



Scottish Information
Commissioner

**Decision 209/2007 - Mr Adam Ingram MSP and the Scottish
Parliamentary Corporate Body**

*Legal advice to Presiding Officer on legislative competence of a private member's
Bill*

**Applicant: Mr Adam Ingram MSP
Authority: Scottish Parliamentary Corporate Body
Case No: 200700120
Decision Date: 8 November 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Legal advice to Presiding Officer on legislative competence of private member's Bill – section 25 (Information otherwise accessible) – section 30(b)(i) (Prejudice to effective conduct of public affairs) – section 36(1) (Confidentiality) – section 38(1)(b)(Personal information) of FOISA

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002: sections 1 (General entitlement); 2(1), (2)(a) and (e) (Effect of exemptions); 25(1) (Information otherwise accessible); 30(b)(i) (Prejudice to effective conduct of public affairs); 36(1)(Confidentiality) and 38(1)(b) and (2) (Personal information)

Data Protection Act 1998: section 1(1) (Basic interpretative provisions) (definition of "personal data"); section 10(1) and (3) (Right to prevent processing likely to cause damage or distress); Schedule 1 Part I (The data protection principles) (the first data protection principle) and Schedule 2 condition 6(1) (Conditions relevant for purposes of the first principle: processing of any personal data)

Scotland Act 1998: sections 29(1) (Legislative competence) and 31 (Scrutiny of Bills before introduction)

The full text of each of these provisions is reproduced in Appendix 1 to this decision. Appendix 1 (and Appendix 2 – referred to below) forms part of this decision.

Facts

Mr Ingram requested information relating to the Civil Appeals (Scotland) Bill and the decision not to proceed with the Bill from the Scottish Parliamentary Corporate Body (the SPCB). After seeking clarification of the request, the SPCB withheld the legal advice given to the Presiding Officer and also the identity of the person who had provided this advice.

Following an investigation, the Commissioner found that the SPCB had been correct to withhold the actual legal advice, but ordered the SPCB to release the identity of the person who had given the advice.



Background

1. On 30 November 2006, Mr Ingram wrote to the SPCB requesting all communications (including drafts) related to the Civil Appeals (Scotland) Bill and the decision not to proceed with the Bill. Mr Ingram described the searches that he wished to be carried out to ascertain what information would fall within his request. (A full copy of Mr Ingram's request is set out in Appendix 2 to this decision.)
2. The SPCB subsequently asked Mr Ingram to clarify his request. He did so, explaining that his request was for information on how the statement of legislative competence was arrived at, and in particular, "the provenance and substance of the legal advice and argument being particularly relevant".
3. On 19 December 2006, the SPCB wrote to Mr Ingram issuing a refusal notice which stated that the information he had requested was exempt under section 36(1) of FOISA. The SPCB stated that the provision of legal advice to the Presiding Officer is information which falls within the terms of section 36(1) and gave reasons as to why it considered the public interest to be in withholding the legal advice.
4. On 21 December 2006, Mr Ingram wrote to the SPCB requesting a review of its decision. Mr Ingram commented that he considered that the public interest lay in legal advice to the Presiding Officer being available to parliamentarians and that withholding such advice prevented members of the Justice 2 Committee properly debating the Civil Appeals (Scotland) Bill.
5. Mr Ingram made a subsequent request to the SPCB on 11 January 2007 about the chronology of the legal advice.
6. On 22 January 2007, the SPCB notified Mr Ingram of the outcome of its review. The review upheld the original decision that the information was exempt in terms of section 36(1) of FOISA, but also stated that the information was exempt under section 30(b)(i) on the basis that disclosure would inhibit substantially the free and frank provision of advice to the Presiding Officer and affect the ability of the Presiding Officer to perform his statutory function in relation to Bills at or before their introduction to the Scottish Parliament. No specific arguments were made at this stage as to where the public interest lay in relation to this exemption.
7. The SPCB provided Mr Ingram on 24 January 2007 with information in respect of his second request, i.e. the order of events leading to the legal advice.



8. On 24 January 2007, Mr Ingram wrote to my Office, stating that he was dissatisfied with the outcome of the SPCB's review and applying to me for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Mr Ingram had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.
10. On 5 February 2007, the SPCB was notified in writing that an application had been received from Mr Ingram and was asked to provide my Office with certain items of information required for the purposes of the investigation. The SPCB responded with the information requested and the case was then allocated to an investigating officer.

