

Decision Notice 043/2022

Legal advice

Applicant: The Applicant

Public authority: Children's Hearings Scotland

Case Ref: 202100838



Scottish Information
Commissioner

Summary

CHS was asked for legal advice it had received about a possible infringement of Article 6 of the ECHR. CHS withheld the information on the basis that it was legally privileged, and that the public interest favoured withholding the information.

The Commissioner found that CHS had complied with FOISA in responding to the request.

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. On 25 April 2021, the Applicant made a request for information to Children's Hearings Scotland (CHS). The information request was for:
all documents relating to the legal advice given to CHS and the National Convener about the possibility they have/have not acted in a way that infringes Article 6 of [the European Convention on Human Rights].
2. CHS responded on 24 May 2021. It told the Applicant that the information was exempt from disclosure under section 36(1) of FOISA as it was information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. While CHS recognised that there was a public interest in transparency and accountability, it considered this to be outweighed by the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
3. The following day, the Applicant wrote to CHS requesting a review of its decision. He expressed concern about the "lack of transparency" from CHS. (The Applicant asked other, related questions of CHS, but those are not covered in this decision notice.)
4. CHS notified the Applicant of the outcome of its review on 6 July 2021. CHS confirmed its previous decision to withhold the information.
5. On 12 July 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He did not consider the information to be exempt from disclosure under section 36(1).

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 16 August 2021, CHS was notified in writing that the Applicant had made a valid application. CHS was asked to send the Commissioner the information withheld from the Applicant. CHS provided information and the case was allocated to an investigating officer.

8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. CHS was invited to comment on this application and to answer specific questions.
9. The Applicant was also invited to comment, which he did.

Commissioner's analysis and findings

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

Section 36(1) - confidentiality of communications

11. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies.
12. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled:
 - (i) The information must relate to communications with a professional legal adviser, such as a solicitor or advocate;
 - (ii) The legal adviser must be acting in their professional capacity; and
 - (iii) The communications must occur in the context of the legal adviser's professional relationship with their client.
13. The Commissioner has considered the content of the information and the circumstances in which it was created, and is satisfied that the information meets the conditions for legal advice privilege to apply. All the conditions stated above apply: the information involves communications with a legal adviser (a solicitor), who is acting in their professional capacity, and the communications occur in the context of the legal adviser's professional relationship with their client, i.e. advice in respect of Article 6 of the ECHR.
14. In his application, the Applicant commented that section 36(1) could not apply because the matter to which the advice relates is not, and has not been, within the criminal or civil court system. However, legal action need not have taken place (or be planned) for legal advice privilege to apply.
15. The exemption in section 36(1) is a qualified exemption, which means that it is subject to the public interest test set out in section 2(1)(b) of FOISA. This means that exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in maintain the exemption.

The public interest

16. In the Applicant's view, the public interest favoured disclosure. He believed that CHS should disclose the information for the following reasons:
 - CHS is a public body, financed through the public purse.

- It would benefit the public to know what the legal advice was, particularly given the subject matter.
 - Disclosure would ensure fairness and transparency in relation to a complaint from a member of the public against CHS.
 - The legal advice given is on a subject matter which impacts on all of Scotland's Panel Members and not one individual.
 - The public have a right to know whether CHS, as a public body and as a legal tribunal, is or is not discharging its functions in compliance with ECHR legislation and the Scotland Act 1998.
17. CHS submitted that the public interest in maintaining the exemption outweighed the public interest in disclosure. CHS said that it had undertaken the required public interest test before deciding to withhold the information requested, and had reviewed previous decisions of the Commissioner on the balancing of public interest against the exemption, such as *Decision 002/2020*¹ and *Decision 084/2019*². Whilst CHS recognised a public interest in transparency and accountability, it believed there was an overriding public interest in the upholding of the right to confidentiality of communications between legal advisers and client.
18. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest on maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB)³. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
19. 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
 - the material discloses an apparently irresponsible and wilful disregard of advice
 - the passage of time is so great that disclosure cannot cause harm.
20. Having examined the withheld information, while the Commissioner accepts that the contents of the advice would be of interest to the Applicant and to the general public, he does not consider that any of the above categories would apply.
21. The Commissioner accepts that there is a public interest in the subject matter of the advice, i.e. Article 6. The Commissioner also accepts that there is a public interest in disclosure of

¹ <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2020/201901221.aspx>

² <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2018/201801807.aspx>

³ [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o%27brien+\)\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o%27brien+)))

the legal advice, in terms of accountability and transparency, with regard to a public authority that is involved in legal decisions about the care and protection of infants, children and young people. However, having reviewed the information along with the arguments put forward by CHS and the Applicant, he is not convinced that in this instance the public interest in disclosure outweighs that in maintaining the exemption.

22. The Commissioner must take account of the important public interest in legal professional privilege itself and the public interest in allowing public authorities to obtain confidential legal advice. On balance, the Commissioner considers that greater weight should be afforded to the arguments which would favour maintaining the exemption. The Commissioner accepts that there is a strong public interest in a Scottish public authority being able to receive full, unhindered legal advice. Without such comprehensive advice being available to CHS, its ability to come to fully-formed decisions would be restricted, which would not be in the public interest.
23. On balance, and after careful consideration, the Commissioner does not find the public interest in disclosure of this information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
24. The Commissioner is therefore satisfied that CHS correctly withheld this information under section 36(1) of FOISA.

Decision

The Commissioner finds that Children's Hearings Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or CHS 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.

Daren Fitzhenry
Scottish Information Commissioner

13 April 2022

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.

...

- (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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