

Decision Notice

Decision 049/2019: Mr L and Stirling Council

Communications relating to a complaint

Reference No: 201802084

Decision Date: 28 March 2019



Scottish Information
Commissioner

Summary

The Council was asked for all correspondence about a complaint. The Council disclosed some information, but withheld other information.

The Commissioner found that the withheld information comprised legal advice which was exempt from disclosure.

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 7 August 2018, Mr L made a request for information to Stirling Council (the Council). He requested all correspondence regarding his complaint about a named employee in the following formats: letter, email, online form, fax, phone call records.
2. The Council responded on 3 September 2018. It withheld information under section 36(1) of FOISA, stating that it comprised confidential communications between legal adviser and client. The Council acknowledged a public interest in disclosing this information, to provide openness and transparency, but believed that there was a greater public interest in the Council being able to obtain legal advice without the advice then being disclosed, potentially prejudicing the Council's position.
3. The Council also stated that the information contained personal data relating to Mr L, exempt from disclosure under section 38(1)(a) of FOISA. The Council provided him with that information, explaining that the information was disclosed to him under data protection legislation, not under FOISA.
4. Later that day, Mr L wrote to the Council requesting a review of its decision. He stated that the Council had not provided the information he had requested: he said that his request was specific to information such as emails received by the named employee of the Council "and illegally forwarded to others without my consent." He required the Council to provide the "trail" of emails he had sent to the Council and to whom they had been forwarded. He reiterated that he required records of telephone calls made by the name employee. Mr L believed there was public interest in disclosure of the withheld information: in his view, it related to a breach of data protection legislation by the Council.
5. The Council notified Mr L of the outcome of its review on 1 October 2018. It told him that its original response had included "all the relevant information". The Council explained that it did not hold any letters, online forms or faxes relating to his request. As telephone calls were not recorded, it had no information relating to telephone call records. (The Council clarified that it was not claiming that no telephone calls took place with Mr L, but that none were recorded). The Council stated that all emails had been provided, with the exception of

communications between legal adviser and client. This information had been withheld by the Council, and it believed that the public interest favoured withholding that information.

6. On 1 October 2018, Mr L asked for details of the times of telephone calls. The Council replied on 3 October 2018 that this information was not recorded. Mr L then questioned whether such information was not required for cost and bills. The Council replied that there was no record of incoming or outgoing phone calls “from the location.”
7. On 16 October 2018, Mr L applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr L believed there was a public interest in transparency and the withheld information would allow him to pursue a legitimate interest arising from misconduct and breaches of the law by Council staff. He believed the information would prove his position. (In his application, Mr L did not express dissatisfaction relating to the absence of telephone records; accordingly, the Commissioner has not included this matter in his investigation and decision.)

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr L 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.
9. On 30 November 2018, the Council was notified in writing that Mr L had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr L. The Council provided the information and the case was allocated to an investigating officer.
10. 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.
11. The Council responded on 31 January 2019, and again – in reply to the investigating officer’s questions about searches - on 28 February and 4 March 2019.
12. Mr L was also invited to comment, and did so during the investigation.

Commissioner’s analysis and findings

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

Section 1 - General entitlement

14. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to certain qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.
15. The Council was asked to explain how it had established what recorded information it held falling within the scope of Mr L’s request.

16. The Council replied that extensive searches of email correspondence were carried out. Its enquiries had included teachers, administrative staff, and other staff from its Education Department, including senior managers. The Council had checked whether any staff involved with Mr L's complaint had kept handwritten notes and whether any additional information "was saved in any core IT systems."
17. On the question of whether Mr L's emails were forwarded to other parties, the Council was asked how it had established that it did not hold any information relating to this aspect of Mr L's request. The Council confirmed that it had spoken to the members of staff and reviewed the email accounts of those staff who had dealt directly with Mr L, and was satisfied that his emails had not been forwarded.
18. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information (or, in this case, more information) is not held.
19. Given the searches carried out by the Council, the Commissioner is satisfied, on the balance of probabilities, that the Council has identified all of the recorded information held by the Council that falls within the scope of his request.