The Investigation

11. Section 31(2) of the Scotland Act 1998 ("the 1998 Act") imposes a duty on the Presiding Officer to decide on or before the introduction of a Bill whether the provisions in the Bill would be within the legislative competence of the Parliament. Section 31(3) of the 1998 Act states that the form or any statement etc. is to be determined under standing orders. Rule 9.3.1 of the Standing Orders of the Parliament provides that a Bill shall, on introduction, be accompanied by a written statement signed by the Presiding Officer which shall (a) indicate whether or not in his or her view the provisions of the Bill would be within the legislative competence of the Parliament; and (b) if in his or her view any of the provisions would not be within legislative competence, indicate what those provisions are and the reasons for that view. The Standing Orders can be viewed at:

<http://www.scottish.parliament.uk/business/so/sto-4.htm>

12. A member's Bill is a public Bill introduced by a MSP who is not a member of the Scottish Ministers. The Civil Appeals (Scotland) Bill, which was introduced by Mr Ingram, can be read at:

<http://www.scottish.parliament.uk/business/bills/77-civilappeals/b77s2-introd.pdf>

This proposed Bill was in respect of the creation of a final right of civil appeal to a Civil Appeals Committee in the Court of Session and the abolition of the right of civil appeal in Scotland to the House of Lords.



13. During the investigation, the SPCB explained that the Parliament's Non-Executive Bills Unit (NEBU) sponsors a number of Bills in each Parliamentary session and assists in developing the policy and drafting of such Bills. The Civil Appeals (Scotland) Bill was such a Bill.
14. As noted above, the Standing Orders (rule 9.3.1) of the Parliament require that a Bill is accompanied on introduction by a written statement signed by the Presiding Officer as to whether or not the provisions of the Bill would be within the legislative competence of the Parliament. Accordingly, the Presiding Officer has no function of advising a member as to whether or not his bill would be within competence; his function is to give a statement which is available to the whole Parliament, and indeed the wider public, to comply with section 31(2) of the 1998 Act and rule 9.3.1 of the Standing Orders.

The Commissioner's Analysis and Findings

15. In his application to me for a decision, Mr Ingram expressed dissatisfaction with the SPCB's refusal to disclose the information he had requested and asked that he receive the legal advice given to the Presiding Officer, the date when it was given and by whom it was given.
16. The SPCB has stated that in replying to Mr Ingram's second information request, they have already provided the date when the advice on legislative competence was given to the Presiding Officer. The SPCB supplied my Office a copy of this letter and having seen this letter I am satisfied that the SPCB has provided this information to Mr Ingram.

Scope of request

17. The SPCB questioned whether the wording of Mr Ingram's request could be interpreted as including the identity of the person who had provided the advice to the Presiding Officer. When Mr Ingram clarified his response at the request of the SPCB, he said that the provenance and substance of the legal advice was particularly relevant. The SPCB interpreted the word "provenance" as meaning the Legal Directorate, on whose behalf the advice had been given, and not the identity of the particular individual who had given the legal advice. However, if I did consider that the identity of the individual fell within the terms of the request, then the SPCB argued that the identity would be exempt under sections 36(1), 38(1)(b) and/or 30(b)(i) of FOISA.



18. During the investigation my Office contacted Mr Ingram and he confirmed that his initial request, clarification, review and application to my Office had been with the intent to establish the identity, in the sense of the name and position, of the legal adviser to the Presiding Officer for this specific advice in respect of the Civil Appeals (Scotland) Bill.
19. Having read Mr Ingram's full information request (only a summary of which is given at paragraph 1 above; the full text is given in Appendix 2) – and also Mr Ingram's clarification and review correspondence – I am of the view that the request can be reasonably interpreted as requesting the identity of the adviser in sense of the name and position of the person who gave the advice.

Section 36(1) - confidentiality of communications

20. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communication could be maintained in legal proceedings. One type of communication which falls into this category is communications which are subject to legal professional privilege. Legal professional privilege can itself be split into two categories – legal advice privilege and litigation privilege (also known as communications post litem motam). It is the first of these categories, legal advice privilege, which is relevant here. It covers communications between lawyers and their clients, where legal advice is sought or given.
21. The information withheld from Mr Ingram by the SPCB is legal advice, which was prepared in confidence by the Directorate of Legal Services of the Scottish Parliament and made available to the Presiding Officer, on the legislative competence of the proposed Civil Appeals (Scotland) Bill. I am therefore satisfied that the information withheld relates to communications with a legal adviser, i.e. it is legal advice given from solicitor to client.
22. The Directorate of Legal Services provides a parliamentary legal service. In relation to the Parliament's legislative activity, the legal advisers of the Directorate are involved in aspects of the passage of primary and secondary legislation. For primary legislation, the legal advisers have a role in advising the Presiding Officer in the exercise of his statutory function under the 1998 Act and this includes giving a view on whether a Bill, at introduction, is within the Parliament's legislative competence.
23. Legal advice is provided to the Presiding Officer, as client, to enable him to fulfil his statutory duty in terms of section 31(2) of the 1998 Act. Accordingly, I am satisfied that the advice is information which relates to communications from a legal adviser acting in his/her professional capacity and is in the context of his/her professional relationship (with the Presiding Officer). Unless the client has taken steps to waive this privilege (and I will consider this point below), I will find that the advice is exempt in terms of section 36(1) of FOISA.



