

# Decision Notice



Decision 190/2012 Mr Bob Costello and Dundee City Council

Correspondence regarding a specific contract

Reference No: 201201243

Decision Date: 22 November 2012

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**Rosemary Agnew**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
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## Summary

Mr Costello asked Dundee City Council (the Council) for information about a particular contract. The Council provided some information to Mr Costello, but withheld the remainder on the basis that it was subject to legal professional privilege.

Following an investigation, the Commissioner found that only some of the information withheld from Mr Costello was subject to legal professional privilege. Given that the Council disclosed the information which was not privileged to Mr Costello during the investigation, she did not require the Council to take any action.

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

## Background

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1. On 9 March 2012, Mr Costello, who had been in correspondence with the Council regarding a particular tender/contract, wrote to the Council requesting the following information:  
“... all correspondence, emails, inter-departmental memos concerning or mentioning the above tendering exercise and the decision to authorise this expenditure without Committee approval.”
2. No response was received from the Council and, on 17 April 2012, Mr Costello wrote to the Council to request that it carry out a review in respect of its failure to response to his request.



3. Mr Costello did not receive a response to his requirement for review and, on 29 May 2012, wrote to the Commissioner's Office, stating that he was dissatisfied with that failure and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. This resulted in *Decision 102/2012 Mr Bob Costello and Dundee City Council* being issued by the Commissioner<sup>1</sup>.
4. The Council notified Mr Costello of the outcome of its review on 15 June 2012. The Council provided some information to Mr Costello, but informed him that the remainder of the relevant information it held was being withheld in terms of section 36(1) of FOISA, on the basis that it consisted of confidential communications with legal advisers.
5. On 26 June 2012, Mr Costello 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. The application was validated by establishing that Mr Costello 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 5 July 2012, the Council was notified in writing that an application had been received from Mr Costello 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.
8. 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 (with specific reference to the requirements of section 36(1)) to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. The Council responded on 14 September 2012, maintaining that certain information was exempt in terms of section 36(1) of FOISA. The Council confirmed, however, that it was no longer relying upon this exemption for certain of the information withheld and provided that information to Mr Costello.
10. The relevant submissions received from both the Council and Mr Costello will be considered fully in the Commissioner's analysis and findings below.

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<sup>1</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201201014.asp>



## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Costello and the Council and is satisfied that no matter of relevance has been overlooked.

### Section 36(1) – Confidentiality

12. The Council contended that the information contained in a number of documents was exempt from disclosure in terms of section 36(1) of FOISA, in that it related to legal advice it had obtained from its in-house solicitors. It considered the information to be subject to both legal advice privilege and litigation privilege.
13. The exemption in section 36(1) of FOISA exempts from disclosure information in respect of which a claim to 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, one aspect of which is legal advice privilege. Legal advice privilege covers communications between lawyer and client in the course of which legal advice is sought or given.
14. For legal advice privilege to apply, certain conditions must be fulfilled. The communication must be with a professional legal adviser, such as a solicitor (including, in most cases, an in-house one) 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.
15. In its submissions to the Commissioner, the Council confirmed that it was no longer relying upon section 36(1) of FOISA to withhold certain information and during the investigation provided that information to Mr Costello. In the circumstances, in the absence of any further submissions on why this information should have been considered subject to the exemption, the Commissioner can only conclude that the Council was not entitled to withhold it in terms of section 36(1) of FOISA. In doing so, it failed to comply with section 1(1) of FOISA.
16. The Council submitted that the information it continued to withhold was contained within emails which related to the request for legal advice and its provision by the Council's in-house solicitors.
17. The Council considered that the information withheld clearly fell within section 36(1) of FOISA, as it related to communications between client and legal adviser, the information being such that a claim of confidentiality could be maintained in legal proceedings.



18. The Commissioner has considered the information withheld under section 36(1) and is satisfied that it comprises communications with the various legal professionals identified by the Council, in the course of which legal advice was requested or provided, or relates to the consideration of such advice.
19. Having considered the content of the documents to which the Council has applied section 36(1), the circumstances under which they were created and anything which may have happened to the information in them subsequently, the Commissioner is satisfied that the information meets all of the conditions set out in paragraph 14 and is therefore exempt information under section 36(1) of FOISA.
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 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*

21. Mr Costello submitted that there was a clear public interest in the public knowing the allocation of large sums of money without the necessary scrutiny.
22. The Council contended that, if the information was provided to Mr Costello, then it would become extremely difficult for in-house solicitors to continue in a manner which would allow a full and frank exchange of advice and information between those in-house lawyers and the client officer. Should such information be released, then the in-house lawyers concerned would become so circumspect in their advice that they would be hampered from carrying out their proper duty in the best interests of the local authority and the people of Dundee.
23. The Council submitted that, while Mr Costello was entitled to an explanation as to what occurred when the relevant contracts were issued, it did not accept that there was any public interest whatsoever in the legal advice being made public. It considered Mr Costello to have been given all the information which would enable him to come to a view as to how the Council had come to its decision in awarding the relevant contracts.
24. The Council acknowledged a public interest in transparency and accountability, and in ensuring that there was scrutiny of the decision making process and effective oversight of public expenditure. It submitted, however, that disclosure would not serve these purposes. While also acknowledging a public interest in disclosure which would contribute to the administration of justice, for the reasons it had given (see paragraph 22 above) it believed disclosure in this case would have the opposite effect.
25. The Council concluded that, on balance, any public interest in disclosing the information was outweighed by the public interest in ensuring that legal advisers and their clients could discuss relevant issues and give and receive legal advice in confidence.



26. 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.
27. Having considered the public interest arguments advanced on both sides, and while accepting that there might be reasons which would justify disclosing legal advice of this kind in certain circumstances, in this instance 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. Consequently, she accepts that the Council correctly withheld the information to which it applied section 36(1) of FOISA.

## DECISION

The Commissioner finds that Dundee City 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 Costello.

The Commissioner finds that the Council was entitled to withhold certain information on the basis of the exemption in section 36(1) of FOISA.

However, the Commissioner also finds that the Council was not entitled to withhold certain information on the basis of the exemption in section 36(1) of FOISA. As a result, the Council failed to comply with Part 1 (and, in particular, section 1(1)) of FOISA.

Given that the information incorrectly withheld has been provided to Mr Costello, the Commissioner does not require the Council to take any action in respect of this failure.

Decision 190/2012  
Mr Bob Costello  
and Dundee City Council



## Appeal

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Should either Mr Costello 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.

**Margaret Keyse**  
**Head of Enforcement**  
**22 November 2012**



## 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.

...

- (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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