Section 36(1) - confidentiality of communications

20. Section 36(1) of FOISA provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
21. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled:
 - (i) the information must relate to communications with a professional legal adviser, such as a solicitor or an advocate;
 - (ii) the legal adviser must be acting in their professional capacity; and
 - (iii) the communications must occur in the context of the legal adviser's professional relationship with their client.
22. The Council withheld correspondence between its Education Department and Legal Department. The Council explained that legal advice was requested from its Legal Department as Mr L had stated that he was taking legal advice at a time when he had already submitted a Stage 2 complaint and an information request.
23. Before information can attract legal advice privilege, it must be information for 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.
24. The Council said that the information was confidential and was not in the public domain, and was information to which a claim to confidentiality of communications could be maintained in legal proceedings. The Council acknowledged that two administrative emails – which were

not to or from a legal adviser – would not attract privilege, and said it would supply that administrative correspondence to Mr L, should he wish. The Commissioner understands that these emails have now been provided to Mr L, and the Commissioner will not consider them further.

25. In relation to the information withheld under section 36(1) of FOISA, after considering the content and the circumstances under which it was created, the Commissioner is satisfied that the information meets the conditions for legal advice privilege to apply.
26. First, the communications sought and provided advice from an in-house solicitor of the Council acting in a professional capacity, as a legal adviser.
27. Second, the communications took place within the context of that legal adviser's professional relationship with their client (the Council's staff, and therefore the Council).
28. Finally, the Commissioner accepts that the information was, and remains, confidential. The response from the legal adviser states that it is strictly confidential. There is no evidence that the information in the emails has been disclosed publicly or to others such that it would lose its confidentiality.
29. The Commissioner therefore accepts that the information falls within the terms of section 36(1) of FOISA.
30. 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. The exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in withholding it.

The public interest

31. The Council submitted that the public interest in withholding the legal advice outweighed the public interest in disclosure. The Council submitted that there was a strong public interest, which the courts have recognised, in maintaining confidentiality of communications between a legal adviser and their client:

“This strong inherent public interest in maintaining legal professional privilege on administration of justice grounds was emphasised by the English case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164¹ which the Commissioner has in previous decisions accepted would be followed in Scotland.”

32. While the Council said that there were occasions when the public interest test favoured disclosure, it said these were appropriate only where:
 - (i) the privileged material discloses wrongdoing by/within an authority;
 - (ii) the material discloses a misrepresentation to the public of advice received;
 - (iii) the material discloses an apparently irresponsible and wilful disregard of advice;
 - (iv) a large number of people are affected by the advice; or
 - (v) the passage of time is so great that disclosure cannot cause harm.

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

33. The Council took the view “that there are no circumstances in this matter which reverses the stronger public interest that confidential legal advice should not be disclosed”.
34. The issue for the Commissioner is whether the public interest in disclosing the legal advice outweighs the public interest in maintaining the exemption in section 36(1) of FOISA.
35. The Commissioner accepts that disclosure of the legal advice would increase transparency, in relation to the Council’s actions and decisions. Disclosure would allow Mr L and the public to see and assess advice given by the Council’s legal adviser. The Commissioner accepts there is, to some extent, a public interest in disclosure of the legal advice in terms of accountability and transparency with respect to the Council's actions as a public authority.
36. The public interest in disclosure of the legal advice must be balanced against the public interest in maintaining the right to confidentiality of communications between legal adviser and client. As the Council submitted, 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.
37. 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 cited by the Council (see paragraph 31)². Generally, the Commissioner will consider the High Court’s reasoning to be relevant to the application of section 36(1) of FOISA.
38. The Commissioner accepts that disclosing the legal advice would have a restraining and suppressive effect, and would hamper the ability of staff within the Council to communicate freely, frankly and fully with the Council’s legal advisers. There is a strong public interest in a Scottish public authority being able to receive, unhindered, full legal advice. Without such comprehensive advice being available to the Council, its ability to make fully informed decisions would be restricted, which would not be in the public interest. There is a significant public interest in maintaining the right to confidentiality of communications between legal adviser and client (even where the client is public authority) on administration of justice grounds.
39. The Commissioner has considered fully the submissions and the withheld information itself. After careful consideration, the Commissioner is satisfied that none of the considerations referred to by the Council in paragraph 32 (which the Commissioner in past decisions has acknowledged as relevant) or any others of comparable weight apply here, in relation to the information withheld under section 36(1).
40. On balance, the Commissioner is satisfied, in all the circumstances of this case, that the public interest in disclosure of this information is outweighed by the public interest in maintaining the exemption in section 36(1). He has concluded that the Council was entitled to withhold the information under section 36(1) of FOISA.

² <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

Decision

The Commissioner finds that, in respect of the matters specified in the application, Stirling Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr L.

Appeal

Should either Mr L 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.

Margaret Keyse
Head of Enforcement

28 March 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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