



Scottish Information
Commissioner
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Decision Notice 128/2025

Legal advice

Authority: Scottish Ministers
Case Ref: 202500309

Summary

The Applicant asked the Authority for legal advice and communications relating to the Authority considering appealing a judgment of the Court of Session to the Supreme Court. The Authority withheld the information requested as it considered it was legally privileged and that the public interest favoured withholding it. The Commissioner investigated and found that the Authority had complied with FOISA in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 36(1) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner).

Background

1. The Authority appealed [Decision 004/2023](#)¹ of the Commissioner to the Court of Session. This resulted in the Court of Session's judgment on 6 December 2023 in [The Scottish Ministers v The Scottish Information Commissioner](#)².
2. On 17 December 2023, the Applicant made a request for information to the Authority for all legal advice it had received relating to it appealing Decision 004/2023 to the Court of

¹ <https://www.foi.scot/decision-0042023>

² <https://www.scotcourts.gov.uk/media/wzclsnew/court-of-session-judgement-the-scottish-ministers-against-the-scottish-information-commissioner-06-december-2023.pdf>

Session. The Authority withheld the information requested on the basis it was legally privileged. The Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. This resulted in [Decision 193/2024](#)³, which required the Authority to disclose the legal advice.

3. On 28 December 2024, the Applicant made a request for information to the Authority (the request under consideration in this decision notice). He referred to the judgment of the Court of Session on 6 December 2023 and asked for:

“... legal advice from senior counsel, as well as any other legal advice and communications relating to whether to appeal the Court of Session’s ruling to the UK Supreme Court, from December 17th 2020 to December 21st 2020, including the eventual decision not to appeal.”
4. The Applicant later clarified the time period for his request as being from 17 December 2023 to 21 December 2023.
5. The Authority responded on 28 January 2025. It withheld the information requested on the basis that it was subject to legal professional privilege and therefore exempt under section 36(1) of FOISA, finding that the public interest test did not favour disclosure.
6. On the same day, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because he did not agree with the Authority’s position that the public interest favoured withholding the information requested. He referred to the arguments he had made in relation to the request which led to Decision 193/2024
7. The Authority notified the Applicant of the outcome of its review on 25 February 2025, which upheld its original decision without modification.
8. On the same day, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He stated that he was dissatisfied with the outcome of the Authority’s review because he considered the public interest favoured disclosure of the information requested. He provided reasons for this view.

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 3 March 2025, the Authority was notified in writing that the Applicant had made a valid application.
11. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority refused to provide the withheld information to the Commissioner as it did not consider it was legally required, given the terms of section 50(5) of FOISA, to do so.
12. The case was subsequently allocated to an investigating officer.
13. 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 the application and to answer specific questions relating to its reasons for withholding the

³ <https://www.foi.scot/decision-1932024>

information under the exemption in section 36(1) of FOISA and its consideration of the public interest test.

Commissioner's analysis and findings

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

Section 36(1) – Confidentiality

15. 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.
16. The Authority explained that it considered all the withheld information to be either:
- (a) communications subject to legal advice privilege between a lawyer and client about obligations under FOISA, or
 - (b) communications created by legal advisers or officials in contemplation of litigation proceedings under FOISA.
17. Legal advice privilege applies to communications in which legal advice is sought or provided. For legal advice privilege to apply, 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.
18. Litigation privilege is different and covers documents created in contemplation of litigation (also known as communications post litem motam).
19. Communications post litem motam are granted confidentiality to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent, or prospective opponent, will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation.
20. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.
21. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given (and sought) in relation to the potential litigation. However, the communication need not involve a lawyer, and the litigation contemplated need never actually happen for the privilege to apply. It will continue to apply after any litigation has been concluded.
22. There is a further matter to be considered, however, before the Commissioner can determine whether, or the extent to which, the section 36(1) exemption in FOISA is applicable in the circumstances of this case.

23. The information cannot be privileged unless it is also confidential. For the section 36(1) exemption in FOISA to apply, the withheld information must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. In other words, the claim must have been capable of being sustained at the time the exemption is claimed.
24. A claim of confidentiality cannot be maintained where, prior to a public authority's consideration of an information request or conducting a review, information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where the confidentiality has been lost in respect of part or all of the information under consideration, any privilege associated with that information is also effectively lost.

The Applicant's submissions

25. The Applicant did not provide specific submissions challenging the application of the exemption in section 36(1) of FOISA. However, he did provide submissions on why he believed the public interest favoured disclosure of the withheld information. These submissions are considered later.
26. The Applicant referred to the information request he made which resulted in Decision 193/2024. The information request in that case was made on 17 December 2023, meaning any information that was not held by the Authority at that time did not fall within the scope of the request.
27. The Applicant considered that, had he waited until 22 December 2023 to make that information request, he would have received the information requested as part of this information request. He explained that this information directly related to the same "chain of events" as the information that was disclosed to him following Decision 193/2024.
28. The Applicant explained that the information he was seeking in this information request directly related to, and fell within, the same "chain of events" as the information which was disclosed to him following Decision Notice 193/2024.

