

Decision Notice

Decision 193/2018: Ms R and East Lothian Council

Review of the governance of the Musselburgh Joint Racing Committee

Reference No: 201800629

Decision Date: 22 November 2018



Scottish Information
Commissioner

Summary

The Council was asked for the review of the governance of the Musselburgh Joint Racing Committee carried out by the legal firm, Pinsent Masons.

The Council advised that the information was subject to legal professional privilege. During the investigation, the Council disclosed some information from the Pinsent Masons' review. Two withheld sections of the Pinsent Masons' review remained of interest to the applicant. Following an investigation, the Commissioner accepted that this information 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 6 July 2017¹, the British Horseracing Authority (BHA) confirmed that the Musselburgh Joint Racing Committee (the MJRC) and East Lothian Council (the Council) had agreed to an independent governance review. The BHA issued a temporary licence until 31 December 2017², which was extended to 16 October 2018³. The law firm Pinsent Masons were selected to conduct the independent review. The review was submitted to the Council in December 2017. The Council has now accepted the review⁴.
2. On 16 February 2018, Ms R asked the Council for a copy of the Pinsent Masons' review of the governance of the MJRC.
3. The Council responded on 23 March 2018. It stated that the Pinsent Masons' review was exempt under section 36(1) of FOISA, as it was prepared by a law firm and contained legal opinion and advice as to the merits and/or appropriateness of potential scenarios. As such, it considered that the Pinsent Masons' review was subject to legal advice privilege.
4. On 23 March 2018, Ms R emailed the Council requesting a review of its decision. She commented that the race course facility is on Common Good Land and has been run as a not-for-profit organisation, and argued that the public interest in disclosure outweighed any legal exemption.
5. The Council notified Ms R of the outcome of its review on 10 April 2018. It upheld its previous decision without amendment.

¹ https://www.britishhorseracing.com/press_releases/bha-update-regarding-musselburgh-racecourse/

² https://www.britishhorseracing.com/press_releases/musselburgh-racecourse-issued-temporary-licence/

³ https://www.britishhorseracing.com/press_releases/musselburgh-racecourse-granted-temporary-licence-16-october/

⁴ https://www.eastlothian.gov.uk/news/article/12553/securing_the_future_of_musselburgh_racecourse

6. On 10 April 2018, Ms R applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms R was dissatisfied with the outcome of the Council's review. She considered it was in the public interest to know what the Pinsent Masons' review found (her reasons are given in detail later in this decision notice).

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Ms R 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.
8. On 16 May 2018, the Council was notified in writing that Ms R had made a valid application. The Council was asked to send the Commissioner the information withheld from Ms R. The Council provided the information and the case was allocated to an investigating officer.
9. 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 answer specific questions on any exemptions it considered applicable to the information requested. The Council responded on 28 June 2018.
10. The investigating officer entered into dialogue with the Council as to whether the exemption in section 36(1) of FOISA applied to the Pinsent Masons' review in its entirety: the investigating officer noted that some of the information within the Pinsent Masons' review was factual in nature, while other information had been published.
11. On 31 August 2018, the Council disclosed a redacted version of the Pinsent Masons' review to Ms R.
12. Ms R identified two redacted sections within the Pinsent Masons' review that remained of interest to her and explained why she considered the public interest test favoured disclosure of this information. She confirmed that she did not require the Commissioner to reach a decision on the information within the Pinsent Masons' review that had previously been withheld but was now disclosed.
13. The Council was also given an opportunity to provide further submissions as to why it considered two sections of the Pinsent Masons' review to be exempt from disclosure. The Council responded on 18 October 2018.

Commissioner's analysis and findings

14. 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 Ms R and the Council. He is satisfied that no matter of relevance has been overlooked.

Section 36(1) - Confidentiality

15. The Commissioner's decision will consider whether the Council was correct to withhold information under section 36(1) of FOISA, from the two sections of the Pinsent Masons' review which remained of interest to Ms R.
16. 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 legal advice privilege, which the Council argued applied in this case.

17. 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;
 - (ii) The legal adviser must be acting in his/her professional capacity; and
 - (iii) The communications must occur in the context of the legal adviser's professional relationship with his/her client.
18. Amongst other points, the Council submitted that there was a requirement to engage a legal firm to provide the Governance Review as it was identified by both the Lothian Racing Syndicate (LRS) and the Council that the key issues were legal in nature and may result in legal advice being provided as part of the Pinsent Masons' review.
19. Later in the investigation, the Council submitted that remaining withheld information comprised legal advice that impacts either on the original structure of the MJRC or how the Council may wish to proceed with a summary of consequences on these actions.
20. Not all of the Council's submissions can be included here, as to do so would reveal the substance of the legal advice.
21. Ms R disputed that the information should be withheld under the exemption, arguing that, as the Council had dismissed all the other options, they should not now be kept secret. She also noted that the MJRC is no longer in existence, and queried whether the exemption applied to the withheld information or whether it was simply the case that there was an issue with the [legal] status of the structure of the MJRC and that it would be embarrassing to the Council if such information was disclosed.
22. Having considered the content of the withheld information and the circumstances under which it was obtained, the Commissioner is satisfied that the information meets the conditions, set out above, for legal advice privilege to apply. The Commissioner accepts that the information which has been withheld comprises legal advice from a legal firm acting in their professional capacity and communicating with their client (the Council) in the context of that professional relationship.
23. 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.
24. The Commissioner's decision is based on the circumstances that existed at the date of the review response, which in this instance is 10 April 2018. He notes that the Council adopted

the recommendations of the Pinsent Masons' review by 27 February 2018⁵, but the details of the recommendations had not been made public at the time of its review response.

