



Scottish Information
Commissioner

**Decision – 190/2006 Mr David Emslie and the
Scottish Public Services Ombudsman**

Request for copies of two legal opinions

**Applicant: Mr David Emslie
Authority: Scottish Public Services Ombudsman
Case No: 200600247
Decision Date: 25 October 2006**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 190/2006 – Mr David Emslie and the Scottish Public Services Ombudsman

Request for copies of two legal opinions associated with an existing housing development – one opinion was released and one opinion was withheld. The Commissioner was partially satisfied that the exemptions relied on to withhold the legal opinion had been used correctly by the Scottish Public Services Ombudsman.

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 section 1(1) (General entitlement); section 16(1)(c) (Refusal of request); section 36 (Confidentiality) and section 38(1)(a) (Personal information).

Data Protection Act 1998 section 1 (Interpretation).

Scottish Public Services Ombudsman Act 2002 section 19(1)-(3) (Confidentiality of information).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr David Emslie (Mr Emslie) requested copies of two legal opinions regarding an existing housing development from the Scottish Public Services Ombudsman (SPSO). The SPSO released one of the legal opinions to Mr Emslie but refused to release the other legal opinion as it had been provided in confidence by the Grampian Housing Association (GHA). Mr Emslie was unhappy with the response from the SPSO and wrote to the SPSO, to ask it to undertake a review of its decision. The SPSO responded to Mr Emslie in writing, upholding its original decision to withhold the second legal opinion (“the legal opinion”) as it had been provided in confidence.

Mr Emslie was dissatisfied with the response he received from the SPSO and submitted an application for a decision by the Scottish Information Commissioner in order to obtain a copy of the legal opinion which had been withheld from him.



(Throughout the investigation, the SPSO did not cite the specific exemption of Freedom of Information (Scotland) Act 2002 (FOISA) it was relying on to withhold the legal opinion. I have interpreted the exemptions described by the SPSO within its correspondence with Mr Emslie and my Office as sections 36(2) and 38(1)(a) of (FOISA)).

Following an investigation, the Commissioner found that the SPSO was entitled to withhold the legal opinion from Mr Emslie under section 36(2) of FOISA.

Background

1. Mr Emslie wrote to the SPSO on 15 November 2005 and asked for copies of two legal opinions, one requested by one of the SPSO's predecessor offices, the previous Housing Association Ombudsman for Scotland, from a professor and the other by the GHA with regards to his right to buy and the Deed of Conditions for the block of flats which Mr Emslie lives in.
2. On 16 December 2005, the SPSO responded in writing to Mr Emslie, enclosing a copy of one of the legal opinions, but withholding the other legal opinion as it had been provided in confidence to the SPSO by the GHA.
3. On 19 December 2005, Mr Emslie wrote to the SPSO expressing his dissatisfaction with its response and asking the SPSO to review its decision to withhold the legal opinion.
4. As he did not receive a response, Mr Emslie wrote again to the SPSO on 21 January 2006. In this letter, Mr Emslie stated it was in the public interest for the legal opinion to be released as the previous Housing Association Ombudsman recommended that the GHA amend the Deeds of Conditions. Mr Emslie also provided details of why the Deeds of Conditions were considered to be defective.
5. The SPSO responded in writing to Mr Emslie's request for review on 24 January 2006. The SPSO upheld its original decision not to release the legal opinion as it had been given to the SPSO in confidence by the GHA.
6. Mr Emslie contacted my Office on 24 January 2006 by fax, stating that he was dissatisfied with the outcome of the SPSO's review and applying to me for a decision in relation to the SPSO withholding the legal opinion from him.



7. On the same day, he sent another fax, providing more information about the Deed of Conditions. According to Mr Emslie, a large number of properties have defective Deeds of Conditions and he had to go through a five year Lands Tribunal case to obtain a ruling that the Deeds of Conditions should be changed. Mr Emslie stated that he needed a copy of the legal opinion so that he could understand why the GHA had not changed the Deeds of Conditions.
8. The case was allocated to an investigating officer and the application was validated by establishing that Mr Emslie had made a valid request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to his request.

