

Decision Notice



Decision 040/2009 Mr Croisdain MacKenzie and Comhairle nan Eilean Siar

Counsel's Opinion

Reference No: 200900168
Decision Date: 02 April 2009

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Kevin Dunion
Scottish Information Commissioner

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



Summary

Mr Croisdain MacKenzie (Mr MacKenzie) requested from Comhairle nan Eilean Siar (the Council) a specified Opinion of Senior Counsel and related information. The Council provided some information, but withheld the Opinion and a summary of it in terms of section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), on the basis that these documents were information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. Following a review, Mr MacKenzie remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner found that the Council had dealt with Mr MacKenzie's request for information in accordance with Part 1 of FOISA. He found that the Council had correctly applied the exemption in section 36(1) and that the public interest in disclosing of the information was outweighed by the public interest in maintaining the exemption.

However, the Commissioner found that the Council had failed to respond to Mr MacKenzie's request for review within the timescale specified in section 21(1) of FOISA. He did not require the Council to take any action in relation to this breach in response to this decision.

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); 21(1) (Review by Scottish public authority) 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 12 June 2008, Mr MacKenzie wrote to the Council requesting a copy of the Opinion it had obtained from Senior Counsel on whether croft property should be taken into account in the calculation of a resident's resources for the purposes of the National Assistance (Assessment of Resources) Regulations 1992. Mr MacKenzie also requested a copy of a guidance and procedure note based on the Opinion which was referred to in the minute of a committee meeting at which a report summarising the Opinion was discussed.



2. In a further email dated 20 June 2008, Mr MacKenzie reiterated this request, and indicated that he also wished to receive any Council reports on the same subject.
3. The Council responded to this request on 26 June 2008. It explained that it had withheld the Opinion in question and the summary of it on the grounds that both were considered exempt from disclosure in terms of section 36(1) of FOISA. The Council explained that it considered the information met the requirements for legal advice privilege and, as such, a claim of confidentiality of communications could be maintained in legal proceedings. Having considered the public interest, it concluded that the public interest did not favour disclosing this information. The Council provided Mr MacKenzie with four reports in fulfillment of the parts of his request seeking the Council's guidance and procedure note and other reports on this subject.
4. On 15 August 2008, Mr MacKenzie wrote to the Council requesting a review of its decision stating that he considered the Counsel's Opinion to be public information.
5. The Council notified Mr MacKenzie of the outcome of its review on 20 January 2009. It upheld its original decision.
6. On 24 January 2009, Mr MacKenzie wrote to the Commissioner stating that he was dissatisfied with the outcome of the Council's review and applying for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr MacKenzie 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 4 February 2009, the Council was notified in writing that an application had been received from Mr MacKenzie and was asked to provide the Commissioner with any information withheld from Mr MacKenzie. The Council responded with the information requested and the case was then allocated to an investigating officer.
9. 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.
10. The Council responded on 20 February 2009 with its submissions on this case and on its reliance on section 36(1) of FOISA.



11. Mr MacKenzie was also invited to comment on why he believed the public interest test favoured the disclosure of the information under consideration. Mr MacKenzie submitted further comments on the public interest test and supporting documentation on 25 February 2009.

Commissioner's analysis and findings

12. 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 Mr MacKenzie and the Council and is satisfied that no matter of relevance has been overlooked.
13. As noted above, Mr MacKenzie requested a copy of the Opinion by Senior Counsel on whethercroft property should be taken into account in the calculation of a resident's resources for the purposes of The National Assistance (Assessment of Resources) Regulations 1992. This document will be referred to as "the Opinion" in what follows.
14. Mr MacKenzie has also requested copies of Council reports on this subject. Although it provided some documentation, the Council withheld a report to its Social Work Committee which summarised the Opinion and made recommendations to the Committee. This will be referred to as "the report" in what follows.
15. The Council has withheld this information in terms of section 36(1) of FOISA.

