

Decision Notice



Decision 101/2010 Mr Peter Cherbi and the Scottish Legal Complaints Commission

Minutes of meetings

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Summary

Mr Cherbi asked the Scottish Legal Complaints Commission (the SLCC) for copies of the minutes of all SLCC meetings up to 28 November 2008. The SLCC responded by providing some documents in full, some subject to redaction and by withholding some in their entirety. In withholding information, the SLCC relied upon a number of exemptions in Part 2 of FOISA. Following a review, Mr Cherbi remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SLCC had been entitled to withhold some, but not all, of the information from Mr Cherbi.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2(1)(b) and (2)(a) and (e)(ii) (Effect of exemptions); 25(1) (Information otherwise accessible); 30(b)(ii) and (c) (Prejudice to effective conduct of public affairs); 36(1)(Confidentiality) and 38(1)(b) and (2)(a)(i) and (b) and (5) (definitions of data protection principles, data subject and personal data) (Personal information) and 39(1) (Health, safety and the environment)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of personal data); Schedules 1 (The data protection principles) (the first principle) and 2 (conditions relevant for purposes of the first principle: processing of any personal data) (condition 6)

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.

Background

1. On 28 November 2008, Mr Cherbi wrote to the SLCC requesting copies of the minutes of all meetings of the SLCC up to 28 November 2008.
2. The SLCC responded on 5 January 2008. The SLCC provided some of the documents falling within the scope of the request in full, others were provided subject to redaction and some were withheld in their entirety. The SLCC withheld information on the basis that the exemptions in sections 30(b)(ii), 30(c), 36(1) and 38(1)(b) of FOISA applied.



3. On 7 January 2009, Mr Cherbi wrote to the SLCC requesting a review of its decision. Mr Cherbi commented that he felt he had been discriminated against as he had some evidence to suggest that some of the information which had been withheld from him had been provided to others in full.
4. The SLCC notified Mr Cherbi of the outcome of its review on 13 February 2009. In this response, the SLCC released additional information to Mr Cherbi, where that information had previously been disclosed in response to other information requests. However, in relation to the remaining documents, the SLCC maintained its position with regard to the information it considered exempt from disclosure.
5. On 17 March 2009, Mr Cherbi wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SLCC's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. He again commented that, while additional information had been disclosed to him following the review, other information had been withheld from him which had been disclosed to others as a result of requests under FOISA.
6. The application was validated by establishing that Mr Cherbi 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

7. On 31 March 2009, the SLCC was notified in writing that an application had been received from Mr Cherbi and was asked to provide the Commissioner with the information which had been withheld from Mr Cherbi. The SLCC responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the SLCC, 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. The SLCC was asked to justify its reliance on any provisions of FOISA it considered applied to the information requested.
9. During the course of the investigation, the SLCC released further information to Mr Cherbi.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Cherbi and the SLCC and is satisfied that no matter of relevance has been overlooked.



Mr Cherbi's grounds for dissatisfaction

11. Mr Cherbi's grounds for dissatisfaction fall into two separate categories. Firstly, Mr Cherbi is not satisfied that the SLCC has applied the exemptions under FOISA correctly to the information withheld. Secondly, Mr Cherbi was dissatisfied with the manner in which his request was handled; in particular, Mr Cherbi felt that the SLCC had not dealt with his request in a fair and proper manner. Mr Cherbi argued that others had received information in full under FOISA which he had received in a redacted form. Mr Cherbi suggested that his status as a legal journalist had influenced the manner in which his request was dealt with.
12. Both of these issues are considered below.

