

Decision Notice

Decision 001/2017: Mrs Lesley Scott and the Scottish Ministers

Legal advice: The Children and Young People (Scotland) Act 2014

Reference No: 201601799

Decision Date: 9 January 2017



Scottish Information
Commissioner

Summary

On 9 August 2016, the Scottish Ministers (the Ministers) were asked for a copy of the legal advice provided by James Wolffe QC to the Scottish Government for a case that was presented at the Supreme Court. The Ministers refused to provide the information, arguing that it was legally privileged.

The Commissioner agreed that the Ministers were entitled to withhold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) 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. The Children and Young People (Scotland) Act 2014 (the 2014 Act) became law in March 2014. Under Part 4 of the 2014 Act, each child and young person in Scotland is allocated a Named Person with responsibility for carrying out designated functions to promote, support and safeguard the wellbeing of the child or young person. Part 4 sets out information sharing provisions relating to the Named Person service.
2. There was significant public debate regarding Part 4 of the 2014 Act, and an appeal against various provisions of the 2014 Act was lodged with the UK Supreme Court, leading to a hearing in March 2016. The Supreme Court judgment¹ granted the appeal, to a limited extent, on 28 July 2016. It found that the information sharing provisions in Part 4 of the 2014 Act were incompatible with Article 8 of the European Convention on Human Rights.
3. On 9 August 2016, Mrs Scott made a request for information to the Ministers. She asked for:

“...all information contain therein of the legal advice issued to the Scottish Government by James Wolffe QC in relation to the hearing on 8 and 9 March 2016 in the UK Supreme Court of *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland)* regarding the information sharing provisions contained in Part 4 of the Children and Young People (Scotland) Act 2014.”
4. The Ministers responded on 6 September 2016. They withheld the information under section 36(1) of FOISA, and argued that the public interest lay in maintaining the exemption.
5. On 8 September 2016, Mrs Scott wrote to the Ministers requesting a review of their decision on the basis that the public interest was best served by revealing what advice was offered to the Ministers prior to the hearing before the Supreme Court.

¹ <https://www.supremecourt.uk/cases/docs/uksc-2015-0216-judgment.pdf>

6. The Ministers notified Mrs Scott of the outcome of their review on 30 September 2016. They upheld their previous response, arguing that the information was exempt under section 36(1) of FOISA and that the public interest favoured maintaining the exemption.
7. On 3 October 2016, Mrs Scott applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mrs Scott stated she was dissatisfied with the outcome of the Ministers' review because there was an overwhelming public interest in disclosing the information.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mrs Scott made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
9. On 20 October 2016, the Ministers were notified in writing that Mrs Scott had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mrs Scott. The Ministers 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 Ministers were invited to comment on this application and answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

Commissioner's analysis and findings

11. 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 her by both Mrs Scott and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Section 36(1) - Confidentiality

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. The Ministers withheld the legal advice requested by Mrs Scott under this exemption.
13. Among the types of communication which fall within this category are those which are subject to legal professional privilege. One aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*).
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 opponent/s, or prospective opponent/s, will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation.
15. 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.
16. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential

litigation. However, the communication need not involve a lawyer and the litigation contemplated need never actually happen for the privilege to apply. It will continue to apply after any litigation has been concluded.

17. The Ministers explained that James Wolffe's legal advice was prepared in advance of litigation; the litigation in question being the case of *The Christian Institute and others v The Lord Advocate*.
18. From the information supplied by the Ministers and Mrs Scott, the Commissioner accepts that the legal advice was prepared in contemplation of litigation.
19. Information cannot be privileged unless it is also confidential. For the section 36(1) exemption to apply, the withheld information 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. For this to be the case, the information must possess the quality of confidence at that time, i.e. at least up to the point at which the authority carries out a review of its response to the information request and communicates the outcome to the requester.
20. The Ministers explained that the legal advice was (and continues to be) confidential between the Scottish Government and James Wolffe QC. They argued that this confidentiality could be maintained in legal proceedings because the advice was shared only amongst Senior Counsel, Junior Counsel and the Scottish Government, including solicitors in the Scottish Government Legal Directorate. The Ministers argued that the Scottish Government has not, at any time before or after the court case, discussed or disclosed the contents of the legal advice, in full or in summary, with anyone outwith the Scottish Government.
21. The Commissioner accepts the Ministers' submission that the content of the legal advice has not been disclosed in such a way as to result in the loss of the quality of confidence. She accepts that the withheld information has not been made public, either in full or in summary.
22. The Commissioner is therefore satisfied that the information withheld by the Ministers was prepared in contemplation of litigation and is information to which a claim of confidentiality of communications could be maintained in legal proceedings. It therefore falls within the scope of section 36(1) of FOISA.
23. 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 Commissioner must therefore go on to consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.

