

Decision Notice 171/2021

Details of discussion of Keira Bell High Court judgment

Applicant: The Applicant

Public authority: The Commissioner for Children and Young People in Scotland

Case Ref: 202100541



Summary

CYPCS was asked for information relating to a High Court judgment of 1 December 2020 relating to Keira Bell.

CYPCS provided some information but considered the remaining information was exempt from disclosure on the basis that some of it was legally privileged and some of it was confidential.

The Commissioner investigated and found that CYPCS had complied with FOISA in responding to the request as the information was legally privileged and confidential.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(c) (Effect of exemptions); 36 (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 7 January 2021, the Applicant made a request for information to the Commissioner for Children and Young People in Scotland (CYPCS). The information requested was from September 2020 until the date of the request:
 - (i) Correspondence and other relevant material between CYPCS and any of the other UK Children's Commissioners/staff on a High Court judgment of 1 December 2020 relating to Keira Bell;
 - (ii) Internal CYPCS communications, such as emails and briefings, on the High Court judgment;
 - (iii) Communications from CYPCS's staff to external organisations on the High Court judgment.
2. CYPCS responded on 2 February 2021, identifying five relevant documents. Four were provided with some redactions under section 38(1)(b) FOISA (Personal information), whilst the fifth was withheld in its entirety under section 36(1) of FOISA. CYPCS stated that it held no information for the third part of the request
3. On 30 March 2020, the Applicant wrote to CYPCS, requesting a review of its decision as she did not agree with the reasons provided by CYPCS for withholding the information and considered the public interest was in favour of disclosure.
4. CYPCS notified the Applicant of the outcome of its review on 27 April 2021. It confirmed its decision to withhold personal data under section 38(1)(b) of FOISA. CYPCS now provided the Applicant with a copy of the fifth document, with information redacted under sections 30(c) (Prejudice to effective conduct of public affairs), 36(1), 36(2) and 38(1)(b) of FOISA.
5. Later that day, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of CYPCS's review because she considered the withheld information to be of immense public

interest, as it pertained to the safeguarding of children and the views of the office charged with safeguarding these interests.

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 4 May 2021, CYPCS was notified in writing that the Applicant had made a valid application. CYPCS was asked to send the Commissioner the information withheld from the Applicant. CYPCS provided the 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. CYPCS was invited to comment on this application and to answer specific questions. These related to CYPCS's reasons for withholding information under the exemptions in sections 30(c), 36(1) and 36(2) of FOISA, including consideration of the public interest.
9. The Applicant confirmed to the Investigating Officer that she was not challenging the withholding of information under section 38(1)(b) of FOISA. Consequently, the exemption will not be considered in this decision.

Commissioner's analysis and findings

10. 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 him by both the Applicant and CYPCS. He is satisfied that no matter of relevance has been overlooked.

Withheld information

11. The withheld information under consideration here comprises an email chain that originated in a communication from a member of staff of one of the UK Children's Commissioners to their Commissioner. This email was then forwarded by that Commissioner to the CYPCS. The email chain also includes an email from the CYPCS's in-house legal officer relating to the original email from the other Commissioner and the High Court Judgment detailed in the request.
12. CYPCS is withholding the email from the other UK Children's Commissioner under sections 30(c) and 36(2) of FOISA and the email from its in-house legal officer under section 36(1) of FOISA.

Section 36(1) – confidentiality of communications

13. 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. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
14. 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.
15. CYPCS argued that the email formed part of a communication between its Head of Advice and Investigations and its in-house Legal Officer, acting in her professional capacity.
16. CYPCS confirmed its in-house Legal Officer was a solicitor, with a current Law Society of Scotland practising certificate.
17. It confirmed that it had not waived legal professional privilege and the information was and remained confidential.
18. CYPCS was satisfied that all the necessary conditions for legal advice privilege to apply were met.
19. In relation to the information withheld under section 36(1) of FOISA, after considering the content and the circumstances in which it was created, the Commissioner is satisfied that the information meets the conditions for legal advice privilege to apply.
20. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. The exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in withholding it.

The public interest

21. In her application to the Commissioner, the Applicant submitted that the public interest favoured disclosure. In her view, the matter was of immense public interest as it pertained to the safeguarding of children and the views of the office charged with safeguarding these interests. The Applicant went on to argue that there needed to be openness and transparency in order to maintain public trust and confidence. She highlighted that the Children's Commissioners were created by statute out of concern that the welfare of children had not been prioritised as it should have been, and therefore served the public interest.
22. CYPCS submitted that the public interest in withholding the information outweighed the public interest in disclosure.
23. It recognised that the High Court judgment under discussion raised issues that were clearly of concern and interest to the public and that, since the judgment was issued, the matters raised had been of significant interest to the media, lawyers, medical practitioners, civil society and individual children and their families.
24. However, CYPCS's view was that there was a strong public interest in maintaining the right to confidentiality between a legal adviser and their client. It considered this encouraged free and frank discussions in the knowledge that information would not be disclosed.
25. CYPCS submitted that, to fulfil his mandate to promote and safeguard children's human rights, the Commissioner must be allowed to continue to ensure that fully-formed decisions could be taken on children's rights law, policy and practice. In CYPCS's view, this required legal advice to be confidential, in order to facilitate debate on complex matters of law and public policy.