Section 36(1)

16. 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 communications between a legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled.
17. Firstly, the information being withheld must relate to communications with a legal adviser. In this case the information withheld is the legal advice communicated to the Council (as client) and a report which summarises and comments upon that advice.
18. The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of his/her professional relationship with his/her client.
19. In this case the legal adviser is Senior Counsel. The Opinion comprises professional legal advice within a relationship where the legal adviser has been asked to provide an opinion in his professional capacity to a client (the Council).



20. The Council has confirmed (and the Commissioner is satisfied that this is the case) that legal professional privilege had not been waived. It stated that since the Opinion was provided, the information had remained confidential and had not been disclosed to any person other than Officers or Members of the Council.
21. The Commissioner is satisfied that the Opinion is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, it is exempt in terms of section 36(1) of FOISA.
22. The Commissioner is also satisfied that the report is concerned entirely with communicating the key terms of the Opinion to Members, and to inform decisions to be taken in the light of the Opinion. The Commissioner is therefore satisfied that the report in its entirety relates to the legal advice and so it is also information in respect of which a claim of confidentiality of communications could also be maintained. He notes that the report is marked “confidential” and “not for publication” in terms of schedule 7A of the Local Government (Scotland) Act 1973. He is satisfied again that the Council has taken steps to maintain the confidentiality of this report, and that privilege has not been waived. He has found that the exemption in section 36(1) also applies to the report.

The Public Interest Test

23. 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. Where a public authority finds that this exemption applies to information which has been requested, it 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. Unless the public interest in maintaining the exemption (i.e. in withholding the information) outweighs that in disclosing the information, the public authority must disclose the information.
24. At this point, the Commissioner would note that he has considered (as he is required to do in any decision) the balance of public interest in the circumstances of the time when the Council notified Mr MacKenzie of the outcome of its review. The relevant point is 20 January 2009 and therefore the Commissioner cannot take into account any changes in circumstances after that time.

Mr MacKenzie’s submissions

25. Mr MacKenzie provided detailed arguments as to why he believes the information should be disclosed. Given the circumstances of his family, he has a personal interest in understanding the basis for the Council’s practice in taking croft property into consideration when establishing a person’s means to pay for care. He argued that disclosure was also a matter of significant interest to the crafting community more generally, and that disclosure would help to inform him and others in similar situations as to what assets are reckonable as part of any assessment of means to pay for care. He argued that disclosure would ensure fairness in relation to his complaints.



26. Mr MacKenzie informed the Commissioner that he was aware of numerous cases ongoing and he maintained that the public should be informed as to what Council policy is, and how the Council can legally charge, and what assets are reckonable. He suggested that non-disclosure would adversely affect the economically vulnerable crofting community, by creating a disincentive to crofters to invest and develop a croft.
27. He argued that the Council should be accountable to the public and that disclosure would allow understanding of the decision making process, and would allow public participation in that process. He maintained that certain other Councils did not take crofts into consideration when paying for care, and that disclosure would contribute to establishing which (if any) of these authorities were failing to properly discharge their functions.
28. He maintained that disclosure would contribute to ensuring effective oversight of expenditure of public funds and, as the Opinion was financed by public money, the public have a right to know the detail of an Opinion sought on their behalf.
29. Mr MacKenzie also provided a copy of the minutes of the Council's recent Policy and Resources Committee meeting on 18 February 2009, in which a decision was made to suspend the consideration of croft property in relation to residential care costs, pending further research. He argued that if the Council intended to suspend the policy then it would be timeous for the Opinion to be released. The Commissioner has had to disregard this final point because the decision taken was made after the Council had conducted its review of Mr MacKenzie's request.

The Council's submissions

30. The Council accepted that the information under consideration was of interest to Mr MacKenzie, but went on to argue that there was no evidence to suggest that disclosure would be something of serious concern and benefit to the public. The Council also noted that it had received no other requests from the public for access to the Opinion. It submitted that the absence of any formal objections to its financial assessment policy regarding croft property indicated that the matter was not of serious concern to the public.
31. Council indicated that it had considered that there should always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, and that such communications should only be disclosed in highly compelling circumstances. It submitted that it was in the public interest that the Council could communicate with its advisers fully and frankly and in confidence, in order to obtain the most comprehensive legal advice in order that it may discharge its statutory functions properly. It submitted that the disclosure of the legal advice sought may inhibit others from seeking or providing such high quality and comprehensive advice in the future. It referred to a number of the Commissioner's previous decisions in support of this view.