The Investigation

9. The investigating officer wrote to the SPSO on 22 February 2006, giving notice that an appeal had been received and that an investigation into the matter had begun. The letter invited comments from the SPSO as required by section 49(3)(a) of FOISA. The SPSO was asked to supply the investigating officer with a copy of the information withheld from Mr Emslie.
10. On 23 February 2006, the SPSO questioned why my Office needed to see the information as they felt it was a straightforward matter.
11. On 24 February 2006, the investigating officer wrote to the SPSO explaining my duty to investigate an application for a decision once the application had been validated, and that I required the information to conduct the investigation. The SPSO was advised that I could, if necessary, issue an Information Notice to secure the required information.
12. The SPSO subsequently provided a copy of the legal opinion on 16 March 2006.
13. The investigating officer entered into further correspondence with the SPSO to obtain clarification as to which exemption in FOISA it was relying on to withhold the legal opinion from Mr Emslie and whether it had obtained confirmation that the GHA had provided the legal opinion in confidence to the SPSO.



14. On 21 August 2006, the SPSO wrote to the investigating officer, stating that the request for the legal opinion should be considered under the Data Protection Act 1998 (DPA) and that it was exempt under FOISA as it had been provided in confidence. The SPSO provided additional commentary on the confidentiality argument. The SPSO also argued that although sections of the document could be considered rather general and not specific, the document itself should not be considered in sections, but as a single entity. However, the SPSO did not clarify the specific exemptions in FOISA that it was relying on to withhold the legal opinion from Mr Emslie.

The Commissioner's Analysis and Findings

15. I shall first analyse the SPSO's exemption descriptions and clarify my interpretation of which exemptions of FOISA have been applied to withhold the legal opinion. I will then consider the application of those exemptions to withhold the legal opinion from Mr Emslie. In coming to this decision, I have taken account of the submissions made to me by both the SPSO and Mr Emslie.

Section 36 of FOISA - confidentiality

16. In considering the exemptions (sections 25 to 41) within FOISA that could possibly apply to the information withheld, I have looked in detail at the SPSO correspondence with Mr Emslie and my Office.
17. In its response to Mr Emslie's original request on 16 December 2005, the SPSO stated that the legal opinion had been provided to it in confidence. The GHA had requested that the SPSO respect that confidence and not release a copy of the legal opinion. The SPSO re-iterated the fact that the legal opinion had been provided in confidence in its further correspondence with Mr Emslie and its correspondence with my Office.
18. Section 36(1) exempts from release information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Section 36(2) exempts from release information which has been provided to a third party in confidence (paragraph 19). I have therefore proceeded on the basis that the SPSO has chosen to exempt the legal opinion from disclosure on the basis of section 36(2).



Application of Section 36(2) of FOISA

19. Section 36(2) of FOISA is an absolute exemption, in that it is not subject to the public interest test required by section 2(1)(b) of FOISA. Section 36(2) of FOISA states that information is exempt information if it was obtained by a Scottish public authority from another person (including another such authority); and its disclosure by the receiving authority to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person.
20. There is a two stage test which must be passed before this exemption can be relied on. Firstly, 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 body, such as a company or partnership.
21. The GHA is a housing association based in the North East of Scotland. Therefore the first part of this test is fulfilled, as the legal opinion was provided to the SPSO by the GHA.
22. The second part of the test is that the disclosure of the information by the SPSO would constitute an actionable breach of confidence either by the person who gave the information to the public authority or by any other person.
23. Although there was no discussion about the meaning of the word "actionable" when the Freedom of Information Bill was being considered in Parliament, I take the view that actionable means that the basic requirements for a successful action appear to be fulfilled.
24. There are three main requirements, all of which must be met before a claim for breach of confidentiality can be established. These are:
 - a) the information must have the necessary quality of confidence;
 - b) the public authority must have received the information in circumstances from which an obligation on the authority to maintain confidentiality could be inferred; and
 - c) there must be a disclosure which has not been authorised by the person who communicated the information but which would cause damage to that person.
25. Taking into account the requirements set out above, I considered whether if by releasing the legal opinion an action could be raised against the SPSO for breach of confidence.
26. I am satisfied that the information requested has the necessary quality of confidence to be actionable, as is it is not currently in the public domain and Mr Emslie would not be able to create the information himself.



