

## Disclosure of legal advice under freedom of information

A recent decision by the Scottish Information Commission (**SIC**) confirms that disclosure of privileged legal advice will only be ordered in cases where the public interest in disclosure is highly compelling.

The legal professional privilege (**lpp**), or confidentiality of communications as it is known in Scotland, attaching to legal advice provides an exemption from the disclosure of that advice under FOI legislation. However the exemption is a qualified one, meaning that it is subject to the public interest test, which weighs up the public interest in disclosing the information against the public interest in applying the exemption.

In **SIC Decision 184/2010 Mr Alasdair Ross and Aberdeen City Council**, Mr Ross requested disclosure of legal advice and correspondence relating to the payment of incremental salary increases from the Council.

The SIC noted in its decision that a strong public interest in maintaining the right to lpp has frequently been recognised by the courts, including the House of Lords case *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*. Accordingly, disclosure of privileged information would be required only in "highly compelling" cases.

Having weighed up the public interest in maintaining lpp against the public interest arguments raised in favour of disclosing advice of this kind (its interest to prospective litigants and general arguments of accountability) the SIC decided that the public interest in maintaining lpp prevailed in this case.

### Supplementary thoughts

- a recent decision of the ICO illustrates that it adopts the same general approach to lpp;
- the Council was required to disclose certain parts of its advice which it had repeated in a committee report and had thereby waived its lpp for. Inadvertent waiver of privilege is something to be mindful of when repeating or sharing sensitive legal advice.
- the Azko Nobel case (which confirmed that lpp cannot be relied upon by in-house lawyers in the context of EU competition law investigations) although concerning for in-house lawyers seems unlikely to have any impact in the domestic FOI context. The ICO and SIC have previously recognised that lpp can attach to advice given by in-house lawyers in the FOI context and the Law Society and Law Society of Scotland have both issued statements confirming their views that the extent of lpp under English law and Scots law has not changed.

### Further information

For further information please contact [Sam Price](#).