Information withheld

13. In response to Mr Cherbi's request, the SLCC identified 41 sets of minutes (documents 1-41) which fell within the scope of his request. Thirteen of these documents (documents 1-6, 11, 14, 16, 27, 31, 32 and 33) were released in full. Six of the documents (documents 7-9, 28, 29 and 35) were released subject to redaction under section 38(1)(b) of FOISA only. Fifteen documents (documents 10, 12, 15, 17-26, 30, 34) were released subject to redaction under differing combinations of sections 30(b), 30(c) 36(1) and 38(1)(b) of FOISA. Six documents were withheld in their entirety: documents 36 – 39 were withheld under section 30(c) of FOISA and documents 40 and 41 were withheld in their entirety under sections 30(b)(ii) and 38(1)(b).
14. During the course of the investigation, the SLCC supplied Mr Cherbi with a redacted copy of document 13. However, by 13 January 2009, Mr Cherbi had published a full copy of this document on his blog spot. As the information contained in document 13 is clearly information which Mr Cherbi can reasonably obtain other than by requesting it under section 1(1) of FOISA, the Commissioner considers that it is exempt under section 25(1) of FOISA. (This is an absolute exemption, in that it is not subject to the public interest test contained in section 2(1) of FOISA.)
15. The Commissioner will, however, take into account the SLCC's responses to Mr Cherbi in respect of this document when considering the general handling of his request.
16. The SLCC also supplied Mr Cherbi with a copy of document 21, subject to redaction under section 38(1)(b) only. Copies of documents 40 and 41 were also supplied to Mr Cherbi with only the names of SLCC members and senior SLCC staff reinstated, the remainder being withheld under sections 30(b)(ii) and 38(1)(b) of FOISA.
17. Within its submissions to the Commissioner, the SLCC stated that, in addition to applying the exemption in section 38(1)(b) to the names of certain individuals, where an individual other than an SLCC member, senior SLCC staff member or SLCC staff with a public-facing role, was mentioned, the SLCC now wished to claim the exemption contained in section 39(1) of FOISA.



Section 38(1)(b) – Personal information

18. The SLCC applied the exemption in section 38(1)(b) of FOISA, read in conjunction with 38(2)(a)(i), to the personal data of individuals other than members of the SLCC and senior SLCC staff who have a public facing role.
19. The SLCC stated that the individuals' names and initials are personal data, as defined by section 1(1) of the Data Protection Act 1998 (the DPA), and that disclosure of this personal data would breach the first data protection principle.
20. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), exempts information if it is personal data and if its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles laid down in Schedule 1 to the DPA.
21. This particular exemption is an absolute exemption and so is not subject to the public interest test laid down by section 2(1)(b) of FOISA.

Is the information personal data?

22. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (see the Appendix for the full definition).
23. There is some information which the Commissioner has found to be exempt under other exemptions cited by the SLCC (see below). Where this is the case, the Commissioner has not considered it necessary to consider whether the exemption in section 38(1)(b) applies.
24. The information which the Commissioner will consider under section 38(1)(b) can be grouped in the following way:
 - recruitment information
 - information relating to the personal circumstances of the SLCC employees
 - third party names – i.e. names of individuals who are not employed by the SLCC, but who are representatives of third party agencies or representatives of third party service providers
25. Having reviewed the information in question, the Commissioner is satisfied that all of the information is personal data. The redacted information goes beyond the individuals' casual connection with the meetings in question; their names are (in the vast majority of cases) referenced in full and within the context within which they are being discussed. The Commissioner accepts that the information focusses on and is significantly biographical of those individuals. Consequently, he accepts that the information relates to them.



Would disclosure of the information breach the first data protection principle?

26. As noted above, the SLCC argued that disclosure in this case would breach the first data protection principle.
27. The first data protection principle requires that the processing of personal data (here, the disclosure of data into the public domain in response to Mr Cherbi's information request) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met. For sensitive personal data, one of the conditions in Schedule 3 to the DPA must also be met. The Commissioner has considered the definition of sensitive personal data contained in section 2 of the DPA and is satisfied that none of the personal data which has been withheld in this case falls into this category. As a result, it is not necessary to consider the conditions in Schedule 3 in this case.
28. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the Schedules. However, these three aspects are interlinked. If there is a specific condition which permits the personal data to be disclosed, it is likely (although other issues may also be relevant) that the disclosure will also be fair and lawful.
29. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed and, if there are, whether the disclosure of this personal data would otherwise be fair and lawful.