Waiver of privilege?

24. During the investigation, the SPCB was invited to provide submissions on whether the Presiding Officer had waived privilege by “deploying” the legal advice. If I concluded that there had been waiver, the claim to confidentiality of communications could not be maintained in legal proceedings, as required by section 36(1). In this case, the issue is whether partial disclosure of, or public reference to, the confidential advice has given rise to an implied waiver of confidentiality in relation to the whole of the advice.
25. During the investigation, the SPCB provided my Office with a letter of 17 August 2006 written by an official involved with the NEBU of the Scottish Parliament to Mr Ingram. This letter refers to legal advice on the lack of competency for the Parliament to legislate in the terms of the proposed Bill. If this was the same legal advice which the SPCB was withholding from Mr Ingram, then it was possible that the privilege in the advice had been waived as a result of it being relied on in a letter to Mr Ingram. I therefore questioned the SPCB on this point.
26. The SPCB responded that the legal advice referred to in the letter of 17 August 2006 was not the legal advice which it was seeking to withhold from Mr Ingram. It noted that Mr Ingram had asked for information on “how the statement of legislative competence was arrived at...” The legal advice referred to in the letter of 17 August 2006 related to legal advice to Mr Ingram given during the drafting of the Bill by the NEBU in terms of the assistance it provides to MSPs highlighted in paragraph 13 above. It was therefore distinct in type from, and pre-dated, the information sought by Mr Ingram in his request.
27. I accept the submissions from the SPCB that the legal advice given to the Presiding Officer was not, and could not have been, deployed in the letter to Mr Ingram from NEBU and that there has been no waiver of confidentiality in regard to the legal advice to the Presiding Officer on this Bill.
28. I am therefore satisfied that the legal advice is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, I am of the view that the actual legal advice is exempt in terms of section 36(1) of FOISA.
29. The exemption in section 36(1) is subject to the public interest test as required by section 2(1)(b) of FOISA, and I must go on to consider whether, in all the circumstances of the case, the public interest in the release of the information is outweighed by the public interest in maintaining the exemption. However, I will first of all consider the position of the identity of the legal adviser.



Identity of adviser

30. The SPCB submitted that the identity of the legal adviser fell within the terms of section 36(1). I have considered the submissions provided by the SPCB on this point and I am not convinced that the identity of the person who provided the advice would fall within the types of information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.
31. Legal professional privilege is an example of a relationship which can produce documents which fall within the terms of section 36(1). Case law explains that the purpose of legal professional privilege is to allow a client to make full disclosure to a solicitor without fear that disclosure of their communications might subsequently be made against his/her will. Legal professional privilege only applies to communications made for the purpose of seeking and receiving legal advice, and generally a court would consider the function and nature of the documents before it.
32. So, for example, there is case law which suggests that a record of time on an attendance note, time sheet or fee record could not be regarded as a communication and was also not concerned with obtaining legal advice. So, while a record of an appointment might be regarded as involving a communication between a solicitors and client, it would not normally be treated as being made in connection with legal advice.
33. For example in the case of *R v Manchester Crown Court ex parte Rogers* [1988] QB 579, it was held that a record of an attendance at a solicitor's office by a client for an appointment, which must involve giving the name of the client, was a communication between client and solicitor, but not one that attracted legal professional privilege. Lord Bingham CJ considered (at page 839), the function and nature of the document with which the court was concerned, and he concluded that:

"It records nothing which passes between the solicitor and the client and it has nothing to do with obtaining legal advice. It is the same sort of record as might arise if a call were made on a dentist or a bank manager. A record of an appointment made does involve a communication between the client and the solicitor's office but is not in my judgment, without more, to be regarded as made in connection with legal advice. So to hold would extend the scope of legal privilege far beyond its proper sphere ..."
34. That decision was considered in the case of *R on the Application of Miller Gardner Solicitors v. Minshull Street* [2002] EWHC 3077 Admin where it was stated [at 20]:



“That decision provides strong support, for the proposition that the provision of an individual's name, address and contact number cannot, without more, be regarded as being made in connection with legal advice. It records nothing which passes between the solicitor and client in relation to the obtaining of or giving of legal advice. Taking down the name and telephone number is a formality that occurs before the legal advice is sought or given. As my Lord observed during argument, providing these details does no more than create the channel through which advice may later flow: see in this regard the case of *Studdy v Sanders and others* [1823] 2 D and R 347.”