32. The Council went on to state its opinion that it is in the public interest that local authorities and their legal advisers can discuss relevant issues and give and receive legal advice in confidence. It maintained that without such high quality and comprehensive advice, the quality of the Council's decision making would be restricted, and this would not be in the public interest.

Conclusions on the public interest

33. In a number of previous decisions, 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. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications 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*. While the Commissioner will consider each case on an individual basis, he is likely only to order the release of such communications in highly compelling cases.
34. Mr MacKenzie has identified a number of reasons why the public interest would be served by disclosure in this case. It would allow greater understanding of the basis for the Council's practice by those who are affected by it. It would enhance scrutiny of the actions of the Council and, by extension, contribute to the effective oversight of expenditure of public funds.
35. The issue of funding for care and the valuation of a person's assets for this purpose is one that has significant implications for the lives and livelihoods of both the recipients of care and their families. The Commissioner acknowledges that there is a real public interest in enabling such individuals to be informed about the basis for decisions on this topic.
36. The Commissioner recognises that Mr MacKenzie has strong personal reasons for wishing to understand the legal advice underpinning the Council's policy, and that this interest might well be shared by others in similar circumstances. Such access would allow challenge to the particular legal arguments considered therein.
37. However, the Commissioner notes that there are separate and established routes for challenging the decision making of public authorities and questioning its legality, either via internal complaint channels and the Scottish Public Services Ombudsman, or via judicial review through the courts.
38. Given that alternative mechanisms exist for the pursuit of any concerns with the Council's policy, the Commissioner does not find that the public interest would be significantly served via disclosure of the Opinion or the report outwith these contexts.



39. The Commissioner must also balance the public interest in disclosing the information, against any consequent harm to the public interest of requiring disclosure of information of this type. The Commissioner agrees with the Courts and the Council that it is strongly in the public interest that an authority can receive and discuss advice regarding its position and to communicate with its advisers fully and frankly in confidence, in order to obtain the most comprehensive legal advice in relation to its projects and to defend its position adequately should that become necessary.
40. In all the circumstances of the case, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information withheld.
41. Therefore, he is satisfied that the Council correctly applied the public interest test in withholding the Opinion and report and that the information contained in both is exempt by virtue of section 36(1) of FOISA.

Failure to respond within timescales laid down in FOISA

42. As noted above, the Council responded to Mr MacKenzie's request for review of 15 August 2008 some three months later, on 20 January 2009.
43. Section 21(1) of FOISA requires a public authority in receipt of a request for review to comply promptly, and by not later than the twentieth working day after receipt of the request for review. Therefore the Commissioner has found that the Council breached section 21(1) of FOISA in its handling of Mr MacKenzie's request.
44. In its response of 20 January 2009, the Council apologised for the delay and explained that, due to an oversight, it had not processed Mr MacKenzie's request for review timeously.
45. In its submissions to the Commissioner, the Council acknowledging that it had breached the technical requirements of FOISA as a result of this failure.
46. Given that the Council apologised to Mr MacKenzie and provided a response to his request for review once it was alerted to its failure to respond, the Commissioner does not require the Council to take any action in response to the failings identified in this particular case. However, he would advise the Council to take steps to ensure that all information requests and requests for review are clearly identified and actioned upon their receipt.



DECISION

The Commissioner finds that Comhairle nan Eilean Siar partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr MacKenzie.

The Commissioner finds that by withholding the Opinion and the report in terms of section 36(1) of FOISA, the Council complied with Part 1.

However, the Council failed to comply with Part 1 by failing to meet the timescale required by section 21(1) of FOISA. For the reasons set out above, the Commissioner does not require the Council to take any action in response to this failure.

Appeal

Should either Mr MacKenzie or Comhairle nan Eilean Siar 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
02 April 2009



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.

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

36 Confidentiality

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