Can any of the conditions in Schedule 2 of the DPA be met?

30. The SLCC has argued that of all the conditions in Schedule 2 of the DPA, only condition 6 might permit disclosure of the personal data in this case.
31. The Commissioner has considered all of the conditions in Schedule 2 of the DPA, and shares the view that condition 6 is the only one which might be considered to apply in this case. This condition allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
32. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
 - Does the applicant have a legitimate interest in obtaining this personal data?
 - If yes, is the disclosure necessary to achieve these legitimate interests? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate interests be achieved by means which interfere less with the privacy of the data subject?
 - Even if the processing is necessary for the legitimate purposes of the applicant, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject? This will involve a balancing exercise between the



legitimate interests of the applicant and those of the data subject. Only if (or to the extent that) the legitimate interests of the applicant outweigh those of the data subject can the personal data be disclosed.

Does the applicant have a legitimate interest?

33. The SLCC submitted that, whilst not treating Mr Cherbi any differently in respect of how it handled his information request, it looked at Mr Cherbi's legitimate interests in the context of condition 6 and the tests to be applied in the DPA in respect of the lawfulness of the disclosure of third party personal data.
34. The SLCC highlighted that a number of the SLCC's members appear on Mr Cherbi's website and it considered it likely that the names of other individuals featured in the documents could, if disclosed, become a feature of the website. The SLCC submitted that these individuals do not have a reasonable expectation that their personal data will be disclosed. (These arguments will also be considered below when considering the legitimate interests of the data subjects.)
35. The Commissioner is satisfied that there is a general legitimate interest in ensuring transparency and the scrutiny of the decision making process. In this instance, the Commissioner notes that the members and employees of the SLCC and their contributions to these meetings which are recorded in the minutes have been disclosed to Mr Cherbi and that Mr Cherbi has a legitimate interest in knowing the names of the members and employees in question.
36. The Commissioner is equally satisfied that Mr Cherbi's legitimate interests extend to knowing the identity of individuals who are representing third party companies and organisations which have provided advice to or carried out general services for the SLCC. This legitimate interest in the transparency of the SLCC actions arises from the importance of the role that the SLCC carries out.
37. The Commissioner has also concluded there is a general legitimate interest which extends to information relating to the recruitment of named individuals and the professional performance/conduct of individuals employed by the SLCC. The performance of these individuals and the recruitment of particular skills and experience impacts directly on the performance of the SLCC as a whole and, ultimately, the provision of a public service. The Commissioner is satisfied, therefore, that there is a legitimate interest in disclosure of information relating to the recruitment of named individuals and the professional performance or conduct of individuals employed by the SLCC.
38. However, the Commissioner does not consider that there is a legitimate interest in the disclosure of the small amount of information in the documents which have been withheld which relates to the personal circumstances of an individual, where the information does not relate to professional performance of conduct. As a result, the Commissioner finds that condition 6 does not permit this information to be processed and that, as a consequence, disclosure would breach the first data protection principle. The Commissioner is therefore satisfied that this information is exempt under section 38(1)(b) of FOISA.



39. Where the Commissioner has concluded that Mr Cherbi does have a legitimate interest in the personal data, he will go on to consider whether the disclosure of the withheld information is necessary to achieve Mr Cherbi's legitimate aims.

Is disclosure necessary to achieve these legitimate aims?

40. The Commissioner accepts that disclosure would be necessary to fulfil Mr Cherbi's legitimate interests. He can identify no reasonable means of achieving those legitimate interests in the absence of disclosure.
41. As the Commissioner is satisfied that disclosure of the personal data would be necessary to fulfil Mr Cherbi's legitimate interests, the Commissioner is now required to consider whether that disclosure would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the individual data subjects. As a result, he will go on to consider the third test contained in condition 6.

Would disclosure cause unwarranted prejudice to the legitimate interests of the data subjects?

42. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the individuals identified in the redacted information. As noted above, this requires a balancing exercise between the legitimate interests of Mr Cherbi and the individuals in question. Only if the legitimate interests of Mr Cherbi outweigh those of the individuals in question can the information be disclosed without breaching the first data protection principle.
43. In the Commissioner's briefing on section 38 of FOISA¹, the Commissioner notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:
- whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances).
 - the potential harm or distress that may be caused by the disclosure.
 - whether the individual has objected to the disclosure
 - the reasonable expectations of the individuals as to whether the information would be disclosed.

Recruitment information

44. The Commissioner notes that information has been redacted which relates to the recruitment of individuals not yet under the employ of the SLCC. The information reflects their personal circumstances and the negotiation process leading up to employment.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



45. The Commissioner is satisfied, given the nature of the information under consideration and the manner in which it is conveyed, that the individual in question would not have an expectation that information relating to their personal circumstances would be placed in the public domain prior to their employment.
46. Having balanced the legitimate interests of Mr Cherbi with those of the individuals concerned, the Commissioner has concluded that disclosure of the information relating to the recruitment of named individuals would be unwarranted in this case. As a result, the Commissioner finds that there are no conditions in schedule 2 to the DPA which would allow the information to be disclosed. As such, he must find that the disclosure of the information would breach the first data protection principle and that the information is exempt from disclosure under section 38(1)(b) of FOISA.

Third party names

47. The Commissioner notes that, while the information withheld here is personal data, the information in this category relates to work carried out by individuals as part of their employment or professional life, as opposed to their private life. In many cases, the relationship between the SLCC and the body for which these individuals work is already publicly known. The Commissioner has not been provided with any evidence to suggest that the individuals in question objected to the disclosure. Although the SLCC suggest potential harm or distress on disclosure of their information, this harm and possible consequences of disclosure does not correlate with the function or services that these individuals provide to the SLCC.
48. Having balanced the legitimate interest of Mr Cherbi with those of the individual representatives in this case, the Commissioner is satisfied that any prejudice to the rights, freedoms and legitimate interests of the data subjects is outweighed in this instance by the legitimate interest of the requestor and the wider public. As such, he has concluded that disclosure would be in line with condition 6(1) within schedule 2 of the DPA.

Is the processing otherwise fair and lawful?

49. The Commissioner has not been presented with arguments which suggest that disclosure of the third party names requested by Mr Cherbi would be lawful, other than by contravening the first data protection principle and, having considered the question carefully, the Commissioner can find no reason to find that the disclosure would be unlawful. He will therefore go on to consider the issue of the fairness of such disclosure.
50. The Commissioner is satisfied generally that the processing of the information in question (i.e. by disclosure) should not be considered to be unfair. In reaching this view he considers that these individuals providing services for, or giving advice to, the SLCC, a public authority subject to FOISA, would have a reasonable expectation that the minutes of these meetings and their association with the SLCC would be placed into the public domain. (As noted above, the relationship between the bodies for whom these individuals work and the SLCC is, in many cases, already publicly known.)



51. Having found disclosure to be both fair and lawful, and in line with condition 6(1), the Commissioner does not accept that disclosure of the names of the third party representatives offering advice or services to the SLCC would breach the first data protection principle. He therefore finds that the third party names are not exempt under section 38(1)(b) of FOISA.