35. Whilst this application is different in some respects, I think that there are similarities. Such a communication (the identity of the adviser) does not in any way reveal the substance of the matter about which the advice is to be sought. There was no indication that specialist external advice might be sought where the identity of the adviser may disclose concerns or lack of specialism within the SPCB about an issue. No evidence or authority has been brought to my attention which decides that the identity of the legal adviser, where it is known that legal advice has been sought, would fall within the terms of being a communication which attracts legal privilege.
36. Accordingly I do not consider that the identity of the legal adviser can be said to fall within the terms of section 36(1). In considering the public interest test, I will therefore concentrate on the actual advice, rather than the name and position of the legal adviser.

The Public Interest test

37. As I have stated in previous decisions, 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 and there are many judicial comments on the fundamental nature of this confidentiality to our legal system. Many of the arguments in favour of maintaining confidentiality of communications were discussed in *Three Rivers District Council and Others v Governor and Company of the Bank of England* (2004) UK HL 48:

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

38. In *Decision 023/2005 - Mr David Emslie and Communities Scotland*, I concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, while I will consider each case on an individual basis, I am likely only to order the release of such communications in highly compelling cases.



39. The public interest arguments favouring release of the legal advice include:
- enhancing scrutiny of the legality of the actions of a public body and, by extension, effective oversight of expenditure of public funds and obtaining value for money. The public interest argument of Mr Ingram is based on enhanced scrutiny i.e. that publication of the legal advice to the Presiding Officer on legislative competence will allow the public to assess the legal advice;
 - that disclosure of the advice would make a significant contribution to debate on a matter of public interest;
 - that there could be said to be a general public interest in this Bill, given that there were texts suggesting that such a proposed bill was competent;
 - that there is not a method of legal challenge of the Presiding Officer's duty: the SPCB advise me that the 1998 Act provides no mechanism for the Presiding Officer's views on legislative competence to be challenged in the courts or to be debated in the Scottish Parliament.
40. The public interest arguments favouring withholding the legal advice include:
- that an authority or person should be permitted to communicate its position to its advisers fully and frankly in confidence, in order to obtain the most comprehensive legal advice to defend its position adequately should that become necessary;
 - it is in the public interest for a public authority to receive/give the most comprehensive legal advice about its proposed actions;
 - that, according to the SPCB, there could not be said to be a general public interest in this Bill, and that the interest would mainly be that of academic lawyers;
 - that there exists a means of scrutiny of the Presiding Officer's fulfilment of his duties: that the constitutional position has been created to allow scrutiny of the Presiding Officer's decision i.e. that he/she is required to provide a statement on legislative competence;
 - that there are procedures available for an MSP who is dissatisfied with the way in which a Bill was dealt with after the Presiding Officer's statement: for example, contacting the Procedures Committee setting out his concerns about the relevant Standing Orders;



- disclosure of legal advice so directly connected to the Presiding Officer's function would have a restraining and suppressive effect and would substantially hamper the ability of the Presiding Officer to communicate freely, frankly and fully with his legal advisers about the competence of a Bill being introduced in Parliament and would affect the core business of the Parliament and the scheme for devolution as set out in the 1998 Act.
41. The SPCB also highlighted that any legal advice to the Presiding Officer is simply advice and it is the Presiding Officer who would make a decision on the basis of the advice and that decision could involve acceptance or rejection of that advice.
 42. As noted above, 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 and there would require to be compelling countervailing arguments for disclosure to outweigh that public interest.
 43. I take the view that for the disclosure of information to be in the public interest it needs to be in the interest of the public for it to be released. In this case, the information relates to advice on the competence of a proposed members Bill in respect of the creation of a final right of civil appeal to a Civil Appeals Committee in the Court of Session and the abolition of the right of civil appeal to the House of Lords. The SPCB submitted in this respect, that there could not be said to be a general public interest in this Bill, and that the interest would mainly be that of academic lawyers. I believe that the issue of legislative competence generally, and in particular to this Bill, *is* of public interest but that the question of whether legal advice in relation to this competence should be disclosed is a different matter.
 44. In respect of Mr Ingram's proposition that release of the advice would allow enhanced scrutiny, I have already noted that the Presiding Officer has a duty (in terms of Rule 9.3.1(b) of the Standing Orders of the Parliament) to provide reasons why any provision of a Bill is outwith the competence of Parliament. The Scottish Parliament referred me to the following public document which does this in relation to the Civil Appeals (Scotland) Bill:

<http://www.scottish.parliament.uk/business/bills/77-civilappeals/b77s2-introden.pdf>
 45. The SPCB argued that to disclose the legal advice would unreasonably expose legal positions to challenge and it may diminish the range and quality of that advice which would damage the quality of the Presiding Officer's decision making. I agree with the SPCB that releasing the legal advice would expose the legal advice offered and would inhibit others from offering such advice in the future. It is important for officials to be able to obtain such legal advice in confidence.



