

# Decision Notice

---

**Decision 009/2019: Mr Q and Dumfries and Galloway Council**

---

**Insurance investigation report**

Reference No: 201801691

Decision Date: 29 January 2019



Scottish Information  
Commissioner

## Summary

---

The Council was asked for a copy of an insurance investigation report.

The Council withheld the information on the basis that it was subject to litigation privilege. During the investigation some of the information was disclosed.

Following an investigation, the Commissioner found that the remaining information was not subject to litigation privilege and required the Council to disclose it.

## Relevant statutory provisions

---

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 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 17 August 2018, Mr Q made a request for information to Dumfries and Galloway Council (the Council). Mr Q sought a copy of an investigation report relating to a claim he made against the Council.
2. The Council responded on 12 September 2018. It stated that the information was exempt from disclosure under section 36(1) of FOISA, on the basis that a claim to confidentiality of communications could be maintained in legal proceedings.
3. On the same day, Mr Q wrote to the Council requesting a review of its decision. He did not accept that the information was exempt from disclosure.
4. The Council notified Mr Q of the outcome of its review on 5 October 2018. It upheld its previous decision without modification.
5. On 8 October 2018, Mr Q wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Q did not accept the Council's application of section 36(1) of FOISA, arguing that the Council had not given sufficient weight to the presumption in favour of disclosure, or considered the public interest test properly.

## Investigation

---

6. The application was accepted as valid. The Commissioner confirmed that Mr Q 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 8 November 2018, the Council was notified in writing that Mr Q had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Q. The Council 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 Council was invited to comment on this application and to answer specific questions, with specific reference to its application of section 36(1) of FOISA.
9. The Council provided Mr Q with a redacted version of the report in question during the investigation. The remaining redactions are now under consideration.

## **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 Q and the Council. He is satisfied that no matter of relevance has been overlooked.

### **Section 36(1) – Confidentiality**

11. The Commissioner's decision will consider whether the Council was correct to withhold information under section 36(1) of FOISA.
12. 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. One aspect of legal professional privilege is litigation privilege, which the Council argued applied in this case.
13. Litigation privilege (also known as "communications *post litem motam*") is a distinct aspect of legal professional privilege. It is wider than communications between solicitor and client. It applies to documents created in contemplation of litigation (legal action) and to communications when litigation is either pending or being considered.
14. Communications *post litem motam* are granted confidentiality 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 opponents, or prospective opponents, will gain access to the material generated by their preparations. The privilege covers communication 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 applies to documents created by the party contemplating the potential litigation, to expert reports prepared on their behalf and to legal advice given in relation to potential litigation.
16. The timing of the creation of the information will be relevant to whether litigation privilege applies. A general apprehension of future litigation or the possibility someone might, at some point in the future, raise a court action, is not sufficient.
17. The Council submitted that the document in question was only prepared following a claim to its insurer and, as such, would not exist if a claim had not been raised. The Council acknowledged that in this case no litigation had been indicated but it remained an option should the applicant be unhappy with the situation and decided to take the matter further. The Council referred to [Decision 213/2007](#) to support its position.
18. The Council provided Mr Q with a redacted version of the report during the Commissioner's investigation. The report consisted of a template public liability claim form. What remained

redacted from the form was the Council's response to the query as to whether the Council considered itself to be at fault in any way.

19. In his application to the Commissioner, Mr Q stated that he had been advised by the Council's insurers that the Council denied any negligence and hence responsibility. Mr Q provided the Commissioner with correspondence submitted to the insurance company, recounting a telephone conversation stating the basis on which the claim had been rejected.
20. The Commissioner considers that for information to be exempt under section 36(1), the information must not only have been prepared in contemplation of litigation, but must also be confidential. Information will cease to be confidential, with the result that the section 36(1) exemption can no longer be claimed, to the extent that it is disclosed in full or by way of a comprehensive summary.
21. The Council failed to provide any submissions to the Commissioner when questioned about loss of confidentiality in this instance.
22. The Commissioner is satisfied that there is nothing of substance in the information which remains withheld of which Mr Q has not been made aware already. As a consequence, the Commissioner cannot regard that remaining information as confidential and cannot accept the application of section 36(1) of FOISA to this information.
23. As he has concluded that the information sought by Mr Q is not exempt by virtue of section 36(1) of FOISA, he is not required to consider the application of the public interest test in section 2(1) of FOISA.

## Decision

---

The Commissioner finds that the Council failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Q.

By incorrectly relying on section 36(1) to withhold the information, the Council failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Council to provide Mr Q with the information redacted from the report, by **15 March 2019**.

## Appeal

---

Should either Mr Q or the 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.

## **Enforcement**

---

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**29 January 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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

#### 36 Confidentiality

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

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**