

# Decision Notice



Decision 054/2012 Mr Paul Hutcheon of the Sunday Herald and  
Glasgow Caledonian University

Reports and audits concerning BluScientific

Reference No: 201102156  
Decision Date: 29 March 2012

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**Margaret Keyse**

Acting Scottish Information Commissioner

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## Summary

Mr Hutcheon requested from Glasgow Caledonian University (the University) information relating to reports and audits concerning BluScientific, a consultancy service which had been located in the University's School of Life Sciences but is no longer operational. The University withheld the information under section 36(2) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, during which the University additionally applied the exemptions in sections 33(1)(b) and 38(1)(b), Mr Hutcheon remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, in the course of which the University additionally applied the exemption in section 36(1) of FOISA, the Commissioner found that the University had dealt with Mr Hutcheon's request for information in accordance with Part 1 of FOISA by correctly applying the exemption in section 36(1) of FOISA to the withheld information. She did not require the University to take any action.

## Relevant statutory provisions

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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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

## Background

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1. On 20 August 2011, Mr Hutcheon emailed the University requesting the following information:
  - 1) All reports and audits carried out into the safety/quality of the work, research and tests carried out by BluScientific.
  - 2) All reports and audits carried out in relation to contracts BluScientific had with bodies/companies/organisations outside the University.



Mr Hutcheon also made a third request for information that is not the subject of this investigation and decision.

2. The Commissioner understands that BluScientific was a consultancy service based at the University's School of Life Sciences, engaged in the testing, use and application of disinfectants against viruses, bacteria, spores and fungi.
3. The University responded on 29 September 2011. The University advised Mr Hutcheon that it considered the requested information to be exempt from disclosure in terms of section 36(2) of FOISA on the basis that it was provided to the University on a confidential basis.
4. Also on 29 September 2011, Mr Hutcheon emailed the University requesting a review of its decision. In particular, Mr Hutcheon stated that there was a legitimate interest in the information being disclosed and that disclosure should outweigh confidentiality in this case.
5. The University notified Mr Hutcheon of the outcome of its review on 26 October 2011. The University upheld its application of the exemption in section 36(2) of FOISA. Additionally, the University advised Mr Hutcheon that it now considered the information to be exempt under sections 33(1)(b) (stating that it considered the information to be commercially sensitive) and 38(1)(b) (on the basis that the information contained the personal data of third parties) of FOISA.
6. On 19 November 2011, Mr Hutcheon wrote to the Commissioner, stating that he was dissatisfied with the outcome of the University's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Hutcheon 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

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8. On 22 November 2011, the University was notified in writing that an application had been received from Mr Hutcheon and was asked to provide the Commissioner with any information withheld from him. The University responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the University, 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, the University was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.



10. In response, the University confirmed that it considered the information to be exempt in terms of sections 33(1)(b), 36(2) and 38(1)(b) of FOISA. Additionally, the University now stated that it considered the information to be exempt under section 36(1) of FOISA on the basis that a claim to confidentiality of communications could be maintained in relation to the withheld information in legal proceedings. The University provided details of its reasoning when applying each of these exemptions, and the associated public interest test.
11. The investigating officer also contacted Mr Hutcheon during the investigation seeking his submissions on the matters to be considered in this case. The relevant submissions received from both the University and Mr Hutcheon will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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12. 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 Mr Hutcheon and the University and is satisfied that no matter of relevance has been overlooked.
13. Given the nature of the information that has been withheld in this case, the Commissioner decided to consider first the exemption in section 36(1) of FOISA.

### Section 36(1) of FOISA - Confidentiality

14. 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. 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 litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*).
15. Communications *post litem motam* are granted confidentiality in order 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. 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.
16. 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: the communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded.