25. He also notes that it was not until after the Council responded to Ms R's requirement for review on 10 April 2018 that it issued a new Minute of Agreement at its meeting on 24 April 2018⁶ regarding the Musselburgh Racing Associated Committee. Although a new Agreement had been issued, and it might be surmised that comments on the status of the MJRC formed part of the legal advice within the review, the actual content of the advice within the review has not been made public and was still confidential at the date the Council responded to Ms R's requirement for review.
26. The Commissioner is therefore satisfied that the information under consideration remained confidential at the time the Council responded to Ms R's information request and requirement for review.
27. For the reasons above, the Commissioner is satisfied that the exemption in section 36(1) of FOISA is engaged. This 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 Council

28. The Council stated that the Musselburgh Racecourse had been widely publicised over the previous year. The Council considered that there is "clearly a continued interest to the public" in the future of the racecourse. It stated that the public should be informed of the issues surrounding the racecourse as the operation is situated on Common Good Land and has an effect on the residents of Musselburgh and the larger East Lothian Region.
29. The Council noted that matters had progressed since the Pinsent Masons' review, and some information had been made public.
30. However, the Council considered it was not in the public interest for the Pinsent Masons' review to be disclosed as it includes details which could have a direct effect on the staff of the racecourse. The Council did not believe that these issues should be played out in public and stated that the consequences of putting such information into the public domain "may lead to potential issues in terms of the status of the employees employment to date" and "may raise further issues relating to commercial contracts and ventures which have been entered into by the MJRC".
31. The Council provided other reasons why disclosure would not be in the public interest. As these reasons relate to the legal advice in the Pinsent Masons' review, the Commissioner will not summarise or discuss them here. The Council concluded that, on balance, the public

⁵ <https://www.bbc.co.uk/sport/horse-racing/43219786>

⁶ https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiplt_3-q3eAhUMIMAKHUGLBIkQFjAAegQIBxAC&url=https%3A%2F%2Fwww.eastlothian.gov.uk%2Fdownload%2Fmeetings%2Fid%2F19638%2F08_musselburgh_racecourse_-_governance_review&usq=AOvVaw3A2Vmm32icsko1wWbvxD-w

interest upholding legal advice privilege outweighed the public interest in disclosing this information.

Submissions by Ms R

32. Ms R noted that Musselburgh Racecourse operates on Common Good Land and has to date been a not-for-profit facility. It provides income to the Council from the lease of the land and is an integral part of the Musselburgh community both in the business it brings into the town on race days and through several charity events which are held there each year.
33. Ms R stated that, in February 2018, the Council replaced the MJRC with a new Musselburgh Racing Associated Committee, stating employees would now be Council employees. It was now an associated committee of the Council. The public were told that this decision was made on the recommendation of the Pinsent Masons' review, which had not been published.
34. In June 2018, the Council announced that future operations of the racecourse were being put out for procurement to a third party operator – again, on the recommendations of the unpublished Pinsent Masons' review. Ms R considered that, if the Council was asking third party operators to take over operations at the racecourse, then it had a duty to publish the Pinsent Masons' review so all interested parties were fully aware of the issues in its history.
35. Given the importance of the racecourse to Musselburgh and East Lothian, Ms R considered that there is public interest in disclosing the Pinsent Masons' review, "particularly since the Council is making decisions about its future and that of its employees on the back of the report".

The Commissioner's view

36. The Commissioner has considered carefully the representations made by both Ms R and the Council when assessing and balancing the public interest in this case. He has also fully considered the information withheld in this case.
37. As part of its submissions on the public interest test, the Council explained the consequences of disclosing the legal advice and the issues it had identified in the set-up of the MJRC. The Commissioner cannot expand upon these matters, as to do so would risk disclosing the withheld legal advice. Even though certain facts may be known about Pinsent Mason's review, the remaining withheld information retains its confidential nature and it would not be in the public interest to disclose such information.
38. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities, and that disclosure of the information would go some way towards providing that transparency and accountability. He is cognisant of the importance of the racecourse to the local community, the people it employs and the members of the public who visit the racecourse on a regular basis. The Commissioner acknowledges a significant public interest in the public being informed about recommendations for the racecourse, given its importance to the local community.
39. However, there is a strong inherent public interest, recognised by the courts, 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). Generally, the

Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.

40. 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 compelling public interest in disclosing the information. The Commissioner is aware that the status of the MJRC and its future is a significant matter of interest and concern to both the local and horse racing communities.
41. However, having considered the public interest arguments advanced on both sides, 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, he accepts that the Council correctly withheld the information under section 36(1) of FOISA.

Decision

The Commissioner finds that the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Ms R.

Appeal

Should either Ms R 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

22 November 2018

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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