

Our Ref: IM-FOI-2022-1438
Date: 21 July 2022



FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

I refer to your recent request for information which has been handled in accordance with the Freedom of Information (Scotland) Act 2002.

For ease of reference, your request is replicated below together with the response.

Information contained in any legal advice to Police Scotland regarding protests at/outside/near clinics carrying out abortions eg. Queen Elizabeth University Hospital and Sandyford Clinic Glasgow.

Your request for information has now been considered and a decision was made not to grant your request. The information requested by you is considered to be exempt in terms of the Freedom of Information (Scotland) Act 2002 (the Act). Section 16 of the Act requires Police Service of Scotland to provide you with a notice which: (a) states that it holds the information, (b) states that it is claiming an exemption, (c) specifies the exemption in question and (d) states, if that would not be otherwise apparent, why the exemption applies. Where information is considered to be exempt, this letter serves as a Refusal Notice that information is held and an explanation of the appropriate exemption is provided.

In relation to the legal advice that Police Scotland hold the following exemption is applicable:

Section 36(1) – Confidentiality

Section 36(1) of FOISA provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.

As you may be aware, for the exemption to apply to this particular type of communication, certain conditions must be fulfilled; namely,

- (i) The information must relate to communications with a professional legal adviser, such as a solicitor or an advocate;
- (ii) The legal adviser must be acting in their professional capacity; and

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(iii) The communications must occur in the context of the legal adviser's professional relationship with their client.

I would advise that all of the withheld information comprised communications between legal advisers within Legal Services Department (Police Scotland) and Police Scotland staff members, as their client, in which legal advice was sought and provided. Consequently, I considered the withheld information was subject to legal advice privilege.

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.

Public Interest Test

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 between legal adviser and client on administration of justice grounds. 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). Generally, the High Court's reasoning will be relevant to the application of section 36(1) of FOISA in this instance.

There is a strong public interest in maintaining legal professional privilege and ensuring the confidentiality of communications between legal advisers and their clients. In my deliberations I would argue that it is important that lawyers can provide free and frank legal advice which considers and discusses all issues and options without fear that such advice might be disclosed and, as a result, potentially taken out of context.

Further, if there was an expectation that such legal advice would be disclosed in the future, this would inevitably lead to similar advice being much more circumspect and therefore less effective.

Nonetheless, in this instance, I accept that there is a general public interest in disclosure of the information under consideration, to allow scrutiny of the actions of the Service and contribute to transparency and public accountability.

However, the strong public interest in ensuring that public authorities, including Police Scotland, are able to obtain and consider legal advice on a confidential basis. As noted above, the Commissioner acknowledges that 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.

As such, considering all competing arguments, withholding the information is the preferred stance.

Should you require any further assistance please contact Information Management - Dundee quoting the reference number given.

If you are dissatisfied with the way in which Police Scotland has dealt with your request, you are entitled, in the first instance, to request a review of our actions and decisions.

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Your request must specify the matter which gives rise to your dissatisfaction and it must be submitted within 40 working days of receiving this response - either by email to foi@scotland.pnn.police.uk or by post to Information Management (Disclosure), Police Scotland, Clyde Gateway, 2 French Street, Dalmarnock, G40 4EH.

If you remain dissatisfied following the outcome of that review, you are thereafter entitled to apply to the Office of the Scottish Information Commissioner within six months for a decision. You can apply [online](#), by email to enquiries@itspublicknowledge.info or by post to Office of the Scottish Information Commissioner, Kinburn Castle, Doubledykes Road, St Andrews, Fife, KY16 9DS.

Should you wish to appeal against the Office of the Scottish Information Commissioner's decision, there is an appeal to the Court of Session on a point of law only.

As part of our commitment to demonstrate openness and transparency in respect of the information we hold, an anonymised version of this response will be posted to the Police Scotland Freedom of Information [Disclosure Log](#) in seven days' time.

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