Section 39(1) – Endangerment to physical or mental health or safety

52. Section 39(1) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. This is a qualified exemption and is subject to the public interest test required by section 2(1)(b) of FOISA.
53. While section 39(1) does not contain the usual harm test of substantial prejudice and in referring simply to “endangerment” sets a lower threshold of harm, the Commissioner still requires that there must be some realistic prospect or likelihood of danger to the health and safety of one or more individuals, based on evidence or convincing arguments to that effect.
54. The SLCC applied section 39(1) of FOISA to some of the names withheld from Mr Cherbi during the investigation. The SLCC submitted that it wished to apply the exemption in section 39(1) to any redactions of personal information of individuals, other than an SLCC member, senior SLCC staff member, or SLCC staff members with a public facing role.
55. The SLCC submitted that disclosure of such information would impact upon the physical or mental health of the individuals concerned as anonymous threats had been received by members of staff and other individuals connected to the SLCC. The SLCC also referred to threats made to other bodies.
56. The Commissioner notes that the individuals in question here are not employees of the SLCC and do not work in SLCC buildings. While he recognises that some of the individuals whose details have been withheld are connected to bodies to which threats have been made, he considers that the profile and role of those individuals is such that their relationship with the SLCC is likely to be public knowledge. The Commissioner cannot therefore accept that the disclosing their names from the minutes is likely to endanger, or will endanger, their health and safety in terms of section 39(1) of FOISA.
57. In most other cases, the individuals are not connected to such bodies. The Commissioner has not been provided with any evidence of danger, or likelihood of danger, to the health or safety these third parties, and cannot accept that section 39(1) applies to this information.

Section 36(1) – Confidentiality (legal professional privilege)

58. The SLCC applied section 36(1) of FOISA to redactions made to documents 15, 23, 24 and 26. The Commissioner has come to the conclusion that the redactions made to documents 23 and 24 are exempt under another exemption of FOISA (see below) and, consequently, has not found it necessary to consider whether they are exempt under section 36(1).



59. Under section 36(1) of FOISA, 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. There are two main categories of legal professional privilege - legal advice privilege and litigation privilege. The SLCC has indicated that the first of these is relevant here.
60. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For legal advice privilege to apply, certain conditions must be fulfilled.
61. For example, the communication must be with a professional legal adviser. The legal adviser must be acting in their professional capacity and the communication must occur in the context of their professional relationship with their client. The information must be confidential between lawyer and client: privilege does not extend to matters known to the legal adviser through sources other than the client.

Document 15

62. Document 15 is a minute of a meeting of SLCC members held on 21 April 2008. The SLCC redacted item 3.4.2.3 under section 36(1) on the basis that it contained the substance of legal advice obtained from the Commission's external legal advisers. The Commissioner accepts that the information constitutes legal advice given in circumstances which would attract legal professional privilege. In addition, given that the information has not been disclosed to any person other than the Members of the Board, the Commissioner is satisfied that legal professional privilege has not been waived.

Document 26

63. Document 26 is the minute of a meeting of SLCC members held on 4 August 2008. The SLCC redacted item 3 on the basis that it contains a list of matters raised in discussion with its legal advisers upon which Commission members highlighted questions they wished to be addressed by the external advisers. The SLCC submitted that this information discloses matters covered by the section 36(1) exemption as it indicates matters upon which the Commission has indicated to its lawyers that it wishes to seek legal opinion.
64. The Commissioner has reviewed the information in question and is not satisfied that section 36(1) of FOISA has been applied correctly in this instance. The information in question reflects a general discussion of the investigative process, training and the differing roles within the organisation. The minutes record a general discussion about the various options for training staff. Although this discussion ensued after an introduction to training requirements by an external legal adviser, the Commissioner is not satisfied that this is the provision of legal advice to which section 36(1) of FOISA can attach. The Commissioner therefore concludes that the SLCC was incorrect in its application of section 36(1) of FOISA to this information.



65. The exemption under section 36(1) is subject to the public interest test contained within section 2(1)(b) of FOISA. As the Commissioner has determined that some of the information has been correctly withheld under section 36(1) (namely item 3.4.2.3 of document 15) of FOISA he is required to go on to consider the application of the public interest test and, in particular, whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption.

The public interest test

66. The Courts have recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds and there are many judicial comments on the fundamental nature of this confidentiality in our legal system. Many of the arguments in favour of maintaining confidentiality of such communications were discussed in *Three Rivers District Council and Others v Governor and Company of the Bank of England* (2004) UK HL 48.
67. In Decision 023/2005, the Commissioner concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client and, therefore, while he will consider each case on an individual basis, he is likely to order the release of such communications in highly compelling cases only. He has reiterated this in a number of subsequent decisions.
68. The Commissioner also recognises the public interest in transparency and accountability and that there is a clear public interest in allowing scrutiny of the decision-making process which this legal advice influenced.
69. On balance, the Commissioner finds that the public interest in maintaining the exemption in section 36(1) of FOISA outweighs the public interest in disclosure in this case and that disclosure would not contribute significantly to the public understanding or scrutiny of the SLCC's activities. Accordingly, the Commissioner finds that the SLCC was justified in withholding the information under section 36(1) of FOISA.

