

# Decision Notice



Decision 156/2013 Mr John McLean and the Scottish Public Services  
Ombudsman

Legal opinions

Reference No: 201300904  
Decision Date: 31 July 2013

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**Rosemary Agnew**  
Scottish Information Commissioner

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## Summary

Mr McLean asked the Scottish Public Services Ombudsman (the SPSO) for details of legal advice obtained with regard to his remit. The SPSO withheld the information on the basis that it was subject to legal professional privilege. This was accepted by the Commissioner following an investigation.

## Relevant statutory provisions

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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 the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 21 January 2013, Mr Mclean wrote to the SPSO requesting the following information:  
*Can you confirm the extent of legal opinion sought with regard to the remit of the SPSO?  
Could you include the date, question and answer in each case?*
2. The SPSO responded on 22 February 2013, disclosing the number of occasions on which it had obtained relevant legal opinions, but withholding the content of the information under sections 26(a) and 36(1) of FOISA.
3. On 24 February 2013, Mr McLean wrote to the SPSO requesting a review of its decision.
4. The SPSO notified Mr Mclean of the outcome of its review on 22 March 2013, upholding his earlier decision.
5. On 8 April 2013, Mr McLean wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPSO's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr McLean made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.



## Investigation

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7. On 22 April 2013, the SPSO was notified in writing that an application had been received from Mr McLean and was asked to provide the Commissioner with the information withheld from him. The information was provided in summary form and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the SPSO, giving him an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and (in particular) asking him to justify his reliance on any provisions of FOISA he considered applicable to the withheld information.
9. The SPSO provided submissions confirming that he was applying section 36(1) of FOISA to all of the withheld information. He also provided samples of the withheld information
10. Mr McLean was also asked for (and provided) submissions on what he considered to be the public interest in disclosing the withheld information.

## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner has considered the relevant submissions, or parts of submissions, made to her by both Mr McLean and the SPSO. She is satisfied that no matter of relevance has been overlooked.

### Section 36(1) – Confidentiality

12. The SPSO applied this exemption to all of the withheld information. The exemption 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 that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
13. For the exemption in section 36(1) to apply to this particular type of communication, certain conditions must be fulfilled. The information must relate to communications with a legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser. The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of the legal adviser's professional relationship with his/her client. The information must remain confidential at the time the exemption is claimed: privilege cannot extend to information in respect of which there is no reason for confidentiality, or to information which has been made public (either in full or in a summary sufficiently comprehensive to convey the substance).



14. The SPSO submitted that the withheld information was subject to legal advice privilege and stated that the opinions were sought in a professional context, through instructing external legal advisors. The advice provided had been given in confidence.
15. The Commissioner accepts that the information under consideration in this case is legal advice sought by and provided to the SPSO by an external firm of solicitors, in the context of a professional relationship and in circumstances in which legal advice privilege would apply. She accepts that it was obtained in confidence, and can identify no basis for finding that it does not remain confidential.
16. In all the circumstances, therefore, the Commissioner accepts that the withheld information was – and remains – exempt under section 36(1) of FOISA. However, this is not an absolute exemption and the Commissioner must go on to consider the public interest test in terms of section 2(1)(b) of FOISA.

*The public interest test*

17. In previous decisions, the Commissioner has acknowledged that there will always be a strong public interest in maintaining the right to confidentiality of communications on administration of justice grounds. Accordingly, while each case will be considered on its own merits, she is only likely to order the release of such communications in highly compelling cases only. This view reflects the arguments and decision in the House of Lords case, *The Three Rivers District Council and others -v- Governor and Company of the Bank of England* [2004] UK HL 48.<sup>1</sup>
18. The SPSO acknowledged that there was a balanced judgement to be reached and there was a general public interest in openness and transparency. He also submitted that there was a strong public interest in maintaining the exemption in relation to the withheld legal advice, because – in order to carry out his functions – he needed to obtain legal advice on the extent of powers and apply this advice without concern of it being disclosed publicly. It was essential for the carrying out of the Ombudsman's function to ensure that decisions taken were as robust and risk-free as possible. He concluded that the public interest in disclosure was outweighed by the public interest in withholding the information.
19. Mr McLean submitted that he believed the legal opinions he was seeking should be made available to the public. All governmental costs are paid for out of the public purse, he submitted – including the SPSO's costs in seeking legal opinions – and the public had a right to know the advice contained in these legal opinions.
20. It was Mr McLean's contention that the information should not be considered confidential, but rather formed part of an essential process of clarification in relation to the SPSO's governing legislation. It was important that the public had access to this information, to assist them in dealing appropriately with the SPSO and judging the validity of his actions. He pointed out that no information on the SPSO's pursuit of legal opinions had ever been addressed in the SPSO's Annual Reports, Monthly Commentaries or elsewhere.

<sup>1</sup> <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>

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21. The Commissioner has considered Mr McLean's comments and accepts that transparency and public accountability are important factors in the operation of public bodies. On the other hand, she does not accept that these considerations are sufficiently strong in this case to outweigh the public interest in upholding legal advice privilege and withholding the information.
22. Having considered the submissions from both Mr McLean and the SPSO, therefore, the Commissioner finds that the public interest on this occasion favours maintaining the exemption in section 36(1) of FOISA.
23. As the Commissioner has found that the exemption at section 36(1) of FOISA should be upheld, she will not go on to consider the exemption at section 26(a) of FOISA.

## DECISION

The Commissioner finds that the Scottish Public Services Ombudsman complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr McLean.

## Appeal

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Should either Mr McLean or the Scottish Public Services Ombudsman wish to appeal against this decision, there is an 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**  
**31 July 2013**



## Appendix

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### 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.

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- (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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