

Decision Notice



Decision 180/2012 Cal Solutions Ltd and Scottish Water

Report produced by named solicitor for Scottish Water

Reference No: 201200792

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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Cal Solutions Limited (Cal Solutions) asked Scottish Water for a copy of a report produced for Scottish Water by a named firm of solicitors. Scottish Water withheld the report from Cal Solutions, arguing that it was protected by the law relating to confidentiality of communications. This was accepted by the Commissioner following an investigation.

Relevant statutory provisions

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

1. Cal Solutions (Billingham) Limited, a company which shared the same Directors as Cal Solutions, provided information to Scottish Water which it alleged demonstrated inappropriate activity within Scottish Water and related companies in relation to the award of contracts for work.
2. On 11 April 2011, Cal Solutions wrote to Scottish Water requesting a copy of the report produced for Scottish Water by named solicitors, which concerned an investigation carried out into the allegations made by Cal Solutions (Billingham) Limited.
3. Scottish Water responded on 16 May 2011. It advised Cal Solutions that as the requested information was external legal advice provided to Scottish Water, it was withholding the information under the exemption in section 36(1) of FOISA.
4. On 17 May 2012, Cal Solutions wrote to Scottish Water requesting a review of its decision, advising that it did not expect to receive any privileged legal advice.
5. Scottish Water notified Cal Solutions of the outcome of its review on 14 June 2011. It considered Cal Solutions to be engaged in vexatious behaviour and therefore, in line with section 21(8) of FOISA, refused to carry out a review.



6. On 16 June 2011, Cal Solutions wrote to the Commissioner's office, stating that it was dissatisfied with the outcome of Scottish Water's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. Following an investigation, which led (in *Decision 210/2011*) to the Commissioner finding that the request was not vexatious, Scottish Water carried out a review, communicating the outcome to Cal Solutions on 11 December 2011. This upheld the earlier decision to withhold the information under section 36(1) of FOISA. In addition, parts of the report (relating to specific individuals) were withheld under section 38(1)(b) of FOISA.
8. On 22 April 2012, Cal Solutions wrote to the Commissioner, stating that it was dissatisfied with the outcome of Scottish Water's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Cal Solutions had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

10. On 26 April 2012, Scottish Water was notified in writing that an application had been received from Cal Solutions and was asked to provide the Commissioner with any information withheld from it. Scottish Water responded with the information requested and the case was then allocated to an investigating officer.
11. The investigating officer subsequently contacted Scottish Water, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, Scottish Water was asked to justify its reliance on sections 36(1) and 38(1)(b) of FOISA.
12. Submissions were also obtained from Cal Solutions on what it considered to be the public interest in disclosing the withheld information.
13. The relevant submissions received from both Scottish Water and Cal Solutions will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Cal Solutions and Scottish Water and is satisfied that no matter of relevance has been overlooked.



Section 36(1) – Confidentiality

15. Scottish Water has applied section 36(1) to all of the information contained in the report produced by the named solicitors, stating that the information attracted both legal advice privilege and litigation privilege.
16. 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. Among the types of communication which fall into this category are those which are subject to legal professional privilege. One aspect of legal professional privilege is legal advice privilege, which covers communications between lawyers and clients in the course of which legal advice is sought or given.
17. For the exemption 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 advocate. This may include an in-house legal adviser. The legal adviser must be acting in his or her professional capacity and the communications must occur in the context of the legal adviser's professional relationship with his or her client.
18. In this case, having considered Scottish Water's submissions along with the withheld information, the Commissioner cannot accept that legal advice privilege applies to the information. The Commissioner acknowledges that the report was prepared by a solicitor on the instructions of Scottish Water. However, what the solicitor was asked to do was to carry out an independent review of the allegations made by Cal Solutions (Billingham) Limited. The skills of a lawyer may have been helpful in this task, but the Commissioner cannot accept that this was a task *requiring* these skills. Further, the report makes findings of fact, conclusions on the reasonableness of Cal's assertions and recommendations on matters of good contract governance. The Commissioner does not accept that it provides legal advice.
19. Scottish Water also considered the withheld information to be subject to litigation privilege, another aspect of legal professional privilege. This covers documents created in contemplation of litigation (also known as communications *post litem motam*).
20. 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/s or prospective opponent/s will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation.
21. 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. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given 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. In this case, given the history of dealings between Cal Solutions (Billingham) Limited and Scottish Water, the Commissioner finds it reasonable to accept that the report was prepared in contemplation of litigation. She also accepts that the character of the report is such as to bring it within the scope of litigation privilege.

Was the information confidential?