46. Having carried out a balancing exercise, in my opinion, the public interest in the release of the information is outweighed by the public interest maintaining the exemption, i.e. in ensuring that the SPCB can discuss relevant issues and give and receive legal advice in confidence. Without such comprehensive advice, the quality of decision making of the Presiding Officer would be restricted, which would not be in the public interest.
47. Whilst I recognise that there are reasons which might justify disclosing the legal advice to Mr Ingram, in this instance I do not consider that they are so highly compelling as to outweigh the public interest in the confidentiality of legal communications. Therefore, I am satisfied that on this occasion the SPCB correctly applied the public interest test in withholding the document that contained the legal advice.
48. The SPCB has also relied on the exemption in section 30(b)(i) to withhold the legal advice from Mr Ingram. Having decided that section 36(1) applies to the legal advice, I shall not consider the exemption in section 30(b)(i) in respect of the advice. As noted above, however, I will consider the position of the identity of the legal adviser under section 30(b)(i). (I will then go on to consider the identity of the adviser in relation to the exemption in section 38(1)(b).)

Application of section 30(b)(i) – Prejudice to effective conduct of public affairs

49. Information is exempt from release under section 30(b)(i) if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice.
50. As with section 36(1), the exemption under section 30(b)(i) of FOISA is subject to the public interest test required by section 2(1)(b) of FOISA.
51. In accordance with section 29(1) of the 1998 Act, an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. In other words, legislative provisions which are outwith the competence of the Parliament are void. Accordingly, decisions on competence taken by the Presiding Officer are of vital constitutional importance. It follows, the SPCB submitted, that the Presiding Officer requires confidential legal advice to enable him to reach and articulate his decision on legislative competence.
52. The standard to be met in applying the test contained in section 30(b)(i) is high. In applying this exemption, the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would, or would be likely to, inhibit substantially the provision of advice. As I have referred to previously, the word “inhibit” suggests a suppressive effect, so that communication would be less likely, more reticent or less inclusive.



53. The SPCB has argued that if the identity of the adviser were to be released, there would be a focus on the adviser and that there might arise an erroneous impression that the same person always advises the Presiding Officer. The SPCB also commented that it is not the individual who is responsible for the provision of legal advice to the Presiding Officer, but that that responsibility lies with the Head of the Directorate. Identities are, according to the SPCB, given to provide a point of contact for the Presiding Officer. As a result, the free and frank provision of advice, and particularly legal advice, would, or would be likely to be, substantially inhibited.
54. However, I do not accept the argument that an official – in this instance a legal adviser – would feel constrained from offering full and frank advice on future occasions if they were concerned that their identity would be made public in such circumstances, especially where, as in this case, the content of the legal advice is not being disclosed. The legal adviser is a professional adviser and, as a member of the Law Society of Scotland, has certain professional duties to their client.
55. As I have said in earlier decisions on section 30(b), for example *Decision 089/2007 - Mr James Cannell and Historic Scotland*, I look for authorities to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing advice and/or views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.
56. However, I need to go on to consider whether the views or advice expressed by officials would be less free and frank in the future were the identity of the individual to be released. The Presiding Officer is under a statutory duty in respect of ensuring legislative competence and it is known, and expected, that he will take in respect of proposed Bills. It seems to me that legal advice of this kind forms an essential part of the process. It does not seem to me to be possible for such advice not to be given in future or that the quality of the advice would be adversely affected were the identity of the legal adviser to be known.
57. As I have said in *Decision 131/2007 - Mr Anthony Cannon and the Scottish Public Pensions Agency* there are a whole range of factors governing the choice of lawyer when seeking legal advice. The individual, or individuals, who actually provide the advice may be selected for a wide range of reasons: these will include the complexity of the matter, the certainty of the law on that issue, the expertise, the relative urgency of the matter and the level of research required. There may be straightforward practical issues of workload and staff availability.



58. I do not accept that release of the identity of the lawyer will automatically detract from the content of the advice. As I have said, the relative seniority and expertise of the lawyer may become an issue in cases where an organisation or individual seeks to challenge the stance taken by an authority but this is to be expected and is not a reason, in my view, for withholding the identity of the lawyer in every single case and I do not consider that it is applicable in this case.
59. In the circumstances, then, it seems to me that release of the identity of the adviser in this case would not, and would not be likely to, inhibit substantially the free and frank provision of advice in future cases because there will always be an expectation that any legal adviser within the SPCB will provide full and frank advice which reflects accurately all relevant considerations falling within its remit. Again, given the need to maintain full records of any advice given to the Presiding Officer, it does not seem to me possible that the advice given would not be recorded in future.
60. In conclusion, therefore, I do not consider that the SPCB has demonstrated that disclosure of this information would, or would be likely to, substantially inhibit the free and frank provision of advice, given the context within which this advice was provided and, in respect of the recommendations made, the role and expertise of (and the professional obligations on) the individual and agency supplying that advice.
61. I therefore find that section 30(b)(i) of FOISA does not apply to the identity of the adviser.
62. Given that I have found that the identity of the adviser is not exempt in terms of section 30(b)(i), I am not required to go on to consider the public interest test in section 2(1)(b) of FOISA.

