



Scottish Information  
Commissioner  
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# Decision Notice 090/2023

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## Communications supporting assertion about sole trustee of Lauriston Castle Trust

**Authority:** City of Edinburgh Council  
**Case Ref:** 202200047

### Summary

The Applicant asked the Authority for communications supporting the Authority's assertion that it was the sole trustee of Lauriston Castle Trust. The Authority refused to provide the information requested on the basis that it was subject to legal advice privilege and therefore exempt from disclosure under FOISA.

The Commissioner investigated and found that the Authority had partially breached FOISA in responding to the request. While the Commissioner found that the Authority had initially failed to identify all relevant information falling within the scope of the request, and that it had failed to comply with the statutory timescale for responding to the request for review, he was satisfied that, by the end of the investigation, the Authority had identified all relevant information. The Commissioner found this information to be exempt from disclosure.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 10(1) (Time for compliance); 21(1) (Review by Scottish public authority); 36(1) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner)

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 17 August 2021, the Applicant made the following request for information to the Authority:  
*The [Authority] asserts it is the sole trustee of the Lauriston Castle Trust. Please provide copies of all communications, legislation, advice etc. supporting this assertion.*
2. The Authority responded on 14 September 2021. It refused to provide the information requested under the exemption in section 36(1) (Confidentiality) of FOISA, on the basis that it comprised legal advice which was covered by legal privilege, where the public interest favoured maintaining the exemption.
3. On 19 September 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because, in his view, the Authority had sought legal advice “on the basis of [its] assertion that [it was] the sole trustee of Lauriston Castle Trust (the Trust), and not in relation to its administration of the City of Edinburgh.” The Applicant argued that everyone living in Scotland, as he did, were the beneficiaries of the Trust and, as such, he was entitled to have sight of all material appointing the trustees, including legal advice. He believed that there was an unquestionable public interest in knowing who the trustees were and how they claimed to be so, particularly in light of legislation that, in his view, indicated otherwise.
4. The Authority notified the Applicant of the outcome of its review on 20 December 2021. It apologised for the delay in responding (with explanation) and upheld its original decision in full.
5. On 11 January 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority’s review because:
  - (i) the requested material was, in his view, of utmost interest to all beneficiaries (everyone living in Scotland) of the Trust - they had a right to know who the legal trustees were and so confidentiality, in this case, was not a reasonable reason for exemption;
  - (ii) he believed the Authority was not a trustee of the Trust as no Councillor had been nominated as a trustee, and
  - (iii) he did not believe that the Authority had responded to his request or requirement for review promptly.

## Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 8 February 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was subsequently 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. The Authority was invited to comment on this application and to answer specific questions. These focussed on the Authority's justification for withholding the information requested under the exemption in section 36(1) of FOISA (including consideration of the public interest), the searches carried out to identify the information requested, and whether any further in-scope information might be held. The Authority was also asked to comment on its compliance with statutory timescales for responding to the Applicant's request and requirement for review.

## **Commissioner's analysis and findings**

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### ***The information held by the Authority***

10. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it.
11. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4).
12. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority and falls within the scope of the original request.
13. As stated above, the Authority was asked to explain the searches it had carried out to identify the information falling within the scope of the request. It was also asked to confirm whether or not it held any further relevant information.
14. In its submissions, the Authority stated it was relying on the original Trust documentation, all of which had been previously disclosed to the Applicant.
15. In addition, the Authority stated it was also relying on advice provided by its external legal advisers. The Authority provided the Commissioner with additional information of this nature during the investigation, all of which, it submitted, was exempt from disclosure under section 36(1) of FOISA.
16. The Authority explained that the search carried out for the relevant information was relatively straightforward as two in-house solicitors were involved in the matter at the time, and any legal advice was held by these individuals in their email accounts and/or in the Authority's document management system.

### *The Commissioner's views on the information held*

17. The Commissioner has considered all relevant submissions and the terms of the request, including the searches undertaken by the Authority to establish the information held that was relevant to the request. He has also considered the withheld information originally provided to him by the Authority at the start of the investigation, along with the further information provided with the Authority's submissions during the investigation.
18. In the Commissioner's view, a proportion of the newly identified information referred to in paragraph 15 did not fall within the scope of the Applicant's request.
19. For the remainder of the newly-identified information, the Commissioner is satisfied that this does fall within the scope of the Applicant's request. It is evident, however, that this information should clearly have been identified as falling within scope by the close of the Authority's review (i.e. its response of 20 December 2021) at the latest. In failing to do so, the Commissioner finds that the Authority failed to deal with the request fully in accordance with section 1(1) of FOISA. However, the Commissioner is satisfied that the Authority has now located all of the information it holds falling within the scope of the request.
20. As the Authority is withholding this remaining information under an exemption in FOISA (i.e. section 36(1)), the Commissioner will include this in his consideration of the Authority's reliance on that exemption.