23. 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 is applicable in the circumstances of this case.
24. The information cannot be privileged unless it is also confidential. For the exemption to apply, the withheld information must be information in respect to which a claim to confidentiality of communications (in this case in the form of legal professional privilege) could be maintained in legal proceedings. In other words, the claim must have been capable of being sustained at the time the exemption was claimed.
25. 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.
26. In its application, Cal Solutions provided the Commissioner with an article from the *Kilmarnock Standard* newspaper, which demonstrated, in its view, that the matter covered by the report is already in the public eye. Scottish Water considered the matters reported in the *Kilmarnock Standard* related to the allegations made by Cal Solutions (Billingham) Limited and not the withheld report.
27. Having examined the withheld information, together with the content of the article from the *Kilmarnock Standard*, the Commissioner is satisfied that there has not been any disclosure of the withheld information in that article.
28. The Commissioner is therefore satisfied that confidentiality and, as a consequence, privilege in the withheld information has not been lost. The Commissioner accepts that Scottish Water correctly applied the exemption in section 36(1) of FOISA to the withheld information.

Public interest test

29. The exemption in section 36(1) is, however, a qualified exemption, which means that it is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that the withheld information is exempt under section 36(1), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. Unless she finds that it is, she must order the information to be disclosed.



30. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Court and others v the Governor and Company of the Bank of England (2004) UKHL 48*¹ and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
31. Scottish Water advised that it had considered the public interest in it being accountable for its decisions and transparent in the way it reached them, and acknowledged that there might, in the fullness of time, be an argument that it was in the public interest to disclose the contents of the report. However, the arguments in favour of disclosure were, in Scottish Water's opinion, greatly outweighed by the importance to it of maintaining confidentiality in the contents of the report and adhering to its right of legal privilege.
32. Scottish Water also submitted that it was important for it to preserve its customer's funds. Disclosure of the content of the report could lead to unwarranted claims, a waste of resources and disruption to its business. It argued that a public authority should not be prejudiced in court proceedings by having to disclose its tactics or explain to a potential claimant where it might have vulnerabilities. Should litigation be brought, it pointed out, the courts had powers to require disclosure of factual documents. Given the significance of this document (in summarising evidence, weighing up its significance and considering how it might be construed or used in the future) it did not believe the court would require disclosure.
33. In its application, Cal Solutions submitted that the possibility of a related party transaction within a public body, involving public expenditure, was something of serious concern to the public. It believed there to be a public interest in the outcome of an investigation into such matters.
34. More broadly, Cal Solutions considered transparency in the process of expenditure of public finances to be of benefit to the public. In this case, it believed upholding an exemption to withhold this report could inhibit the public scrutiny of matters of genuine public concern, and contribute to prevention of the detection of possible wrongdoings within a public sector body.
35. Having considered the submissions from Cal Solutions and Scottish Water, the Commissioner acknowledges the general public interest that exists in ensuring that public authorities are accountable and act in a transparent manner in relation to spending public funds. She also recognises that this general public interest will be all the more important where there are allegations or suspicions that a public authority is acting in a manner which could be deemed to involve inappropriate use or allocation of public money.
36. Scottish Water also advised that Cal Solutions (Billingham) Limited was offered (and provided with) a note of the outcome of the investigation. This was provided (by the named firm of solicitors) in a letter dated 8 April 2010, a copy of which was provided to the Commissioner.

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



37. Having reviewed this letter, the Commissioner is satisfied that this informed Cal Solutions (Billingham) Limited of the outcome of the investigation. The Commissioner is satisfied that the information in this letter was available to Cal Solutions, which had the same Directors as Cal Solutions (Billingham) Limited. She is also satisfied that (without disclosing anything of the substance of the withheld report) it goes some way towards meeting the public interest arguments advanced by Cal Solutions.
38. The Commissioner accepts that there is some weight to the public interest in disclosure in this case, in that Scottish Water should be transparent in its use and allocation of public funds.
39. However, against this, the Commissioner has identified a stronger public interest in protecting the ability of Scottish Water to prepare for potential litigation in confidence, to enable it to make fully informed decisions.
40. On balance, therefore, the Commissioner is satisfied, in all the circumstances of this case, that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the exemption in section 36(1).
41. As the Commissioner is satisfied that Scottish Water acted correctly in withholding the information under section 36(1) of FOISA, she is not required to, and will not, go on to consider the application of the exemption in section 38(1)(b) of FOISA.

DECISION

The Commissioner finds that Scottish Water complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Cal Solutions Limited.

Appeal

Should either Cal Solutions Limited or Scottish Water 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 notice.

Margaret Keyse
Head of Enforcement
2 November 2012



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.

...

- (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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