Section 38(1)(b) – Personal data

63. During the investigation, when it became clear that I would have to consider whether the identity of the adviser should be disclosed to Mr Ingram, the investigating officer asked the SPCB whether it wished to provide submissions on the application of section 38(1)(b) of FOISA to the identity of the person who provided the advice. The SPCB replied that it did, as it considered that disclosure of the identity of the adviser would breach the first data protection principle.
64. The SPCB stated that the adviser's name and job description in conjunction with being identified as producing specific advice on a specific topic to a specific client is biographical in nature and therefore personal data in terms of section (1) of the DPA. While such an individual is acting in a professional capacity, identifying that person in relation to specific advice puts that person's professional capacity under the spotlight.



65. Section 38(1)(b) of FOISA states that information is exempt information if it constitutes personal data and the disclosure of the information to a member of the public would contravene any of the data protection principles.
66. "Personal data" is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and from other information which is in the possession of or is likely to come into the possession of, the data controller (the definition is set out in full in Appendix 1).
67. I am satisfied, given the definition contained in section 1(1) of the DPA, and for the reasons set out by the SPCB, that the identity of the legal adviser is their personal data.
68. However, FOISA does not exempt information from release simply because it is the personal data of a third party. Personal data is exempt from release under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or (b)) if the disclosure of the information to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. As noted above, the SPCB has argued that, in this case, to disclose the personal data of a third party would breach the first principle of the DPA.
69. The first data protection principle states that the processing of personal data (such as the release of data in response to a request made under FOISA), must be fair and lawful and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
70. I am satisfied that in this case the identity of the adviser does not constitute sensitive personal data and so I do not need to consider whether any of the conditions in Schedule 3 can be met. However, I do need to consider whether any of the conditions in Schedule 2 can be met.
71. Having looked at the conditions in Schedule 2, it appears to me that, without the consent of the adviser for their identity to be released, the only condition which could apply is that contained in condition 6 of Schedule 2 to the DPA. This allows information to be processed where:
- "The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."



72. The SPCB submitted that neither Mr Ingram in particular, nor the general public, has a legitimate interest in the release of the identity of the adviser since release of the personal data cannot affect or change the nature of the advice given or diminish or enhance anyone's rights. The view as to whether the Bill in question was or was not within competence was made by the Presiding Officer and the advice could only inform that decision. Accordingly, there would be no public benefit in knowing which legal adviser gave that advice and release was unnecessary. The SPCB also commented that release of the identity could erroneously suggest that a certain person invariably advises the Presiding Officer on all matters of confidence.
73. In addition, the SPCB stated that in considering the legitimate interests of the data subject, release of information that is not usually available may raise an implication that the information was released because the adviser had a novel view that was not shared by other legal individuals acting in a professional capacity, and identifying that person in relation to specific advice would put that person's professional capacity under the spotlight. As stated above, the SPCB highlighted that it is the Head of the Legal Directorate who is responsible for overall delivery of legal services to the Parliament including legal advice to the Presiding Officer.
74. I must apply a number of tests to establish whether condition 6 supports disclosure of personal data in this case. The first test is whether it can be established that the third party or parties to whom the data would be disclosed has/have a legitimate interest in the processing of the personal data (in this case by disclosure to an MSP under FOISA) to which the request relates. The second is whether the processing is necessary for the purposes of those legitimate interests. The third is whether that processing can be seen to be unwarranted in this particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (here, the adviser). Both competing interests must then be balanced.
75. In considering the first test, it seems to me that there is generally a legitimate interest in disclosing information which reveals the source of legal advice given or obtained by a public authority. In this case, Mr Ingram considers that the Presiding Officer has issued a statement on the validity of his proposed Bill on the basis of legal advice and which has been made on the basis of that legal advice. Therefore, he wishes to know the source of the advice and who, or what body, in effect, gave the advice which led to this decision being made. Although it was drawn to my attention by the SPCB that whilst legal advice had been sought this does not necessarily entail a legal obligation on the Presiding Officer to follow that advice, it seems to me that providing this level of accountability is reasonable.



