



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 36
XA29/25

Lord President
Lord Malcolm
Lord Clark

OPINION OF THE COURT (No 2)

delivered by LORD MALCOLM

in the appeal under section 56 of the Freedom of Information (Scotland) Act 2002

by

THE SCOTTISH MINISTERS

Appellant

against

THE SCOTTISH INFORMATION COMMISSIONER

Respondent

Appellant: D Welsh; Scottish Government Legal Directorate
Respondent: Johnston KC; Anderson Strathern LLP

7 July 2026

[1] In the court's opinion of 26 March 2026, an appeal against a decision of the Scottish Information Commissioner requiring the Scottish Ministers to disclose material subject to legal professional privilege (LPP) was upheld, see [2026] CSIH 15; 2026 SLT 293. The relevant decision of the Commissioner covered other matters which were not the subject of challenge. In the final paragraph of its judgment the court noted that there had been no discussion at the hearing as to the appropriate order to pronounce. There were three possibilities, first, to reduce the whole decision, including those parts unrelated to LPP, and

remit to the Commissioner for a fresh determination; secondly, to reduce only the part relating to disclosure of the LPP material with a remit confined to that matter; and thirdly, to reduce in so far as relating to the LPP issue but with no remit to the Commissioner.

[2] A hearing was fixed for a discussion on the subject. The parties were agreed that the first option was not appropriate. Only the part of the decision concerning the requirement to disclose the documentation subject to LPP should be reduced. We agree with that, thus the only remaining issue is whether there should be a remit to the Commissioner for a new decision on that matter.

[3] The Scottish Ministers provided pre-hearing written submissions to the effect that the terms of the court's decision were such that there was no reasonable prospect that a rational reconsideration would result in a requirement to disclose the LPP material. To remit would be a waste of public funds. The Commissioner's written submissions contended that there should be a remit to allow the Commissioner to issue a fresh decision taken in the light of the court's decision. This would follow the practice in other recent cases involving successful appeals against decisions by the Commissioner.

[4] The full circumstances are narrated in the court's earlier opinion. The Commissioner had to decide whether the public interest in disclosing the information subject to LPP was outweighed by that in maintaining the claimed confidentiality exemption, see section 2(1)(b) of the Freedom of Information (Scotland) Act 2002. He decided that it was not outweighed, thus he ordered disclosure. The Ministers appealed as allowed by section 56 of the Act; the appeal being expressly limited to a point or points of law. Thus, the statute grants the court supervisory control over the legality of the Commissioner's decision. It does not permit the court to re-make the decision and substitute its own view for that of the Commissioner.

(Some statutes setting up public bodies do so permit, for example, see section 22(1) of the

Legal Profession and Legal Aid (Scotland) Act 2007 relating to appeals against decisions of the Scottish Legal Complaints Commission.)

[5] There is no question that the court has power to quash the LPP aspect of the decision and will do so for the reasons previously explained. Where the court strikes down a decision which Parliament has entrusted to a public authority, the general practice is to remit the matter to that body so that it can consider the decision afresh in the light of the terms of the court's judgment. That practice is not absolute. There can be cases where, in effect, the court's decision determines the issue, for example where it is decided that a public body wrongly refused to exercise a statutory power, see *Stovin v Wise* [1996] AC 923, 953B-C. Another example might be where the sole question is as to the meaning of a statutory provision, or where on undisputed primary facts the court is able to say that there is only one rational outcome.

[6] In its opinion the court has made clear the importance which should be afforded to the public interest in maintaining the confidentiality of information subject to LPP. Essentially the Commissioner's decision fell to be quashed because of a failure to recognise this and build it into the decision-making process. While the subject matter here is familiar to the court, nonetheless, to declare the matter closed by our decision would, we think, amount to judicial overreach. The responsibility for the appropriate determination remains with the Commissioner. If the Ministers adhere to the view that in the light of the court's judgment there is only one rational outcome, there remains the possibility of a further appeal against another adverse decision.

[7] We shall adopt the second of the three options identified at the outset, namely the appealed decision is reduced so far as it ordered disclosure of the LPP material, and that

question is remitted to the Commissioner for a fresh consideration and determination in the light of the court's judgment.

[8] The Ministers moved for the expenses of the appeal. The motion was not opposed.

We shall grant it.