27. However, as set out above, in order for the breach of confidence to be actionable, the SPSO must have received the information in circumstances which imposed an obligation on the authority to maintain confidentiality.
28. The GHA commissioned the opinion in 1999 and sent a copy of it to the Housing Association Ombudsman for Scotland (HAO). The HAO merged with the Scottish Parliamentary and Health Service Ombudsman and the Local Government Ombudsman for Scotland in 2002 to form the SPSO.
29. As stated in its email of 14 March 2006, the SPSO commented as follows:
 - The legal opinion had been provided to one of its predecessor offices (HAO) in confidence. The SPSO asked the provider if it could be released from this duty, but this was declined by the provider.
 - If such a document was released it would greatly compromise the effectiveness of the SPSO office and damage its relationships with bodies under its jurisdiction if this confidentiality was threatened.
 - Finally, it made reference to section 19 of the Scottish Public Services Ombudsman Act 2002, which prohibits the disclosure of information provided to it in connection with a complaint. Mr Emslie made a complaint about the GHA, and the HAO obtained a copy of the legal opinion in April 1999 from the GHA to enable it to progress its investigation into the complaint.
30. Therefore, I am inclined to uphold the second requirement that the SPSO received the legal opinion in circumstances which imposed an obligation on the authority to maintain confidentiality.
31. Finally, for a breach of confidence to be actionable, there must be a disclosure which has not been authorised by the person who communicated the information but which would cause damage to that person. The SPSO obtained verbal confirmation from the GHA that it should not release a copy of the legal opinion. Clearly, any disclosure by the SPSO would be unauthorised, particularly since the GHA has recently reiterated to the SPSO that the opinion should not be released.
32. The GHA commissioned the legal opinion in question to enable it to consider various options with regards to the Deed of Conditions and to consider if there was an alternative viewpoint to the legal opinion commissioned by the HAO. It is important that bodies are able to instruct independent legal advice and that they have an opportunity to consider the various options before them. I consider that, without this opportunity, there would be a detriment to bodies such as the GHA.



33. Although the exemption contained in section 36(2) is not subject to the public interest test required by section 2(1)(b) of FOISA, public interest considerations must also be taken into account when applying this particular exemption because the law of confidence recognises that there is a strong public interest in ensuring that people respect confidences, and the burden of showing that a failure to maintain confidentiality would be in the public interest is therefore a heavy one. However, in certain circumstances, the public interest in maintaining confidences may be outweighed by the public interest in disclosure of 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.
34. The courts have considered that there may be a public interest defence to actions of breach of confidentiality where to enforce an obligation of confidence would cover up wrongdoing, allow the public to be misled or unjustifiably inhibit public scrutiny of matters of genuine public concern.
35. I can identify no obvious countervailing public benefit which is likely to accrue from disclosure of the legal opinion. The basis of Mr Emslie's enquiry is that a legal opinion (the one which was disclosed to him by the SPSO in response to his enquiry) had cast doubt on the validity of the Deeds of Conditions, but the GHA had not changed these Deeds of Conditions. Therefore Mr Emslie wanted a copy of the legal opinion which was withheld from him to see if it provided reasoning for the fact that the GHA had not changed the Deeds of Conditions. Having considered the contents of the opinion, I do not find that the SPSO would have a defence to an action of breach of confidence on public interest grounds in the event that it discloses the information.

Application of personal information section in FOISA

36. As noted above, the SPSO considered that the request for the legal opinion should have been dealt with as a request under DPA and not FOISA, given that the legal opinion named Mr Emslie.
37. Mr Emslie raised a complaint against the GHA for failing to comply with the Deeds of Conditions. The HAO instructed a legal opinion and also obtained a copy of another opinion (the legal opinion in question here) from the GHA to allow him to consider whether the GHA had failed to comply with the Deed of Conditions.
38. The legal opinion withheld from Mr Emslie does include Mr Emslie's name and other information related to him. However, the legal opinion contains only a small proportion of information specifically regarding Mr Emslie, with the majority of the opinion interpreting the Deed of Conditions.