26. CYPICS considered that to disclose the legal advice provided in this context would prejudice the Commissioner and his office by inhibiting future policy discussion, leading to less well-developed policy positions on contested matters of law and human rights.
27. While acknowledging an argument for releasing the information, CYPICS identified a far stronger and established public interest in maintaining the right to confidentiality of communications between a legal adviser and their client.
28. 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)*. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
29. The Commissioner accepts that there is a considerable public interest in disclosure of the legal advice, in terms of accountability and transparency, with regard to the formulation of views and positions concerning the safeguarding of children's interests and rights.
30. The Commissioner also 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 CYPICS, its ability to come to fully-formed decisions would be restricted, which is not in the public interest.
31. The Commissioner has considered fully the submissions and the withheld information itself. 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.
32. The Commissioner is therefore satisfied that CYPICS correctly withheld this information under section 36(1) of FOISA.

Section 36(2) – confidentiality

33. Section 36(2) of FOISA provides that information is exempt from disclosure if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure, by the authority obtaining it, to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain disclosure of information which is necessary in the public interest.

Information obtained from another person

34. Section 36(2) therefore contains a two-stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.

35. In its submissions, CYPCS confirmed that the information under consideration withheld under this exemption had been sent to it by another person, namely one of the other UK Children's Commissioners.
36. Having viewed the information, the Commissioner is satisfied that the withheld information was obtained by CYPCS from another person and that the first part of the section 36(2) test has therefore been fulfilled.

Actionable breach of confidence

37. The second part of the test is that disclosure of the information by a public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
38. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
 - (i) The information must have the necessary quality of confidence;
 - (ii) The public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - (iii) Unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

39. CYPCS submitted that the withheld information was not common knowledge or in the public domain and was in fact restricted to a small number of individuals within the public authority.
40. Having considered the withheld information and the explanation put forward by CYPCS, the Commissioner is satisfied that it fulfils the criteria of having the necessary quality of confidence. The information is not common knowledge and could not readily be obtained by the Applicant through any other means

Obligation to maintain confidentiality

41. CYPCS considered an implied duty of confidence existed due to the nature of the withheld information, being legal advice given to the other Children's Commissioner by their in-house legal officer. On receipt of the information, CYPCS immediately marked the email as "Confidential legal advice".
42. It also highlighted the close working relationship between the Children's Commissioners offices, which meant that there were instances, such as this, where information is shared "in confidence".
43. This view was reinforced by the other Children's Commissioner's office in an email exchange with CYPCS, confirming an expectation of confidentiality.
44. Having considered the circumstances, and the source and content of the withheld information, the Commissioner is satisfied that the information withheld was received in circumstances that implied an obligation to maintain confidentiality. He therefore accepts that there was an obligation to maintain confidentiality.

Unauthorised disclosure would cause detriment

45. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence. In that respect, the test of detriment is different to establishing whether, for example, disclosure would *prejudice substantially* the commercial interests of any person when considering the exemption in section 33(1)(b) of FOISA (Commercial interests and the economy).
46. CYPCS explained that it does not have consent from the individual who shared the information.
47. It explained that the issue under discussion was and remained highly contentious, with public opinion being very polarised. In its view, disclosure would cause significant emotional distress to this individual, with a real risk of them being exposed to online harassment and abuse for the opinions they had expressed.
48. The Commissioner accepts that the individual providing this information would have done so in the expectation that this information would be treated confidentially and not disclosed in the public domain in response to an information request under FOISA. In the circumstances, he also acknowledges that the risk of online harassment is credible.
49. The Commissioner is therefore satisfied that the tests for an actionable breach of confidence are met in this case, in relation to the information being withheld under section 36(2) of FOISA.
50. Having found that all the tests for the exemption in section 36(2) of FOISA have been met, and the exemption is properly engaged, the Commissioner must now go on to consider where the balance of the public interest lies in disclosure of the information.

Public interest defence – section 36(2)

51. As noted above, the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and not subject to the public interest test in section 2(1)(b). However, the law of confidence recognises that, in certain circumstances, the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of the information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is generally known as the public interest defence.
52. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.
53. CYPCS submitted that, in enforcing its obligation of confidence, it was not covering up any wrongdoing, or allowing the public to be misled or unjustifiably inhibiting public scrutiny on a matter of genuine public concern.
54. It pointed out that there was a significant amount of information and legal commentary already in the public domain on the judgment in question.
55. CYPCS highlighted the public interest in withholding information on what (at the time) remained a live case, still before the Court of Appeal, on which it would not be appropriate to comment.

56. CYPCS also highlighted the importance, given limited available resources, of being able to benefit from expert analysis from colleagues in other Children's Commissioners' offices. This was particularly important in cases where the other office had more expertise – as here, where the issues were questions of English law but were of potential relevance to the whole UK. Sharing of information to that end would be unlikely to continue if confidential information such as this, particularly on contentious issues, were to be disclosed.
57. For these reasons, CYPCS considered the public interest in upholding the law of confidence (and withholding the information) outweighed the public interest in disclosure.
58. The Applicant's public interest arguments are set out above, in relation to section 36(1) of FOISA.
59. In this case, the Commissioner agrees that there are no compelling reasons for the withheld information to be disclosed into the public domain, in the face of the obligation of confidentiality identified above..
60. In conclusion, the Commissioner finds that CYPCS was correct to withhold the information requested under section 36(2) of FOISA.
61. Given that CYPCS sought to withhold the same information under sections 30(c) and 36(2) of FOISA, and the Commissioner has found that the information was correctly withheld under section 36(2), he will not go on to consider section 30(c).

Decision

The Commissioner finds that the Commissioner for Children and Young People in 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 CYPCS 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

25 October 2021

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 –

- (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.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (c) section 36(2);

...

36 Confidentiality

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

- (2) Information is exempt information if-

- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

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