Public interest test – the Ministers' views

24. The Ministers acknowledged that there is likely to be some public interest in the contribution that release of this information would make as part of open and transparent government and to inform public debate as to the reasonableness and appropriateness of the Scottish Government's Named Person scheme. They acknowledged that it has been a contentious issue.
25. However, the Ministers did not consider that these public interest arguments were sufficiently compelling to outweigh the public interest in maintaining the right to litigation privilege and legal advice privilege. The Ministers argued that it was in the public interest that they should be able to communicate with their legal advisers, fully and frankly, in confidence when

preparing for and during court cases in order to be able to develop arguments, reach fully informed legal views, finalise their position in relation to legal points and generally defend their position robustly in an adversarial legal environment.

26. The Ministers noted that the litigation in question has led to significant re-evaluation of some of the content of the Named Person scheme and has raised issues that are still very much live and are currently being considered following the court case. They believed that it is clearly in the public interest that the Scottish Government, like any individual or organisation, can receive the most comprehensive and robust legal advice when preparing for and conducting litigation and dealing with the consequences of that litigation. The Ministers contended that it is in the public interest for that advice to remain confidential as its disclosure would have the effect of substantially prejudicing the Scottish Government's ability to defend itself when subject to legal challenge by unfairly exposing internal legal exchanges to challenge.
27. The Ministers argued that there is a clear and strong public interest in maintaining the right to legal professional privilege, and more specifically, to communications *post litem motam*. They reiterated that this privilege continues to apply after litigation has concluded.

Public interest test – Mrs Scott's views

28. Mrs Scott argued that the public interest lay in disclosure of the legal advice. She noted that the Supreme Court found that the information sharing provisions of the 2014 Act breached the human rights of Scottish citizens. Mrs Scott argued that it was in the public interest to know whether the decision to fight the challenge to this legislation in the courts was taken within a "fully formed legal context", as argued by the Ministers.
29. Mrs Scott queried whether the legal advice could be considered "high quality legal advice", given that the 2014 Act was found to have breached human rights legislation. She indicated that there is a public interest in establishing whether James Wolffe QC is competent to hold the position of Lord Advocate, given the outcome of the Supreme Court judgment on the unlawfulness of the legislation he had defended. She considered that in order for public trust to be maintained in the highest legal office in Scotland, it was essential for all evidence around the defence of the legislative provisions to be made available to Scottish citizens.
30. Mrs Scott provided further submissions on the public interest during the investigation, all of which were considered and are summarised in this decision notice. She noted that the Supreme Court had awarded all costs to the appellants, which meant that the Scottish taxpayer was responsible for paying the £500,000 cost of defending what she described as the failed court action. Mrs Scott suggested that it was in the public interest for the legal advice to be disclosed, given the large sum of public money involved, and given that the advice had led the Scottish Government to defend legislation that was ultimately deemed to be unlawful.
31. Mrs Scott noted that the issue of information sharing by Named Persons in the 2014 Act has been the subject of enormous public controversy for almost three years and she argued that it fell under the very definition of the public interest as being "something which is of serious concern and benefit to the public". She took the view that, as the Supreme Court found that the 2014 Act was unlawful, this undermined the Ministers' arguments that the proper administration of government requires secrecy. Mrs Scott indicated that what was being considered here is the improper administration of government.