### **Section 36(1) (Confidentiality)**

21. At both initial response and review stages, the Authority withheld the information requested under the exemption in section 36(1) of FOISA. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. This includes communications subject to legal professional privilege. An aspect of legal professional privilege is legal advice privilege which, the Authority argued, applied in this case.
22. Legal advice privilege applies to communications between legal advisers and their clients in which legal advice is sought or given. The following conditions must be fulfilled for legal advice privilege to apply:
  - (i) the communications must involve a professional legal adviser, such as a solicitor or an advocate - this may include an in-house legal adviser or an external solicitor engaged by the authority;
  - (ii) the legal adviser must be acting in his/her professional capacity, and
  - (iii) the communications must occur in the context of the legal adviser's professional relationship with his/her client.

### *The Authority's submissions – section 36(1)*

23. The Authority submitted that section 36(1) of FOISA applied to the withheld information, the content of which related to, or referenced, communications with in-house legal advisers and external solicitors acting in their professional capacity, where the Authority was the client and where it was seeking legal advice on its governance of the Trust.
24. The Authority stated that the information, which was provided as part of a governance review, addressed issues of compliance with legislation, and made recommendations as to how to address current concerns and manage the Trust appropriately and legally.

25. The Authority confirmed that legal professional privilege had not been waived (i.e. the information was not in the public domain).
26. The Authority believed that a claim to confidentiality could be maintained in legal proceedings as the information was sought and given on a confidential basis. It explained that the Applicant had raised issues relating to the Authority's governance of the Trust on multiple occasions, which had led to the Authority having to seek legal advice on its compliance with legislation and trust law, and on any changes in its approach to governance.
27. These issues, the Authority submitted, had been addressed in confidential committee reports on the Authority's "B-Agenda", i.e. not in public. It explained it was still addressing concerns on the B-Agenda as recently as June 2023, when a confidential report on the proposed way forward on governance of the Trust was considered by the Authority's Finance and Resources Committee, and this had since been referred to full Council for determination (also expected to be considered on the B-Agenda). As such, the legalities surrounding the issues and potential approaches were still under discussion.
28. The Authority stated that it had confirmed to the Applicant, on a number of occasions, that it was the sole trustee of the Trust and that a review of the governance was underway. It explained that the Applicant's position on this had changed over time – from his original position (understood to be that all councillors were trustees, or that the councillors on the Authority's Finance and Resources Committee were trustees), to the above position where he considered no councillors were trustees and so the Authority was not a trustee.
29. The Authority's position was that it was the sole trustee of the Trust, which was in the public domain, for example, on page 128 of its *Audited Annual Accounts 2021/22*<sup>1</sup>.
30. In conclusion, the Authority believed that confidentiality relating to the legal advice on this issue, and the considerations given to it, must be properly maintained.

*The Applicant's submissions – section 36(1)*

31. In his application to the Commissioner, the Applicant argued that the information (communications, legislation and advice) supporting the Authority's assertion that it was sole trustee of the Trust was of utmost interest to all Trust beneficiaries (which he described as "everyone living Scotland"). He believed they had a right to know who the legal trustees were and confidentiality, in this case, was not a reasonable reason for exemption.
32. In the Applicant's view, the Authority was not a trustee of the Trust as no councillor had been nominated as a trustee. He provided detailed explanation in support of his position on this.

*The Commissioner's view – section 36(1)*

33. The Commissioner can only consider whether the information requested was properly withheld by the Authority under the exemption in section 36(1) of FOISA. He has no locus to comment on whether the Authority is, or is not, a trustee of the Trust, sole or otherwise.
34. Having considered the Authority's submissions, together with content of the information and the circumstances under which it was sought and obtained by the Authority, the Commissioner is satisfied that the information in question meets the conditions set out in paragraph 22 above and is, therefore, subject to legal advice privilege.

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<sup>1</sup> <https://www.edinburgh.gov.uk/downloads/file/30278/audited-annual-accounts-2020-21>

35. Information cannot be privileged unless it is also confidential. It must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed: the information must possess the quality of confidence at that time, so it cannot have been made public, either in full or in a summary substantially reflecting the whole. The Commissioner is satisfied that the information in question remained confidential at the time the Authority dealt with the Applicant's information request for information and his requirement for review (and that it remains so now).
36. The Commissioner is therefore satisfied that the exemption in section 36(1) of FOISA is engaged for this information.

*Public interest test – section 36(1)*

37. The exemption in section 36(1) is subject to the public interest test in section 2(1)(b) of FOISA.
38. As rehearsed above, in his application to the Commissioner, the Applicant argued that the information supporting the Authority's position was of utmost interest to everyone in Scotland who, he stated, were all beneficiaries of the Trust, and who had a right to know who the legal trustees were. He disputed that confidentiality was a reasonable argument for withholding the information.
39. In its submissions, the Authority acknowledged the public interest in disclosure to ensure it was acting legally and taking decisions based on sound legal advice - whether acting in its capacity as trustee of a site that was required to be open to the public, or otherwise.
40. Acknowledging the public interest in the matter in question, the Authority believed, on balance, that the public interest was better served here by maintaining the confidentiality of the legal advice. In the Authority's view, this approach ensured frankness between the external legal advisers and the Authority (as client) and also served the wider administration of justice.
41. For these reasons, the Authority considered it should be able to seek and receive legal advice on sensitive matters such as this, outwith the public glare. The Authority concluded, therefore, that the public interest in withholding the information outweighed that in disclosure.

