

# Decision Notice

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## Decision 132/2014 Mr James Taylor and the City of Edinburgh Council

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### Ensuring compliance with Human Rights legislation

Reference No: 201400236

Decision Date: 17 June 2014



Scottish Information  
Commissioner

## Summary

On 19 August 2013, Mr Taylor asked the City of Edinburgh Council (the Council) for a copy of a letter and information which would show how the Council ensured that its procedures for dealing with taxi licensing and complaints about taxi / private hire drivers are compliant with Human Rights legislation. The Council withheld legal advice which fell within scope of the second part of the request.

During the investigation, the Council disclosed a copy of the requested letter.

The Commissioner found that the Council was entitled to withhold the legal advice under section 36(1) of FOISA, but that the letter provided to Mr Taylor during the investigation should have been disclosed at an earlier stage.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) 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 19 August 2013, Mr Taylor emailed the Council requesting the following information:
  - a. A copy of a letter sent on 13 May 2013 by the Council and addressed to him, but which was never received.
  - b. Copies of all documents and other media created during the process the Council undertook to ensure its procedures and process in respect of complaints against taxi and private hire licence holders and taxi and private hire drivers, and its taxi licensing conditions, comply with the European Convention on Human Rights (the ECHR), the Human Rights Act 1998 (the HRA) and other relevant legislation.
2. The Council did not respond to this request and, on 25 September 2013, Mr Taylor asked the Council to conduct a review of its failure to respond to his request.
3. The Council notified Mr Taylor of the outcome of its review on 25 October 2013. The Council apologised for its failure to respond and informed Mr Taylor that it did not hold any information falling in scope of his request, except legal advice provided to members of the Regulatory and Licensing Sub-Committee by the Council's solicitor. This information was considered exempt from disclosure under section 36(1) of FOISA.
4. On 2 February 2014, Mr Taylor emailed 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.
5. The application was validated by establishing that Mr Taylor made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## **Investigation**

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6. Mr Taylor confirmed that he wanted the Council's response to both parts of his request to be investigated by the Commissioner.
7. On 5 March 2014, the Council was notified in writing that an application had been received from Mr Taylor, and was given the opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). The Council was asked to justify its reliance on any provisions of FOISA it considered applicable. It was asked to explain the steps it had taken to ensure all relevant information had been identified, and why it considered the legal advice should be withheld.
8. On 7 April 2014, the Council provided submissions in support of its position that it did not hold any other information covered by Mr Taylor's request apart from legal advice contained within an Induction Training Information Pack provided to members of the Regulatory Committee.
9. On 8 April 2014, the Council provided Mr Taylor with a copy of its letter to him dated 13 May 2013.

## **Commissioner's analysis and findings**

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

### **Information covered by Mr Taylor's request**

11. During the investigation, the Council provided Mr Taylor with a copy of the letter he had asked for. The Council did not explain why this information was not provided to Mr Taylor when it reviewed its response to his request. Consequently, the Commissioner must conclude that the Council failed to comply with section 1(1) of FOISA in failing to provide this information to Mr Taylor. As the information has now been provided, the Commissioner does not require any further action.
12. In the second part of his request, Mr Taylor asked for information created during the process by which the Council ensured that it complied with human rights legislation in the way it dealt with taxi licensing and complaints about taxi / private hire drivers. The Council told him that the only information it held was legal advice provided to members of the Regulatory and Licensing Sub-Committee. Mr Taylor has argued that the Council must hold more information than solely the legal advice and there must be an audit trail demonstrating what steps it had taken to ensure its processes and procedures are compliant with the HRA.
13. As part of the investigation of Mr Taylor's application, the Council was asked how it established that it did not hold any other information covered by Mr Taylor's request.
14. The Council explained that if any information was held about its compliance with the HRA / rights under the HRA, it would be held electronically and stored in the Community Safety and Legal Services folders on the Council's servers.
15. The Council stated that Mr Taylor's request had been discussed by the Council's Community Safety Manager, the Senior Legal Support Officer in Community Services, the Business Manager for Community Safety and the two Principal Solicitors (Licensing), which confirmed

that the legal advice from the Council's solicitor was the only information held by the Council that related to the complaints process' compliance with the HRA, and that no additional information was held in the form of meeting minutes, reports, correspondence with external bodies or any of the other forms of documentation listed in Mr Taylor's request.

