

Decision Notice

Decision 084/2019: Mr V and the Scottish Social Services Council

Legal advice

Reference No: 201801807

Decision Date: 23 May 2019



Scottish Information
Commissioner

Summary

The SSSC was asked for external legal advice provided on the possibility of judicially reviewing a Fitness to Practice Hearing decision and the reason the advice was sought.

The SSSC advised the information was exempt from disclosure as it was subject to legal professional privilege. The Commissioner accepted this.

Relevant statutory provisions

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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 29 August 2018, Mr V made a request for information to the Scottish Social Services Council (the SSSC). He asked for information about Fitness to Practice Hearings, including the external legal advice provided on the possibility of judicially reviewing a panel decision, and the reason this advice was sought. There were other parts of the request not covered by Mr V's application.
2. The SSSC responded on 4 September 2018. The SSSC provided Mr V with some of the information he had requested, but, in relation to the information described above, informed him that any legal advice sought is privileged and confidential and exempt from disclosure under section 36 of FOISA. It therefore refused to provide the legal advice or the reason that it was sought.
3. On 13 September 2018, Mr V wrote to the SSSC, requesting a review of its decision not to disclose the above information. He provided reasons why he believed the public interest favoured disclosure.
4. The SSSC notified Mr V of the outcome of its review on 15 October 2018. The SSSC upheld its original decision without modification.
5. On 19 October 2018, Mr V wrote to the Commissioner. Mr V applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He stated he was dissatisfied with the outcome of the SSSC's review because he believed disclosure was in the public interest. He provided his reasons for this.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr V made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.

7. On 26 November 2018, the SSSC was notified in writing that Mr V had made a valid application. The SSSC was asked to send the Commissioner the information withheld from Mr V. The SSSC provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SSSC was invited to comment on this application and answer specific questions, focusing on the application of section 36(1) of FOISA to the information held.
9. The SSSC responded, maintaining that the information held relative to the legal advice and any reasoning as to why it was requested, was exempt from disclosure under section 36(1) of FOISA.

Commissioner's analysis and findings

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 him by both Mr V and the SSSC. He is satisfied that no matter of relevance has been overlooked.

Section 36(1) - Confidentiality

11. 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. This includes communications which are subject to legal professional privilege. Aspects of legal professional privilege are legal advice privilege and litigation privilege, both of which the SSSC argued applied in this case.
12. The SSSC submitted that the nature of the information requested and the context in which it was sought/given showed that it attracted legal professional privilege. It provided reasons for this.
13. In this regard, the SSSC referred to: *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 482*¹, where, SSSC submitted, Lord Scott provided a helpful analysis of the public policy reasons for legal professional privilege. It referred the Commissioner to paragraph 27 which states:

Legal advice is frequently sought or given in connection with current or contemplated litigation. But it may equally well be sought or given in circumstances and for purposes that have nothing to do with litigation. If it is sought or given in connection with litigation, then the advice would fall into both of the two categories.
14. The Commissioner will first of all consider whether the information is protected by legal advice privilege.
15. Legal advice privilege applies to communications between legal advisers and their clients, in the course of which legal advice is sought or given. The following conditions must be fulfilled for legal advice privilege to apply:
 - (i) The communications must involve a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser or an external solicitor engaged by the authority.

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

- (ii) The legal adviser must be acting in his/her professional capacity.
 - (iii) The communications must occur in the context of the legal adviser's professional relationship with his/her client.
16. Among other points, the SSSC submitted that this exemption applied to the information withheld because it all related to advice sought from or given by its solicitor. It explained that the information was given by or sought from the solicitor in their capacity as a professional legal adviser to the SSSC. It confirmed that the advice was provided in the context of the solicitor's professional relationship with the SSSC, as client. The SSSC provided evidence to that effect.
17. Having considered the content of all of the information withheld, and while not wishing to draw the concept of "relating to" communications with a legal adviser too broadly, the Commissioner is satisfied that all of the information withheld in this case relates directly to seeking and obtaining legal advice from a professional legal adviser, acting in that capacity. The Commissioner cannot comment on all of the submissions made by the SSSC, as to do so would require referencing the information that has been withheld, but the Commissioner is satisfied that this information meets the conditions set out in paragraph 15 above and so is subject to legal advice privilege.
18. Information cannot be privileged unless it is also confidential. It must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed: the information must possess the quality of confidence at that time, and so cannot have been made public, either in full or in a summary substantially reflecting the whole. The Commissioner is satisfied that this information remained confidential at the time the SSSC responded to Mr V's information request and requirement for review (and that it remains so now).
19. Given that the Commissioner is satisfied that the information falls to be considered as legal advice privilege, he is not required to consider whether the information would also attract protection by virtue of litigation privilege.
20. 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. 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 – section 36(1)

