



Scottish Information
Commissioner

159/2006 Decision Mr Andy Wightman and the City of Edinburgh Council

<i>Request for copy of Counsel's Opinion</i>
--

Applicant: Mr Andy Wightman
Authority: City of Edinburgh Council
Case No: 200600832
Decision Date: 21 August 2006

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 159/2006 Mr Andy Wightman and City of Edinburgh Council

Request for copy of Counsel's opinion – section 36(1) confidentiality of communications applied – public interest considered – application of section 36(1) upheld – public interest in disclosing the information requested outweighed by public interest in withholding it

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); section 2(1)(b) (Effect of exemptions) and section 36(1) (confidentiality of communications)

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

In March 2006 Mr Andy Wightman wrote to the City of Edinburgh Council (the Council) and requested a copy of Counsel's opinion and supplementary advice on a specified matter. The Council refused to supply the information requested citing section 36(1) confidentiality of communications. Mr Wightman was dissatisfied with this response and sought a review. The Council upheld its original decision on review. Mr Wightman applied to the Commissioner for a decision. Following an investigation, the Commissioner found that the Council had correctly relied on section 36(1) and that the public interest in disclosing the information was outweighed by the public interest in maintaining the exemption.

Background

1. On 9 March 2006 Mr Wightman wrote to the Council and requested a copy of the Opinion and supplementary advice obtained from Counsel referred to in the *Rationalisation of Office Accommodation (ROA) – Progress Report to City of Edinburgh Council* 14 November 2002.



2. The Council responded to this request on 16 March 2006. The Council advised that the Opinion and supplementary advice were considered exempt in terms of section 36(1) of FOISA as the Opinion was subject to legal professional privilege. The Council indicated that it did not consider that it was in the public interest for such information to be released.
3. The Council cited *Decision 23/2005* in which I had indicated that the public interest argument for disclosure of legal advice would only apply in “highly compelling cases”. The Council indicated that it did not consider that to be the case here.
4. Mr Wightman wrote to the Council on 17 March 2006 to seek a review. He set out his reasons why he considered that release of the Opinion would be in the public interest (discussed in paragraph 17 below).
5. The Council responded to this request for review on 30 March 2006. The Council upheld its original position. The Council indicated that legal advice by its nature had to examine all aspects of a matter, including examining any strengths and/or weaknesses of a particular stance. The Council indicated that it was clearly not desirable for all such information to be released to any third party upon request. The Council indicated that Mr Wightman was entitled to seek his own legal advice in relation to the matter. The Council reaffirmed its views in respect of the public interest test.
6. Mr Wightman was dissatisfied with this response and on 26 April 2006 applied to me for a decision.
7. The case was allocated to an investigating officer and the application validated by establishing that Mr Wightman 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 his request.

The investigation

8. The officer formally contacted the Council on 15 May 2006 in terms of section 49(3)(a) of FOISA, asking it to comment on the application as a whole.

Council's submissions

9. The Council indicated that the information was exempt by virtue of section 36(1) as the information comprised of two Opinions from Counsel. The Council confirmed that Counsel's Opinion had been sought to detail and consider the position with regard to the sale of Common Good land.
-



10. The Council went on to consider whether the public interest in disclosing the information was outweighed by the public interest in withholding it.
11. The Council argued, amongst other things, that the Opinion sought to ensure that the Council was able to resist a legal challenge should this be launched. Disclosure of the content of the Opinion would also mean that such comprehensive written legal advice would not be sought or proffered in the future as it might be released under FOISA. The Council indicated that this would not be desirable from an audit trail point of view, nor, arguably, would it be in the public interest.
12. The Council considered that the information was being sought by persons who might be adversely affected by plans for a specific area of Edinburgh. The Council argued that this represented a “sectoral interest” rather than a general public interest.

Mr Wightman’s submissions

13. Mr Wightman has an interest in Common Good land in Scotland and the way in which local authorities discharge their responsibilities in respect of this land. In this particular case, Mr Wightman is concerned that the Council has disposed of Common Good land without being aware of the nature of that land and/or that the Council has disposed of this land without the appropriate legal authority.
14. Mr Wightman has supplied me with detailed information about the background to this transaction and his concerns in respect of the Common Good land.
15. In his letter of review Mr Wightman made a number of submissions as to why disclosure would be in the public interest:
 - a) It concerns the disposal of Common Good land. According to Mr Wightman, this fact appeared not to have been disclosed to the Council when they took the decision to sell. In the interests of effective scrutiny and accountability of the decision making process Mr Wightman wanted to know whether this Opinion dealt with this important question.
 - b) It concerns Common Good land which belongs to the citizens of Edinburgh. Mr Wightman indicated that the Council held legal title but it was in the public interest that this Opinion be disclosed because the citizens had a right to know on what grounds their Common Good asset were being disposed of.
 - c) The Council had a fiduciary duty in respect of Common Good assets and it was thus in the public interest for this Opinion to be disclosed in order that the citizens could see that this fiduciary duty was being properly discharged and that the public was obtaining good value.