17. In this case, the University stated that the withheld information comprised reports commissioned by it. The reports had been commissioned as a result of legal advice provided to the University suggesting that an investigation should be conducted by it in contemplation of possible legal proceedings being instigated against it.
18. The University stated that the reports were created for the purposes of enabling it to identify the extent of its insurance cover in the event that litigation ensued against it, to identify what areas could be improved in future to ensure best practice is followed by the University and to obtain an opinion on the nature of the results produced by BluScientific's test results. It also submitted that the reports were created at a point when litigation proceedings were anticipated.
19. Having reviewed the context, content and timing of the reports, the Commissioner is satisfied that they were created by the University in contemplation of litigation. The reports were prepared when the University was facing potential litigation and were prepared on that basis following legal advice provided to it.
20. 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.
21. Information cannot be privileged unless it is also confidential. For the exemption to apply the withheld information must be information in respect of which a claim to confidentiality of communications (in this case in the form of litigation privilege) *could be maintained* in legal proceedings. In other words, the claim must be capable of being sustained at the time the exemption is claimed.
22. A claim of confidentiality will not be capable of being maintained where information has (prior to a public authority's consideration of an information request or conducting a review) been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the information. 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.
23. Having considered the facts in this case and the information available, the Commissioner accepts that the confidentiality of the information in the report had not been lost in advance of the University's consideration of Mr Hutcheon's information request, or subsequent request for review. In the circumstances, the Commissioner is satisfied that the withheld information comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.
24. As a result, the Commissioner accepts that this information is exempt from disclosure in terms of section 36(1) of FOISA.



25. The exemption in section 36(1) is a qualified exemption, which means that the application of this exemption is subject to the public interest test set out in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.

*The public interest test*

26. 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 Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally, including cases such as this which concerns litigation privilege.
27. The University submitted that there is a strong public interest in maintaining the effectiveness of legal professional privilege. The University submitted that a party should be permitted to make full preparation for litigation in order to vindicate its rights without fear of those preparations being released to its potential opponent.
28. The University argued that in the circumstances of the present case, and having regard to the specific information under consideration, there was no compelling reason to release the information which is the subject of litigation privilege. The University submitted that to do so would involve putting into the public domain all of the University's preparations with a view to litigation thereby exposing its potential lines of defence which could potentially have a serious impact on its position in any potential litigation.
29. The University argued that the relatively weak public interest in disclosing the information was plainly outweighed by the strong public interest in maintaining the exemption in section 36(1).
30. In his submissions, Mr Hutcheon argued that there was a strong public interest in the information being released as it related to research work carried out by an institution funded with public money. Consequently, Mr Hutcheon considered that the University should be accountable for how its budget is spent. Mr Hutcheon also argued that the public has a right to know whether any problems had arisen as a result of research that had been carried out and costs that had been incurred to a body that receives a chunk of its funding from the taxpayer.
31. In this case, while accepting that there is a general public interest in authorities being open to scrutiny and being accountable for their actions, the Commissioner recognises that the University was potentially facing litigation as a result of possible legal proceedings being raised against it. In this case, the Commissioner is not satisfied that public interest in disclosure of this particular information is sufficient to outweigh the greater public interest in allowing the University to prepare fully for litigation, without these preparations being open to examination by any other parties.



Decision 054/2012  
Mr Paul Hutcheon of the Sunday Herald  
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32. On balance, therefore the Commissioner is satisfied, in all the circumstances of the case, that the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemption in section 36(1).
33. Therefore, she is satisfied that the University correctly applied the public interest test in withholding the reports from Mr Hutcheon and that this information is exempt from disclosure by virtue of section 36(1) of FOISA.
34. Having reached this conclusion, the Commissioner has not gone on to consider any of the other exemptions that were applied by the University to the information withheld in this case.
35. The Commissioner is aware that, in this case, the exemption she has found to be applicable was not one that was applied by the University in its response to Mr Hutcheon's request or request for review. Since the University was entitled to withhold the information under section 36(1) of FOISA, the Commissioner finds that it complied with Part 1 of FOISA when refusing to supply that information. However, she would add that it would have been good practice for the University to identify all relevant exemptions when first responding to the applicant's request and subsequent request for review.

## DECISION

The Commissioner finds that Glasgow Caledonian University complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Hutcheon.

## Appeal

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Should either Mr Hutcheon or Glasgow Caledonian University 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**  
**Acting Scottish Information Commissioner**  
**29 March 2012**



## Appendix

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### 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.

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- (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.

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##### 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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