

Authority:
Scottish Information Commissioner

Country/State:
Scotland

Case title:

Disclosure of Legal Advice on Appeal of Information Commissioner Decision

Official citation:

Decision 193/2024

Date of decision:

2024

Relevant law:

Freedom of Information (Scotland) Act 2002 (FOISA), section on confidentiality and legal professional privilege

Decision:

The Commissioner ordered the Scottish Government to disclose legal advice it received concerning whether to appeal an earlier decision of the Commissioner, finding that although legal professional privilege applied, the public interest favoured disclosure in the circumstances of the case.

Key words:

Right to Information, legal professional privilege, public interest test, disclosure of legal advice, government accountability

Case Summary

1. Facts

Following Decision 004/2023, which ordered the Scottish Government to disclose information relating to an investigation into the former First Minister under the Ministerial Code, the Scottish Government appealed to the Court of Session. The Court dismissed the appeal and upheld the Commissioner's decision.

Subsequently, a member of the public requested access to the legal advice obtained by the Scottish Government in relation to the decision to appeal. The Scottish Government refused the request, relying on the exemption for legal professional privilege under FOISA and concluding that the public interest did not favour disclosure. This position was maintained on internal review.

2. Decision

The Commissioner accepted that the exemption for confidentiality and legal professional privilege applied to the information requested. However, he concluded that the public interest test had not been properly applied.

In assessing the public interest, the Commissioner stressed that the test must be practical and case-specific, not merely theoretical. Particular weight was given to the high-profile nature of the matter, the constitutional significance of the case, the expenditure of substantial public funds on the appeal, and the Court of Session's swift rejection of the appeal.

Balancing these factors, the Commissioner determined that the public interest in transparency and accountability outweighed the interest in maintaining confidentiality. The Scottish Government was therefore required to disclose the legal advice.

Note (Optional):

This decision underscores that legal professional privilege under FOISA is a qualified exemption and that, even in sensitive cases, authorities must apply the public interest test rigorously and transparently.

Resource:

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