76. With regard to whether disclosure is necessary for the purposes of the legitimate interests, I have considered whether these interests might be met equally effectively by any alternative means. In all the circumstances, I have concluded that the legitimate interests in question cannot be met without disclosure of the source of the legal advice and the actual identity of the legal adviser.
77. As mentioned above, I am required to balance Mr Ingram's legitimate interests against those of the data subject. I was informed by the SPCB that the data subject does not wish their identity to be disclosed in this context.
78. The Information Commissioner, who is responsible for enforcing the DPA, has provided guidance (Freedom of Information Act Awareness Guidance No 1) on the consideration of the data protection principles within the context of freedom of information legislation. This guidance recommends that public authorities should consider the following questions when deciding if release of information would breach the first data protection principle:
- a) would disclosure cause unnecessary or unjustified distress or damage to the data subject?
 - b) would the data subject expect that his or her information might be disclosed to others?
 - c) has the person been led to believe that his or her information would be kept secret?
79. A legal adviser providing advice to a public authority or official, whether or not they are employed by that authority, is acting in a professional capacity. Disclosing the identity of that lawyer would reveal information only about activities they have carried out in that professional capacity.
80. The Freedom of Information (Scotland) Act received Royal Assent in May 2002 and from that date onwards public authorities and those who work for those authorities were on notice that they might in future be identified in connection with the work they carry out in a professional capacity. In the circumstances of this case, I do not accept that a lawyer providing such advice would never have expected that they might be identified in connection with that advice in circumstances where that information could be publicly accessible.
81. In conclusion, therefore, I do not consider that the disclosure of this information would be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. In the circumstances, I find that Condition 6 of Schedule 2 of the DPA permits disclosure of this personal data provided disclosure is in all other respects fair and lawful. I will first of all consider the question of lawfulness.



82. The SPCB explained that the Head of the Directorate is responsible for overall delivery of Legal Services to the Parliament. Legal advice will be provided by persons from a pool of individuals and the identity of the adviser would not usually be available outwith the confines of a confidential client relationship.
83. As already noted, I was informed by the SPCB that the data subject does not wish their personal data disclosed in this context and the SPCB commented that it would cause the adviser distress.
84. Under section 10 of the DPA, a notice (commonly known as a "Section 10 Notice") can be issued by an individual requiring a data controller to cease (or not to begin) processing data about the individual if the processing of the data is causing, or is likely to cause, the data subject or another person unwarranted substantial damage or distress.
85. The data controller in this case is the SPCB. Releasing information as a result of a request having been made under FOISA is considered to be processing under the terms of the DPA. A Section 10 Notice needs to be accepted by the data controller before it stops processing the data about the individual. Guidance from the Information Commissioner states that a Section 10 Notice should be complied with unless there is some overriding justification for the processing.
86. In making the comment that release of their identity would cause the adviser distress, the SPCB did not provide me with a Section 10 Notice or its response to this in terms of section 10(3) of the DPA or even state that such a notice had been served by the adviser.
87. In the absence of such a notice or further submissions as to why the disclosure of the identity of the adviser would be unlawful, and given the circumstances in which this advice was sought, I am satisfied that disclosure of the identity of the legal adviser would not be unlawful. (It should be noted that there is a separate exemption in FOISA which exempts personal data from release if the release of the personal data would contravene a Section 10 Notice. The exemption is in section 38(1)(b) as read in conjunction with section 38(2)(a)(ii) of FOISA. However, the SPCB has not claimed this exemption. In any event that exemption is not absolute – it is subject to the public interest test required by section 2(1)(b) of FOISA.)
88. I have set out some of my thinking in connection the legitimate interests in this matter, and whilst I believe that there is a degree of overlap, I shall now go on to consider the fairness in disclosure, both generally and with respect to any distress that may be caused.
89. As I have said, I take very seriously any situation where a data subject has indicated that they do not wish their personal data to be disclosed. The SPCB has indicated that such disclosure would cause distress.



90. However, in the absence of further evidence I am unsure of the extent to which distress could be caused by disclosure of the identity of the adviser in the context of a professional duty and with the contextual information so far provided by the SPCB – and included in this decision notice - about how legal advice is sought and provided by the SPCB to the Presiding Officer. I also do not see how, where the content of the legal advice is not disclosed (as I have decided), and where the legal responsibility for the decision about competency rests with the Presiding Officer and not the legal adviser, that disclosure could be said to be unfair, or to cause distress to the legal adviser.
91. I appreciate that disclosure will draw attention to the adviser, but it does so because Mr Ingram is seeking information about who advised the Presiding Office in respect of a Bill proposed by him. I accepted the SPCB's views on the public interest in the context of section 36(1) which included the point that there is not a general controversy about the Presiding Officer's statement for this Bill which requires public debate. Given that the information was supplied in a professional capacity, and the circumstances in which the advice was sought, I do not accept that a lawyer would never have expected their identity to have been released.
92. To my mind release of the identity would only show that a named person advised the Presiding Officer for the purposes of the Presiding Officer's statutory duty and will give no indication of the content of the advice, the quality of the advice, the depth of the advice, any qualifications to the advice, etc. I cannot accept that such release would be unfair or cause distress.
93. In all the circumstances, I do not accept the SPCB's submissions that the identity of the adviser in this case would breach the first data protection principle. I therefore do not uphold the application of section 38(1)(b) to the identity of the lawyer.

