

PE1458/RR

**Letter from Petitioner Peter Cherbi re: Petition PE1458: Register of Interests
for members of Scotland's Judiciary**

It has come to my attention the Scottish Government have taken legal advice on Petition PE1458.

The legal advice has not been made public although its existence has been confirmed in a Freedom of Information request.

Noting both Scottish Ministers and the judiciary's opposition to the petition and the creation of a register of interests for judges, I suggest to the Petitions Committee, it would be an invaluable insight to the debate and work of the PPC if members were to ask the Scottish Government to provide the committee with the legal advice it commissioned.

This would enable the Scottish Government's legal position on the interests of the judiciary and this petition to be more openly debated, and this advice put on the official record.

Peter Cherbi
Petitioner, PE1458

Mr Peter Cherbi



Our ref: FoI/15/00779
2 June 2015

Dear Mr Cherbi

REQUEST UNDER THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 (FOISA)

Thank you for your request dated 29 April 2015 under the Freedom of Information (Scotland) Act 2002 (FOISA).

Your request

You asked to find out if the Scottish Government has taken legal advice on calls to create a register of interest for members of Scotland's judiciary as called for in Petition PE1458 at the Scottish Parliament, and disclosure of information contained in such advice and the identity of who provided it.

Response to your request

The Scottish Government has taken legal advice on this subject.

While our aim is to provide information whenever possible, in this instance we are unable to provide the remaining information you have requested because exemptions under sections 36(1) (confidentiality in legal proceedings) and 30(c) (substantial prejudice to the effective conduct of public affairs) apply to that information. The reasons why the exemptions apply are explained in the Annex to this letter.

Your right to request a review

If you are unhappy with this response to your FOI request, you may ask us to carry out an internal review of the response, by writing to Mr Neil Rennick, acting Director of Justice
Your review request should explain why you are dissatisfied with the response, and should be made within 40 working days from the date when you receive this letter. We will complete the review and tell you the result, within 20 working days from the date when we receive your review request.

If you are not satisfied with the result of the review, you then have the right to appeal to the Scottish Information Commissioner. More detailed information on your rights is available on the Commissioner's website at www.itspublicknowledge.info .

Yours sincerely

JAN MARSHALL
Deputy Director

An exemption applies, subject to the public interest test

An exemption under section 36(1) of FOISA (confidentiality in legal proceedings) applies to some of the information requested because it is legal advice and disclosure would breach legal professional privilege.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is some public interest in release as part of open and transparent government, and to inform public debate. However, this is outweighed by the strong public interest in maintaining the right to confidentiality of communications between legal advisers and clients, to ensure that Ministers and officials are able to receive legal advice in confidence, like any other public or private organisation.

An exemption under section 30(c) of FOISA (prejudice to effective conduct of public affairs) applies to some of the information requested. This exemption applies because revealing the source of the Scottish Government's legal advice on a register of judicial interests would be likely to lead to conclusions being drawn from the fact that any particular lawyer has, or has not, provided advice, which in turn would be likely to impair the Government's ability to take forward its work on such issues. This would constitute substantial prejudice to the effective conduct of public affairs in terms of the exemption.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, there is a greater public interest in enabling the Scottish Government to determine how and from whom it receives legal advice, without facing external pressure or concerns that particular conclusions may be drawn from the fact that any particular lawyer has or has not provided legal advice on a particular matter. Releasing information about the source of legal advice would also be a breach of the long-standing Law Officer Convention (reflected in the Scottish Ministerial Code) which prevents the Scottish Government from revealing whether Law Officers either have or have not provided legal advice on any matter. There is no public interest in breaching that Convention by divulging which lawyers provided advice on any issue.

Mr Peter Cherbi



Our ref: FoI/15/00779
15 June 2015

Dear Mr Cherbi

Response to request for review of original response

Further to my email of 10 June 2015, I have now completed my review of our response to your request under the Freedom of Information (Scotland) Act 2002 (FOISA) "to find out if the Scottish Government has taken legal advice on calls to create a register of interest for members of Scotland's judiciary as called for in Petition PE1458 at the Scottish Parliament, and disclosure of information contained in such advice and the identity of who provided it".

I have concluded that the original decision should be confirmed, without modifications.

I have carefully considered the reasons you have given to support your view that the legal advice should be disclosed. However, I do not agree that these reasons are sufficiently compelling to override the strong public interest arguments for maintaining the right to confidentiality of communications between legal advisers and clients, as set out in our original response. Both the Scottish Information Commissioner and the courts have recognised that the release of the content of such legal advice is likely to be appropriate only in highly compelling cases. See, for example, the House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*.

If you are unhappy with the outcome of this review you have the right to appeal to the Scottish Information Commissioner about our decision within 6 months of receiving this letter. You can contact the Commissioner at:

The Scottish Information Commissioner
Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS

E-mail: enquiries@itspublicknowledge.info
Telephone: 01334 464610

Should you then wish to appeal against the Commissioner's decision, there is a right of appeal to the Court of Session on a point of law only.

Yours sincerely

NEIL WATT
EU Criminal Justice Team