



Scottish Information
Commissioner
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Decision Notice 149/2025

Advice relating to speakers at Edinburgh/Gaza City twinning meeting

Authority: City of Edinburgh Council
Case Ref: 202201219

Summary

The Applicant asked the Authority for a copy of the advice which led to speakers not being allowed to address a meeting about the twinning of Edinburgh with Gaza City. The Authority withheld the information as it considered it to be legally privileged, and 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. On 6 September 2022, the Applicant made a request for information to the Authority. He asked for the advice given to then Council leader, who had stated that he was not going to allow deputations (including some from Gaza) to address a committee meeting of the Authority about the possible twinning of Edinburgh with Gaza, because of “legal advice” he had received.

2. The Authority responded on 7 October 2022. It withheld the information on the grounds that it was subject to legal advice privilege and therefore exempt under section 36(1) of FOISA, and the public interest did not favour disclosure.
3. On 8 October 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not believe confidentiality rules applied when democracy had been denied. He asked the Authority to consider whether any part of the information could be disclosed.
4. The Authority notified the Applicant of the outcome of its review on 1 November 2022, upholding its original response in full.
5. On 1 November 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because natural justice, open democracy and accountability demanded full disclosure of the information.

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 22 November 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The Authority was also 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.

Commissioner's analysis and findings

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

Background to the request

10. The Applicant explained that the Authority's Policy and Sustainability Committee discussed the twinning of Edinburgh with Gaza City (following the submission of a petition on the subject) at a meeting on 30 August 2022.
11. He stated that five deputations (he listed named individuals located in Gaza and in the UK) were due to speak at the meeting via an online link. The evening before the meeting, the deputations received instructions about how long they should talk (leading them to believe that they would be able to speak) but the Applicant explained that they were subsequently not allowed to address the meeting.
12. The Applicant explained that at the committee meeting on 30 August 2022, the Council leader stated that he would not allow the deputations to address it because of legal advice.

Withheld information

13. The withheld information comprises a single document which was given to the Council leader in advance of the committee meeting.

Section 36(1) – Confidentiality

14. During the investigation, the Authority confirmed that it was relying on legal advice privilege to withhold the requested information.
15. 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.
16. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled:
 - The information must relate to communications with a professional legal adviser, such as a solicitor or advocate
 - The legal adviser must be acting in their professional capacity, and
 - The communications must occur in the context of the legal adviser's professional relationship with their client.
17. Before information can attract legal advice privilege, it must be information for 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, and so cannot have been made public, either in full or in a summary substantially reflecting the whole. Where confidentiality has been lost in respect or part or all of the information under consideration, any privilege associated with that information is lost.

The Authority's comments

18. The Authority confirmed that it considered the withheld information to be subject to legal advice privilege, and it stated that privilege had not been waived.
19. The Authority argued that the information qualified as legal advice because it met the three principal tests.
20. Firstly, it explained that the information was a briefing document produced by the Authority's Legal and Assurance Team, who were acting as legal advisors to the Authority, and the briefing document was itself based on legal advice obtained from an external KC.
21. Secondly, it submitted that the KC was acting in his role as legal advisor employed by the Authority to provide a legal opinion, and that the briefing document was produced by the Authority's in-house legal advisors working in their professional capacity to communicate the advice provided by the KC to Councillors.
22. Thirdly, the Authority submitted that the information was confidential and that it had not been shared outwith the Authority. It noted that the document was marked as being legally privileged and it included the legal opinion from the KC, along with a risk analysis of the Authority's position.

The Authority also noted that while the briefing document contained some information sourced from the public domain, the information was included for the sole purposes of providing a qualified legal opinion on the matter.

23. The Authority indicated that the briefing document had only been shared internally to a limited number of individuals. It submitted that it was sent to group leaders to explain the position, and the committee clerk's circulation was limited to committee members only in advance of the meeting. It added that it was likely that the information had also been shared with the then Chief Executive of the Authority and the committee manager.

The Applicant's comments

24. The Applicant stated that he did not believe confidentiality rules applied in situations where democracy had been denied.

