

Decision Notice

Decision 150/2015: Mr Alexander J Morrison and the Crofting Commission

Discussions with solicitors

Reference No: 201501131

Decision Date: 24 September 2015



Summary

On 21 February 2015, Mr Morrison asked the Crofting Commission for information relating to discussions between the Crofting Commission and its solicitors, and the Crofting Commission's solicitors and Government solicitors, in relation to section 22 of the Crofters (Scotland) Act 1993.

The Crofting Commission withheld the information on the basis that it was subject to legal professional privilege. Following an investigation, the Commissioner accepted that the Crofting Commission was entitled to withhold the information on this basis.

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. Mr Morrison had been in correspondence with the Crofting Commission regarding the legality of orders made under section 22 of the Crofters (Scotland) Act 1993 (the CSA), taking account of subsequent legislation (the Crofting Reform (Scotland) Act 2010).
2. On 21 February 2015, Mr Morrison made a request for information to the Crofting Commission. He asked for information relating to all discussions between the Crofting Commission and its solicitors, and between the Crofting Commission's solicitors and Government solicitors on justification for the continued use of section 22 (of the CSA), as the tenancy termination authority, after 1 October 2011.
3. The Crofting Commission responded on 10 March 2015. It informed Mr Morrison that it considered the information to be exempt from disclosure under section 36(1) of FOISA, because such communications attracted legal professional privilege.
4. On 21 March 2015, Mr Morrison wrote to the Crofting Commission requiring a review of its decision. He submitted that the public interest favoured disclosure: the Crofting Commission had a duty to act with transparency and within its powers and he believed continued concealment of the information gave cause for suspicion of procedural failings.
5. The Crofting Commission notified Mr Morrison of the outcome of its review on 7 May 2015. It upheld the original decision without modification.
6. On 15 June 2015, Mr Morrison wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Morrison stated he was dissatisfied with the outcome of the Crofting Commission's review because he disagreed with the application of section 36(1) of FOISA.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Morrison 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.
8. On 29 June 2015, the Crofting Commission was notified in writing that Mr Morrison had made a valid application. The Crofting Commission was asked to send the Commissioner the information withheld from him. The Crofting Commission provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Crofting Commission was invited to comment on this application and answer specific questions, with reference to any provisions of FOISA it considered applicable to the information requested.
10. The Crofting Commission responded with submissions that all of the information was exempt from disclosure under section 36(1) of FOISA and, in addition, the information contained in one of the documents was considered exempt in terms of section 29(1)(a) of FOISA.
11. Mr Morrison was informed that the Crofting Commission was relying on the above exemptions and provided submissions as to why he considered the information should be disclosed.

Commissioner's analysis and findings

12. 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 Mr Morrison and the Crofting Commission. She is satisfied that no matter of relevance has been overlooked.
13. The Commissioner will first of all consider the information withheld in terms of section 36(1) of FOISA.

Section 36(1) - Confidentiality

14. 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 which are subject to legal professional privilege. An aspect of legal professional privilege is legal advice privilege, which the Crofting Commission argued applied in this case.
15. 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.
16. Among other points, the Crofting Commission submitted that this exemption applied to the withheld information because it all related to advice given by or sought from its solicitor. It was given by or sought from the solicitor in their capacity as a professional legal adviser to the Commission. It confirmed that the advice was provided in the context of the solicitor professional relationship with the Commission, as client.
17. Having considered the content of all of the information withheld, and while she would not wish to draw the concept of "relating to" legal advice too broadly in this context, the Commissioner is satisfied that all of the information withheld in this case relates directly to seeking, obtaining and considering legal advice from a professional legal adviser acting in that professional capacity. Consequently, the Commissioner is satisfied that this information meets the conditions set out in paragraph 15 above and so is subject to legal advice privilege.
18. 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 this information remained confidential at the time the Crofting Commission responded to Mr Morrison's information request and requirement for review (and that it remains so now).
19. The exemption in section 36(1) is also a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Having decided that the information is exempt under section 36(1), the Commissioner must 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.

The public interest test – section 36(1)

Submissions by the Crofting Commission

20. The Crofting Commission recognised a public interest in ensuring transparency in public affairs and enhancing the understanding of public policy, as well as the accountability and scrutiny of public authorities.
21. The Crofting Commission submitted that it was of the utmost importance that public authorities, itself included, were able to obtain free and frank advice on legal matters from their solicitor, allowing them to act on the basis of the best legal advice available. It further argued that it would be to the substantial prejudice, both to the confidentiality of communications between solicitor and client and to obtaining the best advice, if such advice were given in a context where the solicitor was aware it could be disclosed. It considered there to be a serious concern that advice would become less frank (and thus not the best obtainable) if there were an expectation that it could be disclosed.

22. In summary, the Crofting Commission submitted it was strongly in the public interest that public authorities could act and carry out their public functions on the basis of best legal advice. These considerations, it believed, outweighed the public interest in disclosing such information.

Submissions by Mr Morrison

23. In his requirement for review, Mr Morrison stated that the interests of administration of justice and the application of law could only be satisfied by disclosure, to establish whether the Crofting Commission acted in compliance with specific legislation. He submitted that the Crofting Commission had a duty to act with transparency and within its powers, and that without doubt disclosure was in the personal interests of numerous crofting tenants he considered to have been the victims of a miscarriage of justice, financially disadvantaged and deprived of rights.
24. In his application to the Commissioner, Mr Morrison made comment on his disagreement as to the action of the Crofting Commission in the use of section 22, which he considered to be a repealed law. He stated that he considered the actions of the Crofting Commission to have deprived every tenant of enhanced grounds of appeal contained in the subsequent legislation and submitted that accountability must, given the perceived consequences of the Crofting Commission's actions, take precedence over legal privilege.

The Commissioner's view

25. The Commissioner has considered carefully the representations made by both Mr Morrison and the Crofting Commission when balancing the public interest both for and against disclosure of the withheld information.
26. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities, and that disclosure of the information would go some way to providing that transparency and accountability.
27. 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). Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
28. The Commissioner acknowledges 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, she acknowledges the views of Mr Morrison regarding the processes followed by the Crofting Commission in carrying out its legislative duties.
29. Having considered the public interest arguments advanced on both sides, the Commissioner is not satisfied that the public interest in disclosure of this particular information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of

communications between legal adviser and client. Consequently, she accepts that the Crofting Commission correctly withheld the information to which it applied section 36(1) of FOISA.

30. Given that the Commissioner has concluded all of the withheld information was properly withheld under section 36(1), she is not required (and does not intend) to give any further consideration to whether elements of it also fell to be withheld in terms of section 29(1)(a) of FOISA.

Decision

The Commissioner finds that the Crofting Commission complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Morrison.

Appeal

Should either Mr Morrison or the Crofting Commission 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 September 2015

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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