Submissions by the SSSC

21. The SSSC made reference to the Commissioner's guidance on the consideration of the public interest test², advising that it had considered the general public interest that information is accessible. It further advised that it had considered whether disclosure would contribute to the effective oversight of expenditure of public funds, or ensuring that any public authority with regulatory responsibilities is adequately discharging its functions. It submitted that disclosure would not contribute to any of these functions.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx>

22. The SSSC provided submissions relating to the nature and scope of the legal advice and how that impacted on the public interest argument. In doing so, it provided full reasoning as to the nature of, and why, the legal advice had been sought.
23. The SSSC made further submissions as to why the public interest favoured withholding the information in this particular case: the Commissioner cannot publish the SSSC submissions in detail without making reference to the actual information withheld. .
24. The SSSC also made reference to previous decisions by the Commissioner, in particular *Decision 023/2015 Mr David Emslie and Communities Scotland*³, stating that it wished to rely upon the public interest arguments submitted by the public authority in that case. It drew attention to the Commissioner's comment in that case, recognising that there would always be a strong public interest in maintaining confidentiality of communications between legal adviser and client and that disclosure of such communications would only be ordered in highly compelling cases. The SSSC further stated that, without comprehensive advice in the context of a given case, the quality of its decision-making as a regulator would be significantly reduced.

Submissions by Mr V

25. In his requirement for review, and in his application to the Commissioner, Mr V made submissions which focussed on concerns over the fairness of the SSSC's Fitness to Practice disciplinary hearing procedures. He stated that if the SSSC considered seeking a judicial review in regard to a decision made by the panel, it called into question the legitimacy and effectiveness of the SSSC's casework and the independence of the panel, and so the public interest favoured disclosure of the information requested. If the SSSC had sufficient concerns about its own processes to seek advice on a judicial review, but had then decided against seeking one, there was a public interest in knowing why.

The Commissioner's view

26. The Commissioner has considered carefully the representations made by both Mr V and the SSSC when assessing and balancing the public interest in this case. He has also fully considered the information withheld in this case.
27. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities and accepts that disclosure of the information would go some way to providing that transparency and accountability.
28. However, as the Commissioner has noted in a number of previous decisions, and as submitted by the SSSC, 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. In a Freedom of Information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB)⁴. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
29. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2005/200501380.aspx>

⁴ <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

compelling public interest in disclosing the information. A parallel might be drawn with the wider law of confidentiality, where the courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, or where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern. The Commissioner is satisfied that this is not the case here.

30. In this particular case, the Commissioner fully acknowledges the concerns of Mr V regarding the processes to which the legal advice would relate. While he also acknowledges the general public interest in transparency and accountability, the Commissioner is not satisfied (having considered the withheld information) that this public interest can outweigh the strong public interest in maintaining confidentiality between client and legal adviser in this case.
31. Having considered the public interest arguments advanced on both sides, therefore, 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 confidentiality of communications between legal adviser and client. Consequently, he accepts that the SSSC correctly withheld the information to which it applied section 36(1) of FOISA.

Decision

The Commissioner finds that the Scottish Social Services Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr V.

Appeal

Should either Mr V or the Scottish Social Services 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.

Daren Fitzhenry
Scottish Information Commissioner

23 May 2019

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.

...

- (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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Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info