16. The Commissioner notes that her remit in carrying out this investigation extends to the consideration of what the Council held at the time of Mr Taylor's request, not whether the Council should have recorded any, or more, information about a particular event or process or subject, nor whether it should have retained particular records. She cannot comment on whether information should have been recorded for every action the Council undertakes nor can she comment on what should be kept. Her decision in this case is based upon evidence provided by the Council to establish what information it held in relation to Mr Taylor's request.
17. The Commissioner is satisfied with the Council's submissions that the only information held is the legal advice provided to Members of the Regulatory and Licensing Sub-Committee as part of their training, which has been withheld under section 36(1) of FOISA. She accepts that the Council does not hold any further information. She notes that the Council has engaged in correspondence with Mr Taylor to advise him of the Council's interpretation of the relevant legislation, and the steps taken by the Council to comply with it, and has also provided Mr Taylor with details of the relevant complaint process.

#### **Section 36(1) of FOISA - Confidentiality**

18. 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 covered by legal advice privilege, which covers communications between lawyer and client in which legal advice is sought or given.
19. The Council stated that it was relying on the exemption in section 36(1) of FOISA to withhold the legal advice provided by a Council Solicitor to members of the Regulatory and Licensing Sub-Committee in their Induction Training Information Pack. The Council maintained that this information is subject to legal advice privilege, as it covers communications between the Council's Solicitor and their client, in which legal advice is provided.
20. For legal advice privilege to apply, certain conditions must be fulfilled. The communication must be with a professional legal adviser, such as a solicitor or 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.
21. The Council stated that the solicitor was providing legal advice to new members of the Regulatory Committee, as part of their induction. The Council considered that the solicitor was clearly acting in a professional capacity and the information supplied was legal advice.
22. Having considered the content of the withheld information and the circumstances under which it was obtained (i.e. in the context of a professional relationship between a legal adviser and their client, in the course of which confidential legal advice was requested and provided), the Commissioner is satisfied that the information meets all of the required conditions and is subject to legal advice privilege.

23. Information cannot be privileged, however, unless it is also confidential. For the section 36(1) exemption 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. For this to be the case, the information must possess the quality of confidence at that time (i.e. at least up to the point at which the authority carries out its review and communicates the outcome to the applicant).
24. A claim of confidentiality will not be capable of being maintained where information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where the confidentiality has been lost in respect of all or part of the information under consideration, any privilege associated with that information (or the relevant part) is also effectively lost.
25. The Council stated that the Induction Training Information Pack is a confidential document that the Council has not placed into the public domain, and does not intend to. As a consequence, the Council considered that the legal advice contained within it remains confidential.
26. Having considered the Council's submissions and the contents of the withheld information, the Commissioner is satisfied that the legal advice referred to above has not been made public, either in full, or in summary. She is satisfied that the information withheld under section 36(1) is (and was at the time relevant for this decision) information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings, and is therefore exempt from disclosure under section 36(1) of FOISA.
27. 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. Therefore, having decided that the information is exempt under section 36(1), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

*The public interest test*

28. In its response to Mr Taylor, the Council acknowledged that there was a clear public interest in disclosing the legal advice, as this would provide openness and transparency in local government. However, it argued that any public interest in disclosing the legal advice was outweighed by the "overwhelming" public interest in ensuring that legal advice provided to the Council by its solicitors remained confidential.
29. Mr Taylor disagreed with this view, which he believed would effectively mean that employees in the Council's Legal Services department were unaccountable; in his view, this "would negate every fundamental tenet of our democracy where public servants are supposed to be accountable." He stated that he could understand such a test being applied where third party legal professionals were protected from identification for commercial reasons, but, in his view, the Council was using it to deliberately hide information from the public, in contravention of the terms and spirit of FOISA.
30. In its submissions to the Commissioner, the Council explained that the legal advice in question was provided as part of general training to Councillors. The training papers provided to the Regulatory Committee members covered a wide range of topics and gave examples of a variety of scenarios which the members might encounter when sitting on the



Licensing Sub-Committee, which considers complaints against individual taxi drivers when these are referred to it by the Police or the Licensing Complaints Officer.

