshire 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 Investigations
16 September 2008



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 –
- (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.

Local Government (Scotland) Act 1973

Schedule 7A: Access to information: exempt information

12. Any instructions to counsel and any opinion of counsel (whether or not in connection with any proceedings) and any advice received, information obtained or action to be taken in connection with--

- (a) any legal proceedings by or against the authority, or
- (b) the determination of any matter affecting the authority,

(whether, in either case, proceedings have been commenced or are in contemplation).