The Commissioner's view

25. Having considered the withheld information, the Commissioner is satisfied that it meets the conditions for legal advice privilege to apply.
26. The Commissioner is also satisfied that the confidentiality of the legal advice has not been lost or waived through being shared with limited relevant employees or members within the Authority.
27. The Commissioner therefore considers that the information in question was confidential at the time the Authority dealt with the Applicant's information request and requirement for review (and that it remains so now).
28. The exemption in section 36(1) is a qualified exemption, which means that it 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.

Public interest test - section 36(1)

The Authority's submissions

29. The Authority acknowledged that there was a public interest in disclosure of public documents such as legal advice provided, in order to better inform the public about the issues being considered. However, the Authority contended that there was a stronger and valid countervailing public interest in withholding documents related to legal advice being sought and provided in the course of the Authority undertaking its statutory duties.
30. The Authority argued that retaining the confidentiality of legal advice allowed it to consider, more fully and without restraint, the merits of any particular course of action, and that if the advice were to be made public the Authority's ability to do this would be significantly constrained.
31. The Authority concluded, on balance, that it required a space free from the public gaze in which to conduct some of its official business. The Authority argued that the content of the applicable legal advice in this appeal, the circumstances surrounding its receipt and the integrity of the legal professional privilege meant that, on balance, the public interest favoured withholding the information.

The Applicant's comments

32. The Applicant stated that he did not believe confidentiality rules applied when democracy had been denied.
33. He commented that, in his view, the explanation (that the information constituted legal advice privilege) made no sense. The Applicant explained that the night before the meeting those who had been due to address the meeting received communication from the Authority on the length of time they would be allowed to speak (i.e. they therefore believed they would be allowed to speak).
34. The Applicant further argued that "something happened" in the early morning of 30 August 2022 whereby those people were suddenly excluded from proceedings. The Applicant contended that the Authority's position that legal advice prevented those people speaking was an excuse and that pressure had been put on the Authority to silence those people.
35. He further suggested that this pressure might have come from lawyers who supported Israel, or the Israeli authorities, and questioned whether (if this was the case) it was appropriate that such pressure be hidden from the electorate.
36. The Applicant argued that those denied a chance to speak should be provided with an explanation as to what sort of legal advice warranted their exclusion at such short notice and that the legal advice should not be kept secret from the public which paid for it.
37. The Applicant argued that natural justice and open democracy demanded the full disclosure of the information.
38. Furthermore, he argued, accountability demanded that the public was told who or what was pressurising the Authority to make decisions which, in his view, flew in the face of democratic process.

The Commissioner's view

39. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities and that disclosure of the information requested would go some way towards satisfying that interest. Furthermore, he notes that the deputations were expecting to speak at the meeting until the decision was made, at short notice, not to allow this.
40. However, the Commissioner also acknowledges that there is a strong inherent public interest, recognised by the courts, in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds.
41. 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)¹. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.

¹ [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+)))

42. 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 (and he has on occasion required disclosure of such information where the particular circumstances of the appeal supported it). For example, disclosure may be appropriate where (the list is not exhaustive):
- the privileged material discloses wrongdoing by/within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material discloses an apparently irresponsible and wilful disregard of advice
 - the passage of time is so great that disclosure cannot cause harm.
43. While the Commissioner accepts, having examined the withheld information, that the contents of the advice would be of interest to the Applicant, those who had been due to speak, and to the general public, he does not consider that the circumstances of this case reflect any of the scenarios described above (or any other reason for disclosure of equal force).
44. In relation to the Applicant's specific claim that the Authority could be under pressure from an outside body, the Commissioner acknowledges that were it to be the case that the withheld information provided evidence of such pressure on a democratic institution, this could provide a strong public interest argument for disclosure of information, including that to which section 36(1) of FOISA had been applied.
45. However, (and in providing his reasoning, the Commissioner must ensure he does not disclose the contents of the withheld information) the Commissioner considers that this is not the case in this particular appeal.
46. The Commissioner must take account of the important public interest in legal professional privilege and the public interest in allowing public authorities to obtain confidential legal advice.
47. 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 formed decisions would be restricted, which would not be in the public interest. Consequently, in this case, the Commissioner is satisfied that the Authority correctly withheld, under section 36(1) of FOISA, the information requested.

Decision

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) 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.

Euan McCulloch
Head of Enforcement

12 June 2025