32. Mrs Scott also stated that the Scottish Government introduced, and Parliament approved, legislation that breached the fundamental rights of Scottish citizens, a matter of serious concern to the public. She argued that it must be in the public interest to disclose the legal advice which led the government erroneously to conclude the opposite.
33. Mrs Scott asserted that the Scottish Government's "misleading" response to the Supreme Court judgement caused some public confusion and that this also weighed in favour of disclosure of the information. She stated that the Scottish Government had issued public statements indicating that it had "won" the legal action, when this was not the case: she argued that the Supreme Court decision to award all costs to the appellants indicates that the Scottish Government did not win the case. Mrs Scott contended that there is confusion throughout the public sector, and in the minds of parents, which could be clarified by seeing what the Scottish Government's own internal advice on these matters was.
34. Mrs Scott also stated that the fact that the Scottish Parliament is unicameral has been criticised by many for leading to inadequate scrutiny. She contended that the Supreme Court plays a vital constitutional role in reviewing legislation passed by the Scottish Parliament. She argued that legal advice about the Supreme Court's likely view on whether the Scottish Parliament had acted lawfully has constitutional significance in this context and clearly passes the public interest test in being of "serious concern and benefit to the public".
35. Mrs Scott maintained that the operation of government, and of the essential public discourse, checks and balances, has been materially harmed by the Scottish Government's decision to develop the Named Person scheme and roll it out without informing the Scottish people. Mrs Scott referred to minutes of a meeting which indicated that the Scottish Government consciously decided to embed the "Getting it right for every child" approach in professional practice before raising general awareness in the general public. Mrs Scott contended that this secrecy has had a deleterious effect on the ancient rights and freedoms of the Scottish people and she argued that a presumption toward openness is now manifestly in the public interest.

Commissioner's conclusions

36. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, on administration of justice grounds. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC164 (QB)². Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
37. The Commissioner acknowledges that there will be occasions where the significant in-built public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where (the list is not exhaustive):
 - the privileged material discloses wrongdoing by/within an authority
 - the material discloses a misrepresentation to the public of advice received

² [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o'brien+\)\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o'brien+)))

- the material discloses an apparently irresponsible and wilful disregard of advice
 - a large number of people are affected by the advice
 - the passage of time is so great that disclosure cannot cause harm.
38. In this case, the legal advice under consideration relates to legislation which affects every child (and parent) living in Scotland. Given this, it is clear that a large number of people would potentially be affected by the legal advice and the Commissioner is satisfied that this factor weighs in favour of disclosure in the public interest.
39. The Commissioner agrees with Mrs Scott that there is a strong public interest in the disclosure of information that would demonstrate the legal basis for the Scottish Government's decision to defend a court case which incurred costs of some £500,000 of public funds. Furthermore, the Commissioner also agrees that there is a public interest in understanding why the Scottish Government contended that the 2014 Act was fully compliant with human rights legislation, when the Supreme Court took an opposing view.
40. The Commissioner has considered carefully the public interest arguments put forward by both parties. She accepts that there is a public interest in authorities being open to scrutiny and being accountable for their actions. The 2014 Act has been controversial and subject to significant public debate, and she considers that disclosing the advice would enable the general public to better understand the Scottish Government's reasons and grounds for defending the court case. She accepts that disclosure of the legal advice obtained by the Scottish Government would contribute to transparency and accountability in understanding why the Scottish Government pursued its defence of a case which cost it (and the Scottish taxpayer) significant sums of money (while noting that the appeal was only partially successful, and that the Scottish Government successfully defended the appeal on other points).
41. Against this, the Commissioner has balanced the in-built interest in legal professional privilege itself and the public interest in allowing the Ministers to obtain confidential legal advice in contemplation of litigation.
42. The Commissioner is aware that the Scottish Government is currently establishing how to amend the 2014 Act to comply with the Supreme Court's ruling and that the legal advice that has been requested relates to a live issue. This suggests that the legal advice should be withheld.
43. In addition, the Commissioner is not persuaded that disclosing the advice would have all the public interest benefits argued by Mrs Scott, particularly in relation to establishing the competence or quality of that advice. In any contested court case, there will always be at least two different points of view. The Commissioner also notes that the Supreme Court ruling has been published online and gives a summary of the legal points considered by the judges, including those put forward on behalf of the Scottish Government.
44. On balance, the Commissioner accepts that greater weight should be attached to the arguments which would favour withholding the information. There is a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, and she believes, particularly given that this remains a live issue, that this outweighs the public interest in disclosing the information under consideration here.
45. In all the circumstances of this case, therefore, the Commissioner concludes that the public interest in disclosing the information was outweighed by that in maintaining the exemption in

section 36(1). Consequently, she finds that the Ministers were entitled to withhold the legal advice under that exemption.

Decision

The Commissioner finds that the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mrs Scott.

Appeal

Should either Mrs Scott or the Scottish Ministers 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

9 January 2017

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.

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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