Section 30(b)(ii) – Prejudice to effective conduct of public affairs

70. A number of documents were withheld held either partially or in their entirety by the SLCC on the basis that the information was exempt under section 30(b)(ii) of FOISA.
71. In order for the SLCC to rely on the exemption laid down in section 30(b)(ii) of FOISA, it must show that the disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
72. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the tests contained in sections 30(b)(i) and 30(b)(ii) is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of the information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views.



73. In applying these exemptions, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression and whether the timing of disclosure would have any bearing: releasing advice or views whilst a decision was being considered, and for which further views were still being sought, for example, is likely to be more substantially inhibiting than once advice had been taken.
74. In applying this exemption the SLCC submitted that account had been taken of the impact of disclosure on the free and frank discussion within the Commission and also with key stakeholders outwith the Commission, such as the Scottish Government and the Law Society of Scotland. The SLCC argued that effective working relationships with key stakeholders requires a certain amount of private space for discussions to take place to ensure decisions are taken on the basis of a full consideration of pertinent issues.

Document 15

75. The SLCC redacted information from item 7.1 of document 15. The SLCC submitted that this information recorded a free and frank discussion raising some sensitive issues in relation to a specific matter. At the time the SLCC made its submissions to the Commissioner, it was in the process of negotiating an agreement with a third party. It considered that the release of the information contained in 7.1 would, or would be likely to, prejudice substantially what are, by necessity, ongoing frank exchanges of views between the SLCC and the third party about the operation of the SLCC. The SLCC were also concerned that the disclosure of the information could disrupt staff harmonisation processes.
76. The Commissioner has considered the information contained in item 7 and is satisfied that the discussions recorded remained sensitive at the time of Mr Cherbi's request and that the SLCC was entitled to withhold the information under section 30(b)(ii) of FOISA.

Document 17

77. The SLCC redacted one paragraph from item 5.4 on the basis that section 30(b)(ii) applied. This information conveyed the SLCC's views in relation to the performance of a particular team with whom the SLCC engages as a stakeholder group. The SLCC submitted that its members need to be able to convey their views to this particular team in free and frank terms within the context of a private space, in order that matters can be addressed and improved where they have gone wrong. Having considered the content of this information, the Commissioner is satisfied that the SLCC applied section 30(b)(ii) correctly. In doing so, the Commissioner has taken account the frank manner in which the information is conveyed and the potential harm to the relationship between the bodies under discussion.



Document 18

78. The SLCC also redacted the information contained in items 6.16 to 6.16.10 and in items 9.1 to 9.2 on the basis of the exemption in section 30(b)(ii) of FOISA.
79. The SLCC submitted that items 6.16 – 6.16.10 relate to very sensitive discussions about staffing issues. It stated that the discussions were ongoing at the time of Mr Cherbi's request and, at the time of making their submissions to the Commissioner, discussions had not yet been resolved. It argued that disclosing the frank discussion of members would, or would be likely to, inhibit them substantially from continuing these discussions in meetings, if there were any chance of future disclosure. It argues that the substantial inhibition would arise because of members' acute awareness of the problems that would be likely to arise in terms of settling matters if discussions were made public.
80. It is clear from the content of the discussions that the matters were still ongoing and sensitive at the time. The Commissioner therefore concludes that the SLCC was correct in its application of section 30(b)(ii) to this information.
81. In addition the SLCC applied section 30(b)(ii) of FOISA to items 9.1 and 9.2, which it states contains discussions of members on sensitive matters relating to interactions between the SLCC and other organisations which were still 'live' in the sense of ongoing discussion and consideration of matters.
82. The information under consideration relates to the drafting of "cornerstone agreements" with these organisations. The Commissioner has considered the information and is satisfied that the manner in which these views are expressed and the context within which they are made, if disclosed, would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. The Commissioner therefore concludes that the SLCC was correct in its application of section 30(b)(ii) to this information.