Application of section 25

94. The SPCB also said that it could be argued that section 25 applied to the withheld material. Section 25(1) of FOISA exempts information in circumstances where the applicant can reasonably obtain the information other than by requesting it under section 1(1) of FOISA.
95. I am satisfied, however, that the legal advice is not otherwise reasonably accessible and that this exemption does not apply.
96. The exemption in section 25(1) is absolute in that it is not subject to the public interest contained in section 2(1)(b). Accordingly, I am not required to go on to consider where the public interest lies in relation to this exemption.



Decision

I find that the Scottish Parliamentary Corporate Body (SPCB) acted partially in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Ingram.

I find that the SPCB correctly applied section 36(1) to the content of the legal advice, but was wrong to apply the exemption to the identity of the legal adviser.

I also find that the SPCB misapplied sections 30(b)(i) and 38(1) to the identity of the legal adviser.

I find that the SPCB misapplied section 25 to all of the information.

Where I have found exemptions to have been misapplied, I find that there has been a breach of section 1(1) of FOISA.

I require the SPCB to provide Mr Ingram with the identity of the legal adviser (i.e. the name and position) within 45 days after the date of intimation of this decision notice.

Appeal

Should either Mr Ingram or the SPCB wish to appeal against this decision, there is an 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 notice.

Kevin Dunion
Scottish Information Commissioner
8 November 2007



Appendix 1

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.

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 –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
 - (...)
 - (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.



30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

(...)

(b) would, or would be likely to, inhibit substantially-

(i) the free and frank provision of advice ...

36 Confidentiality

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

38 Personal information

(1) Information is exempt information if it constitutes-

(...)

(b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

(...)

(2) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles;

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.



DATA PROTECTION ACT 1998

1 Basic interpretative provisions

- (1) In this Act, unless the context otherwise requires-
"personal data" means data which relate to a living individual who can be identified—
- (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
- and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual

10 Right to prevent processing likely to cause damage or distress

- (1) Subject to subsection (2), an individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing, or processing for a specified purpose or in a specified manner, any personal data in respect of which he is the data subject, on the ground that, for specified reasons p
- (a) the processing of those data or their processing for that purpose or in that manner is causing or is likely to cause substantial damage or substantial distress to him or to another and
 - (b) that damage or distress is or would be unwarranted.
- (...)
- (3) The data controller must within twenty-one days of receiving a notice under subsection (1) ("the data subject notice") give the individual who gave it a written notice –
- (a) stating that he has complied or intends to comply with the data subject notice, or
 - (b) stating his reasons for regarding the data subject notice as to any extent unjustified and the extent (if any) to which he has complied or intends to comply with it.



SCHEDULE 1

THE DATA PROTECTION PRINCIPLES - PART I THE PRINCIPLES

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

SCHEDULE 2

CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

SCOTLAND ACT 1998

29 Legislative competence

- (1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

31 Scrutiny of Bills before introduction

- (1) A member of the Scottish Executive in charge of a Bill shall, on or before introduction of the Bill in Parliament, state that in his view the provisions of the Bill would be within the legislative competence of the Parliament.
- (2) The Presiding Officer shall, on or before the introduction of a Bill in the Parliament, decide whether or not in his view the provisions of the Bill would be within the legislative competence of the Parliament and state his decision.
- (3) The form of any statement, and the manner in which it is to be made, shall be determined under standing orders, and standing orders may provide for any statement to be published.



Appendix 2

Mr Ingram's original information request of 30 November 2006

I would like the following information under the Freedom of Information (Scotland) Act 2002.

All communications (emails, memos, faxes, letters, contemporaneous notes including 2 "yellow stickies" and other appended notes as well as ALL drafts of the above) related to the Civil Appeals (Scotland) Bill and the decision not to proceed with this bill.

Please ensure that the search covers Non Executive Bills Unit, Chamber desk, Scottish Parliament's Legal Office and the Presiding Officer.

Please also provide any information which is held electronically in the IT vault or backup systems to ensure that requested information deleted from individual user accounts is recoverable.

All minutes of meetings related to the above decision, including all draft minutes and notes held in note books, memo pads, yellow stickies or other formats. Please also provide any information which is held electronically in the IT vault or backup systems to ensure that requested information deleted from individual user accounts is recoverable

In order to keep costs down and help the environment please provide the requested information in electronic form if possible and supply within 20 working days.