39. The SPSO did not clarify which exemption in FOISA it wished to rely on in withholding the opinion under the heading of “data protection”. However, given that Mr Emslie, the applicant, is named in the opinion, I consider that the most relevant exemption is that contained in section 38(1)(a) of FOISA.

Application of Section 38(1)(a) of FOISA

40. Section 38(1)(a) of FOISA states that information is exempt information if it constitutes personal data of which the applicant is the data subject.

The term “personal data” is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

41. The definition is subject to the interpretation contained in *Durant v Financial Services Authority* [2003] EWCA Civ 1746. In this decision, the Court of Appeal held that if information is to be viewed as personal data, the information has to be biographical in a significant sense, i.e. going beyond the recording of the individual’s involvement in a matter or event that has no personal connotations. The individual also has to be the focus of the information, rather than some other person with whom that individual may have been involved. The Court of Appeal summarised these two aspects as information affecting a person’s privacy whether in his personal or family life, business or professional capacity.
42. I do not accept that the whole of the legal opinion can be exempted under section 38(1)(a) of FOISA. Although the opinion does include some personal information relating to Mr Emslie’s, this is only a small percentage of the entire legal opinion. The original complaint that instigated the commissioning of the opinion was raised by Mr Emslie and reference is made in the opinion to Mr Emslie’s complaint and other personal information associated with his place of residence. However, the remainder of the opinion details the interpretation of the Deed of Conditions. Therefore, although I can accept that sections of the opinion contain Mr Emslie’s personal information, the entire legal opinion should not be withheld under section 38(1)(a) of FOISA. I consider that this request was a hybrid request, i.e. one which was required to be dealt with partially under the DPA and partially under FOISA.
43. The exemption in section 38(1)(a) is an absolute one in that it is not subject to the public interest test required by section 2(1)(b) of FOISA. Given that I have already found that the whole of the opinion is exempt under section 36(2), I do not intend to specify which parts of the opinion I consider to be Mr Emslie’s personal data.



Decision

I find that the Scottish Public Services Ombudsman (the SPSO) was entitled to withhold the opinion from Mr Emslie on the basis that the opinion is exempt in terms of section 36(2). I therefore find that, in withholding the opinion, the Ombudsman complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA).

However, I also find that the SPSO were not entitled to rely on the exemption contained in section 38(1)(a) to the whole of the legal opinion, for the reasons set out above.

In failing to advise Mr Emslie of the exemptions which it was relying on to withhold the opinion from him, the SPSO also failed to comply with Part 1 of FOISA in that it did not specify the exemption it was relying on. In doing so, it failed to comply with section 16(1)(c) of FOISA.

Appeal

Should either the SPSO or Mr David Emslie 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
25 October 2006



APPENDIX

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.

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing ... which –
 - (a) ...
 - (b) ...
 - (c) specifies the exemption in question ...
 - (d) ...

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.

38 Personal information

- (1) Information is exempt information if it constitutes-
 - (a) personal data of which the applicant is the data subject

Data Protection Act 1998

1. (1) In this Act, unless the context otherwise requires-
"personal data" means data which relate to a living individual who can be identified-
 - (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,



and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual

Scottish Public Services Ombudsman Act 2002

19 Confidentiality of information

- (1) Information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with any matter in respect of which a complaint or a request has been made must not be disclosed except for any of the purposes specified in subsection (2) or as permitted by subsection (3).
- (2) Those purposes are-
 - (a) the purposes of-
 - (i) any consideration of the complaint or request (including any statement under section 11),
 - (ii) any investigation of the matter (including any report of such an investigation),
 - (b) the purposes of any proceedings for-
 - (i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Ombudsman,
 - (ii) an offence of perjury alleged to have been committed in the course of any investigation of the matter,
 - (c) the purposes of an inquiry with a view to the taking of any of the proceedings mentioned in paragraph (b),
 - (d) the purposes of any proceedings under section 14.
- (3) Where information referred to in subsection (1) is to the effect that any person is likely to constitute a threat to the health or safety of patients, the Ombudsman may disclose the information to any person to whom the Ombudsman thinks it should be disclosed in the interests of the health and safety of patients.