31. The Council explained that Councillors would also receive additional specific legal advice focussing on any legal issues relating to a particular complaint; this advice would be provided to the taxi driver too. The Council took the view that a taxi driver subject to a complaint would be aware of any legal advice provided to elected members in relation to his or her particular case. He or she would therefore be in a position to agree with or challenge such legal advice. (This addresses a concern raised by Mr Taylor that failure to disclose the legal advice would breach Article 6 of the European Convention on Human Rights, which states that everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law.)
32. The Council submitted that the public interest in disclosure of the advice in the training notes was outweighed by the Council's need to be able to seek and obtain legal advice without it being subsequently released into the public domain, potentially prejudicing the Council's position. It argued that this was particularly relevant regarding the advice provided to the Regulatory and Licensing Sub-Committee and the decisions that it makes. It argued that if individuals are dissatisfied with the Sub-Committee's decisions, there are appropriate appeals processes to follow which would not require disclosure of the general background legal advice that the committee received.
33. The Court of Session, which hears appeals from the Commissioner's decisions, has not yet considered in any detail the public interest test in relation to the exemption in section 36(1) of FOISA. However, the equivalent test contained in the (UK) Freedom of Information Act 2000 (FOIA) was considered by the High Court in the case of *The Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB).<sup>1</sup>
34. In the High Court, Mr Justice Wynn Williams upheld a line of decisions from the Information Tribunal in which it was determined that there is a significant in-built weight of public interest in maintaining the equivalent of the section 36(1) exemption in FOISA (i.e. section 42 of FOIA). According to Mr Justice Wynn Williams, this is because of the strong constitutional importance attached to legal professional privilege and, thereby, the protection of free and frank communications between lawyers and their clients. This was summed up, according to Mr Justice Wynn Williams, in the case of *R v Derby Magistrates Court ex parte P*
35. [1996] 1 AC487, where Lord Taylor stated at page 507D:  
*"Legal professional privilege is much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."*
36. Mr Justice Wynn Williams stated at paragraphs 41 and 53 of his judgement:  
*"It is also common ground, however, that the task of the Tribunal, ultimately, is to apply the test formulated in section 2(2)(b) [of FOIA, the equivalent of section 2(1)(b) of FOISA]. A person seeking information from a government department does not have to demonstrate that "exceptional circumstances" exist which justify disclosure. Section 42 is not to be elevated "by the back door" to an absolute exemption. As [counsel for the Information Commissioner] submits in her Skeleton Argument, it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld."*

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<sup>1</sup> <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

*That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any qualified exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.*

...

*The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption; in any event ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.”*

37. While not binding on the Commissioner, the Commissioner agrees with the reasoning set out by the High Court and has adopted that reasoning here.
38. In determining where the balance of the public interest lies in relation to section 36(1), the Commissioner must take into account the significant weight to be attached that the public interest in maintaining the exemption. There will be occasions where this significant public interest may be outweighed by the public interest in disclosing the information, for example, disclosure may be appropriate where:
  - the requirement for disclosure is overwhelming
  - the privileged material discloses wrongdoing by/within an authority
  - the material discloses a misrepresentation to the public of advice received
  - the material disclosed an apparently irresponsible and wilful disregard of advice
  - a large number of people are affected by the advice
  - the passage of time is so great that disclosure cannot cause harm.
39. The Commissioner is satisfied that none of these considerations apply in the circumstances of this particular case.
40. The Commissioner has considered the public interest arguments advanced on both sides. She accepts that there is a general public interest in authorities being open to scrutiny and being accountable for their actions. She also accepts that there might be reasons to justify the disclosure of legal advice in certain circumstances. However, 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 advisor and client.
41. Consequently, the Commissioner accepts that the Council correctly withheld the information to which it applied section 36(1) of FOISA.

## **Decision**

The Commissioner finds that the City of Edinburgh 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 James Taylor.

The Commissioner finds that the Council was entitled to withhold the legal advice under section 36(1) of FOISA.

However, by initially failing to provide information (the letter) which was later disclosed, the Council failed to comply with section 1(1) of FOISA. As the information has now been provided, the Commissioner does not require the Council to take any action in respect of this failure.

## **Appeal**

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Should either Mr James Taylor or the City of Edinburgh Council wish to appeal against this decision, they have the right to 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.

**Margaret Keyse**  
**Head of Enforcement**  
**17 June 2014**



## 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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- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

- (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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