Commissioner's analysis and findings

16. Mr Wightman requested a copy of the Opinion and the supplementary advice by Counsel referred to a specified Council Report. I consider it helpful to set out briefly the context to this request.
17. The Council Report (dated 14 November 2002) provides information about the situation at that date regarding the provision of new office accommodation for the Council and other matters relating to that project. Paragraph 3.56 of that Report states that:

The properties at East Market Street and 7 Merchiston Park are held on the Common Good Account. The Council Solicitor has obtained Counsel's opinion to the effect that both of these properties can be sold without the authority of the Court. As a result, he has been able to advise the ROA Team on an approach that will secure the total capital receipt to the project. Counsel advised that the proceeds of sale of the property could be used towards defraying the costs of the Headquarters building since the provision of civic buildings was a purpose consistent with the purposes for which Common Good property is administered. Counsel has confirmed in supplementary advice that his view on the use of the proceeds of sale is not altered by the fact that the Council will have an interest as tenant of the Headquarters building as opposed to ownership rights.
18. It is access to this Counsel's Opinion and the supplementary advice that Mr Wightman is seeking.
19. Section 36(1) provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is communications between a legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. Firstly, the information being withheld must relate to communications with a legal adviser. In this case the information withheld is the communicated legal advice to the Council (as client). The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of his/her professional relationship with his/her client.



20. In this case the legal adviser is Counsel giving legal advice on the sale of Common Good land. This Opinion and supplementary advice comprises professional legal advice within a relationship where the legal adviser has been asked to provide an opinion in his professional capacity to a client (the Council). I am satisfied that it is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result the opinion would be covered by the exemption contained in section 36(1) of FOISA.
21. Section 36(1) is a qualified exemption and is subject to the public interest test contained in section 2(1)(b) of FOISA. Therefore, even where an authority considers the information to be exempt it must still 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.
22. In *Decision 023/2005* 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.
23. The public interest issues in favour of disclosing this information might 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. In this instance, disclosure of the opinion would make public a legal Opinion on the sale of Common Good land. In this way it would enhance scrutiny of the legality of the action of a public body.
24. It might also be in the public interest to order disclosure where it would make a significant contribution to debate on a matter of public interest. I have considered the report supplied by Mr Wightman as part of his application (*Common Good Land in Scotland*) *A Review and Critique – Andy Wightman & James Perman*) and I am also aware of both public and media interest in the larger development to which this land relates.
25. I accept that the disposal of Common Good land is a matter which will be of interest to members of the public and recognise the importance of public scrutiny of the way in which such land is disposed of by authorities and the proceeds accrued as a result of any such disposal. I do not consider, however, that the public interest in information about Common Good land and its disposal automatically extends to the detailed legal advice an authority has obtained in considering the method of disposal.
26. It is in the public interest that an authority can communicate its position to its advisers fully and frankly in confidence, in order to obtain the most comprehensive legal advice in relation to its projects and defend its position adequately should that become necessary.



27. In this particular instance Mr Wightman is seeking access only to the legal Opinion and advice obtained by the Council regarding the sale of specified Common Good land (as opposed to other information surrounding its disposal). The Council has disclosed in its Report a summary of that advice. Therefore, Mr Wightman is seeking, in effect, access to the detailed advice provided by Counsel as to the legality of any such disposal.
28. Having considered all submissions in this matter I am of the view that, in this case, having supplied a summary of the advice from Counsel, the Council is not obliged to provide the detailed advice that it has received on this matter. In particular, I take the view that there is an established means of scrutinising the legality of the actions of public bodies, through judicial review in the courts. 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.
29. In this case I recognise that there are reasons which might justify disclosing the opinion to the applicant. However, I do not feel 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 Council correctly applied the public interest test in withholding Counsel's opinion and that this information is exempt by virtue of section 36(1) of FOISA.

Decision

I find that the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in withholding the information requested by Mr Wightman in that the information is exempt by virtue of section 36(1).



Appeal

Should either the Council or Mr Wightman wish to appeal against this decision, there is a right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
21 August 2006



APPENDIX

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.

36 Confidentiality

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