*The Commissioner's view on the public interest – section 36(1)*

42. As the Commissioner has noted in a number of 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. 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)<sup>2</sup>. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.

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<sup>2</sup> [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+)))

43. The Commissioner recognises that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a compelling public interest in disclosing the information. In this particular case, he has given weight to the Applicant's views regarding the public interest in disclosure of information that would be relevant to the residents of Scotland, particularly in the event that they were the "beneficiaries" of the Trust, as asserted by the Applicant. He recognises that there is a consequent public interest, in terms of accountability and transparency, in knowing the content of the legal advice relating to the Authority's claim that it is the sole trustee of the Trust.
44. The Commissioner also notes, however, that the issue of who is/are the trustee(s) of the Trust is still a "live" matter which continues to be under consideration by the Authority, as evidenced by the report on the Trust considered, in private, by the Authority's Finance and Resources Committee in June 2023. The Commissioner accepts that, given the nature of this issue, the legal advice sought and obtained will continue to be relevant to the Authority's consideration of the matter in a legal context. He therefore recognises the requirement to maintain the confidentiality of the relevant communications and advice between legal adviser and client, particularly given the matter in question is still a "live" issue.
45. Having considered the public interest arguments on both sides, the Commissioner is not satisfied that the public interest in disclosure of this particular information to be sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
46. In conclusion, after careful consideration, the Commissioner is satisfied that the Authority correctly withheld all of the relevant information withheld under section 36(1) of FOISA.

***Handling of the request – failure to comply with timescales***

47. As set out in the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the EIRs) (the "[Section 60 Code](https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/)"<sup>3</sup>), sections 10(1) and 21(1) of FOISA require all public authorities to respond "promptly" to a request or a requirement for review (and, in any case, within a statutory 20 working day timescale).
48. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
49. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. Again, this is subject to qualifications which are not relevant in this case.
50. Both of these provisions make it clear that the 20 working day period is a long-stop and that the overriding requirement is to respond promptly.
51. As noted earlier in this Decision Notice, the Authority was invited to provide submissions on its handling of the Applicant's request and requirement for review.

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<sup>3</sup> <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

52. In response, the Authority submitted that it endeavoured to respond to requests for information under FOISA within the statutory timeframes but, unfortunately, there were occasions when that did not happen. The Authority stated that this was sometimes the case when multiple requests were received from the same applicant with similar wording. Equally, it submitted, there were occasions when input was required from multiple sources within the Authority, which could take more time to co-ordinate. The Authority stated that its resources were not infinite and occasionally, regrettably, deadlines could sometimes be missed.
53. It is clear from reading the response to the Applicant's request that it was responded to by the Authority within the statutory timescale of 20 working days. The Commissioner also notes that the Authority reported having received 582 information requests (under FOISA and the EIRs) in the same quarter in which the Applicant made the request. Given that the request was responded to within 20 working days, and taking account of the number of other requests being dealt with by the Authority around that time, the Commissioner finds that, given the lack of evidence from the Applicant as to why the Authority would have been in a position to respond more quickly, the Authority did respond promptly.
54. It is a matter of fact, however, that the Authority did not respond to the Applicant's requirement for review within 20 working days. Indeed, the Authority acknowledged this in its response to the requirement for review and apologised for the delay in responding.
55. The Commissioner therefore finds that the Authority did not respond to the Applicant's requirement for review promptly or within the statutory timescale. As such, he finds that the Authority failed to comply with section 21(1) of FOISA.
56. The Commissioner has recorded this procedural failure in his case management database, which is used to inform and monitor FOI practice by authorities.

## **Decision**

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that, by the end of his investigation, the Authority had located all of the information falling within the scope of the Applicant's request. This information was correctly withheld under section 36(1) of FOISA.

However, the Commissioner also finds that the Authority failed to comply with Part 1 of FOISA by:

- failing to identify all relevant information until during the investigation (and in doing so, failed to comply with section 1(1)); and
- failing to comply with the timescale for responding to the Applicant's requirement for review, as set out in section 21(1) of FOISA.

Given that the Authority did provide a response to the Applicant's requirement for review, the Commissioner does not require the Authority to take any action in respect of its failure to respond timeously, in response to the Applicant's application.



## **Appeal**

Should either the Applicant or the Authority 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**

**24 August 2023**

## **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) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

#### **2 Effect of exemptions**

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
  - ...
  - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

#### **10 Time for compliance**

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
  - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
  - (b) in a case where section 1(3) applies, the receipt by it of the further information.
- ...

## **21 Review by Scottish public authority**

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

## **36 Confidentiality**

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

...

## **47 Application for decision by Commissioner**

- (1) A person who is dissatisfied with -
  - (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
  - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify -
    - (i) the request for information to which the requirement for review relates;
    - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
    - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...