The Authority's submissions

29. The Authority explained that the information withheld under the exemption in section 36(1) was either:
 - (a) communications subject to legal advice privilege between a lawyer and client about obligations under FOISA, or
 - (b) communications created by legal advisers or officials in contemplation of litigation proceedings under FOISA.
30. The Authority said that it considered the relevant applicable period for contemplation of proceedings began on receiving notification of Decision 004/2023 on 31 January 2023 and lasted until it took a final decision on 20 December 2023 on whether to appeal to the Supreme Court following the outcome of the Court of Session hearing on 6 December 2023.
31. The Authority confirmed that there was no information withheld from 21 December 2023, so all information withheld fell within the relevant applicable period for contemplation of proceedings.
32. The Authority stated that the withheld information had not at any time been shared with anyone outwith the Authority. As such, it remained confidential at the time it responded to the Applicant's request and requirement for review (and remains so now).

33. The Authority therefore considered all of the necessary conditions for litigation privilege to apply were satisfied. Notwithstanding the fact that the litigation, in the form of an appeal to the Supreme Court, was not started, it considered litigation privilege continued to apply to the withheld information.
34. The Authority also considered that legal advice privilege applied to some of the withheld information as it related to communications with, or references to communication with, in-house legal advisers acting in their professional capacity and the Authority as their client, in which legal advice was sought and provided.
35. The Authority confirmed that all of the information to which legal advice privilege applied was either made or effected for the principal or dominant purpose of seeking or giving legal advice (or evidenced those communications). It submitted that disclosure of this information would breach legal professional privilege by divulging information about the points being considered by lawyers, the extent of their comments and the issues being flagged up for further consideration. It considered all of the necessary conditions for legal privilege to apply were satisfied.
36. The Authority submitted that a claim to confidentiality could be maintained in legal proceedings because the correspondence in question was only shared between the Authority and its legal advisers. The advice had not at any time been shared with anyone outwith the Authority. As such, it remained confidential at the time it responded to the Applicant's request and requirement for review (and remains so now). It therefore considered that legal professional privilege had not been waived.

The Commissioner's view

37. As rehearsed earlier, the Authority refused to provide the withheld information to the Commissioner as it did not consider it was legally required, given the terms of section 50(5) of FOISA, to do so.
38. Section 50(5) of FOISA provides that a Scottish public authority is not obliged, in response to receiving an information notice, to give the Commissioner information in respect of:
 - (a) a communication between professional legal adviser and client in connection with the giving of legal advice to the client with respect to that client's obligations under this Act; or
 - (b) a communication between professional legal adviser and client, or between such adviser or client and another person, made in connection with or in contemplation of proceedings under or arising out of this Act and for the purpose of such proceedings.
39. Not being provided the withheld information places obvious limitations on the Commissioner's ability to comment on it. However, the Commissioner accepts that, in view of the nature of the information requested and the circumstances in which it was created, the Authority would not have been obliged under section 50(5) of FOISA to provide the withheld information to him, had he issued an information notice (which, in this case, he did not do). While the Authority has made extensive comments on the application of section 50(5) in this case, the Commissioner does not, in the circumstances, consider it necessary to address them further.
40. In all of the circumstances, and having considered the Authority's submissions, the Commissioner accepts that the exemption in section 36(1) of FOISA applies to the withheld information in this case.

41. 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 maintaining the exemption (and withholding it).

The public interest test

The Applicant's submissions

42. The Applicant did not agree with the Authority's view that Decision 193/2024 was not "pertinent" or "applicable" to the present case. He considered it "clearly relevant" as the information requested in this case was "within the same chain of events" as that disclosed following Decision 193/2024.
43. The Applicant submitted that the information requested in the present case would complete the "chain of events" and that it was in the public interest for the legal advice to be seen from "start to finish". Without disclosure of the withheld information in the present case, the public would not have a "full version of events". He considered this meant the public interest favoured disclosure.
44. The Applicant noted that the legal advice requested in the present case was "discussed" within the legal advice disclosed following Decision 193/2024. He explained his intention as part of the request considered in Decision 193/2024 was to also obtain the advice requested in the present case, but he had been unaware that legal advice was still being received, and discussions were still occurring, regarding the prospect of an appeal to the Supreme Court.
45. The Applicant considered it was in the public interest for the withheld information to be disclosed to see, given the Authority did not appeal to the Supreme Court, what advice it received regarding the prospects of success of such an appeal. In other words, he considered it was a strong point of public interest to understand what it took for the Authority to "listen" to its own legal advisers.
46. The Applicant also stated that he wished to rely on the public interest arguments he provided in relation to Decision 193/2024. That is:
- the novelty of the appeal to the Court of Session, pointing out the rarity of the Authority appealing a decision of its own independent Commissioner
 - the speed at which the Court of Session reached its decision and that it did so without avizandum
 - the significant cost to the public purse
 - to understand what legal advice the Authority had received, particularly if the advice stated that the Authority's prospects of success were low.
47. For all the above reasons, the Applicant considered the public interest favoured disclosure of the withheld information.

