

# Decision Notice



Decision 106/2009 Mr X and Dundee City Council

Legal advice on penalty charge notices

Reference No: 200900339

Decision Date: 10 September 2009

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr X requested from Dundee City Council (the Council) information relating to the legal basis for certain action it was taking in relation to penalty charge notices (PCNs). The Council withheld the information under the exemption in section 36(1) of the FOISA. Following a review, Mr X remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr X's request for information in accordance with Part 1 of FOISA, as the information was subject to legal advice privilege and litigation privilege and had been properly withheld under section 36(1). Consequently, he did not require the Council to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions), 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

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1. On 9 August 2008 Mr X made a request for information to the Council, relating to PCNs for decriminalised parking offences. On receiving a response to this request, on 26 September 2008 Mr X wrote to the Council asking a number of questions and seeking the legal basis on which the Council "can continue to pursue 'single date' PCNs when every other Council in Scotland has decided not to do so".
2. The Council responded on 30 October 2008, advising Mr X that the legal basis for the Council's position was exempt from disclosure in terms of section 36(1) of FOISA, on the basis that it attracted legal professional privilege and litigation privilege.
3. On 22 December 2009, Mr X wrote to the Council requesting a review of its decision to the information on the basis of section 36(1) of FOISA. He did not agree that the public interest in this case favoured maintaining the section 36(1) exemption, pointing out that in his view the PCNs in question were unlawfully worded and therefore unenforceable.



4. The Council notified Mr X of the outcome of its review on 19 January 2009, confirming that it was upholding its decision to withhold the information without modification.
5. On 19 February 2009 Mr X wrote to the Commissioner's Office, 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. The application was validated by establishing that Mr X 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

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7. On 23 March 2009, the Council was notified in writing that an application had been received from Mr X and 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.
8. The investigating officer contacted the Council on 21 May 2009, 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 section 36(1) of FOISA.
9. The Council responded on 8 June 2009 and its submissions will be considered in the Commissioner's analysis and finding section below.

## Commissioner's analysis and findings

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10. 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 X and the Council and is satisfied that no matter of relevance has been overlooked.

### Section 36(1) – Confidentiality

11. The Council relied on the exemption in section 36(1) of FOISA to withhold the legal advice it had obtained from one of its own in-house solicitors, stating that the information attracted legal professional privilege (one of the categories of information to which the phrase "confidentiality of communications" applied).
12. The Council argued that two forms of legal professional privilege, legal advice privilege and litigation privilege, applied to the information in question. In doing so, it rehearsed the requirements for both kinds of privilege.



13. The exemption in section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. Among the types of communication which fall into this category are those which are subject to legal professional privilege. As the Council has submitted, one aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*). Another, which the Council has also argued applies in this case, is legal advice privilege.
14. Communications *post litem motam* are granted confidentiality in order to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent/s or prospective opponent/s will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.
15. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation: the communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded.
16. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For legal advice privilege to apply, certain conditions must be fulfilled.
17. The communication must be with a professional legal advisor, such as a solicitor (which may include an in-house solicitor) or an advocate. The legal adviser must be acting in their professional capacity as such and the communication must occur in the context of their professional relationship with their client. The information must be confidential between lawyer and client: privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy.
18. In this case, an in-house solicitor employed by the Council provided legal advice to colleagues within the Council in relation to aspects of the application of PCNs. The opinion comprises advice within a relationship where the legal adviser has provided advice in his/her professional capacity to a client i.e. the Council. The Commissioner is therefore satisfied that the withheld information in this context is a communication between legal advisor and client, provided in circumstances in which legal advice privilege could apply. Given the context in which the advice was provided, however (where legal proceedings appear to have been simply a hypothetical possibility), it must be questionable whether litigation privilege would also apply to the information.



19. Although the Commissioner is satisfied that the opinion constitutes information to which legal advice privilege could be attached, for the exemption under section 36(1) to apply the withheld information must be information in respect of which a claim to confidentiality of communications (in this case in the form of legal advice privilege) could be maintained in legal proceedings. In other words, the claim must be capable of being sustained at the time the exemption is claimed. This raises the issue of whether, at that time, privilege had been waived by the Council. After consideration of the information in question and the other circumstances of this case, the Commissioner has concluded that legal advice privilege had not been waived at the time the Council dealt with Mr X's request (and, for that matter, has not been waived subsequently).
20. The exemption in section 36(1) is, however, 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 the information is exempt under this exemption, 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 (and therefore withholding the information).

#### *Public interest test*

21. 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. 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*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. Consequently, 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.
22. With regard to the public interest, the Council considered there to be no compelling reason why in this instance the Commissioner should overrule its right to confidentiality of communications with its legal advisers, or that in respect of litigation privilege, concluding that there was a greater public interest in maintaining the right to confidentiality of communications (and thus withholding the information) than in releasing it. In particular, it did not consider Mr X's disagreement with the Council's position in respect of the PCNs to be a sufficiently compelling reason in the circumstances.
23. As indicated above, Mr X considers it to be arguable (on the basis of a 2006 decision by the High Court in England & Wales) that the PCNs used by the Council are unlawfully worded and therefore unenforceable. Given that the Council is collecting money by means of PCNs he believes to be unlawful, he considers it to be in the public interest for the withheld legal advice to be released.



24. Having considered the public interest arguments on both sides, the Commissioner accepts that there is a public interest in concerns relating to the Council's administration of the PCNs in question. In this instance, however, having considered the information withheld, the Commissioner does not consider the public interest in disclosure of this particular legal advice to be sufficiently compelling to outweigh the strong public interest in the confidentiality of communications. Consequently, the Commissioner accepts that the Council was entitled to withhold the legal advice under the exemption in section 36(1) of FOISA.

## **DECISION**

The Commissioner finds that Dundee City Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr X.

## **Appeal**

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Should either Mr X or Dundee 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 decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**10 September 2009**



## Appendix

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### 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.

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- (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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