The Authority's submissions

48. The Authority recognised a public interest in disclosing the withheld information to promote openness and transparency. It also acknowledged that disclosure could enhance public understanding of its decision not to appeal the judgment of the Court of Session to the Supreme Court.

49. However, the Authority considered that there was a very strong public interest in maintaining the exemption relating to legal professional privilege to ensure confidentiality of communications.
50. The Authority submitted there was a significant public interest in ensuring that any person or organisation that is involved in a court action can take legal advice, consider options and prepare their case as fully as possible, without the risk that their opponent will gain access to the material generated by their preparations.
51. The Authority considered it remained important in all cases that lawyers could provide free and frank legal advice, which considered and discussed all issues and options, without fear that the advice may be disclosed and, as a result, potentially taken out of context. It also considered there was a public interest in ensuring that the Authority's position on any issue was not undermined by the disclosure of legal advice, particularly where that advice was relevant to potential court proceedings. Legal advisers need, the Authority argued, to be able to present a full picture to their clients, including to set out the possible arguments both for and against a particular view, weighing up their relative merits.
52. The Authority also argued that there was a strong public interest in protecting the confidentiality of the withheld information to ensure it could discuss and take decisions in full possession of thorough and candid legal advice. This ensured that the Authority could take decisions in a fully informed legal context, having received legal advice in confidence as any other client would.
53. The Authority noted the public interest submissions provided by the Applicant. It did not consider that any of the public interest submissions advanced in Decision 193/2024 had any relevance to this case. These submissions revolved around the argument that there was a public interest in understanding whether the Authority proceeded to appeal Decision 004/2023 contrary to legal advice or with low prospects of success, the significant public expenditure involved in appealing and the perceived merits of the Authority's case.
54. In the present case, the Authority noted that there was no appeal to any court, no expenditure of public money on appealing a decision of the Commissioner and no judicial consideration of the Authority's legal arguments.
55. The Authority considered the only "new" public interest argument raised by the Applicant was that there was a public interest in knowing what it took for the Authority to "listen" to their own legal advisers.
56. The Authority explained that every decision and action it takes, including the decision to appeal Decision 004/2023, is underpinned by the rule of law, and so normally informed by legal advice. It considered that to argue there was a public interest in disclosing legal advice simply because the Authority took account of that legal advice was clearly flawed – the mere fact that it acted in accordance with legal advice could not establish a public interest in its disclosure.
57. On balance, therefore, the Authority concluded that the public interest in maintaining the exemption outweighed that in disclosing the withheld information, given the overriding public interest in maintaining the confidentiality of communications between lawyers and their clients and the public interest in allowing for full and detailed internal consideration of the Commissioner's decision and, in particular, the Authority's right to appeal a decision where it considered it appropriate to do so.

The Commissioner's view

58. As the Commissioner has noted in several 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.
59. 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 \[2009\] EWHC164 \(QB\)](#)⁴. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
60. The Commissioner accepts that there is a considerable, in-built, public interest in maintaining the ability of the Authority to receive full, unhindered legal advice. However, he also acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a public interest in disclosing the information.
61. As rehearsed earlier, the Authority has refused to provide the Commissioner with the withheld information (as, in the circumstances, it is entitled to do). This places the Commissioner in the position of being required to determine whether the public interest lies in withholding or disclosing information he has not seen. Naturally, he will make every reasonable effort to do so, on the basis of such information as is available to him, without presuming that upholding the exemption will be a foregone conclusion.
62. The information requested from the Authority in this case relates to legal advice and any other communications (from 17 December 2023 to 21 December 2023) regarding whether to appeal the judgment of the Court of Session to the Supreme Court, including the eventual decision not to appeal.
63. While the Commissioner recognises the public interest in understanding the legal advice received and the associated communications the Authority engaged in following the Court of Session judgment, and that each case must be considered on its own merits, he must also 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.
64. The Commissioner has also taken account of the information already in the public domain following Decision 193/2024 as well as the fact the Authority did not appeal the Court of Session judgment to the Supreme Court. That fact was apparent (and the information referred to in the public domain) well before the Applicant made his information request in this case – and the position was essentially unchanged (as regards the public interest in disclosure) at the time the Authority carried out its review.
65. 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 the Authority, its ability to come to fully informed decisions would be restricted, which would not be in the public interest.
66. Having considered the submissions made by both parties, the fact the Authority did not appeal the judgment of the Court of Session to the Supreme Court and the information already in the public domain following Decision 193/2024, the Commissioner is not satisfied

⁴ [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+)))

that the public interest in disclosure of the withheld information is significant enough in this case to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.

67. In conclusion, after careful consideration, the Commissioner is satisfied that the Authority correctly withheld the information falling within scope of the Applicant's request under section 36(1).

Decision

The Commissioner finds that the Authority 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 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.

David Hamilton
Scottish Information Commissioner
26 May 2025