Document 19

83. Document 19 is a minute of a meeting of SLCC members. Section 30(b)(ii) was applied to item 5 in its entirety. The SLCC submitted that this particular discussion was free and frank relating to recruitment and harmonisation during the setting up phase of the SLCC. The SLCC explained that the difficulties highlighted in this discussion were ongoing and that the release of the information at this time would be likely to disrupt the staff harmonisation processes. The SLCC submitted that if the information were released, members would be substantially inhibited from continuing discussions in relation to this ongoing matter at future meetings, prejudicing the SLCC's ability to address the issue effectively.



84. The Commissioner has considered the information redacted from item 5 and is satisfied that it reflects discussions relating to the recruitment process and staff transfer. The Commissioner recognises the sensitivities surrounding transfer, but does not accept that the information in these exchanges has that quality. In doing so, he has made a distinction between information which conveys specific information relating to the recruitment of individuals for the SLCC (which he has generally found to be exempt from disclosure at the time of Mr Cherbi's request) and a discussion of general guiding principles with respect to recruitment. The Commissioner notes that the information conveyed is relatively innocuous in nature and cannot therefore accept the SLCC's application of section 30(b)(ii) to this information.

Document 20

85. Document 20 is a minute of a meeting of SLCC members, which the SLCC submitted records valuable, open exchanges between members, including discussion of a range of sensitive issues. The SLCC redacted information within item 7 of this minute on the basis that section 30(b)(ii) applied. The SLCC argued that this information reflected frank discussions about exchanges with the Scottish Government, in the context of exchanges about 'start up' issues of the Commission.
86. The Commissioner has considered the information withheld under item 7.1 and he is satisfied that the nature of these exchanges warrant the use of section 30(b)(ii) of FOISA. It is clear that the forum on this occasion was used to discuss pressing issues and problems which required a frank discussion. The Commissioner is satisfied, taking account of the timing of the request and the content of the information withheld that the SLCC was correct in its application of section 30(b)(ii) of FOISA to this information.
87. The SLCC also applied section 30(b)(ii) to item 7.16. Having reviewed the information withheld, the Commissioner is satisfied that it warrants the use of section 30(b)(ii) of FOISA. The information conveyed is specific about the issues around the transfer of staff to the SLCC rather than general recruitment principles. The Commissioner accepts that disclosure of this information, at the time of Mr Cherbi's request, would, or would be likely to, inhibit substantially the ability of the SLCC to have such open and frank discussions relating to internal staffing issues.

Document 22

88. The SLCC redacted information from items 5.1 through to 5.1.6. This relates to the free and frank discussion about relationships between the SLCC and a separate body.
89. The SLCC considered that disclosure of this information would substantially inhibit members and members of the other body from engaging in such open deliberations in the future. The SLCC argued that it is essential for the proper functions of both organisations that the SLCC have a private space in which to carry on discussions with a view to reaching a satisfactory conclusion.



90. The Commissioner has reviewed the information redacted and is satisfied it conveys sensitive, pressing issues which required a frank discussion. The Commissioner is satisfied that the SLCC was correct in its application of section 30(b)(ii) to this information at the time of Mr Cherbi's request.

Documents 23, 24, 26 and 34

91. The SLCC redacted information from items 6.12.1 and 8.3 from document 23, the minute of a meeting of SLCC members held on 7 July 2008. Item 6.12.1 records the free and frank exchanges between the SLCC and another body and operational concerns arising from the relationship between the two bodies. Item 8.3 again relates to the specifics surrounding staff transfer to the SLCC and the SLCC considers that disclosure would be detrimental to the staff harmonisation process which was ongoing at the time of the request. The SLCC submitted that the information conveyed an unresolved sensitive issue between itself and another body. The Commissioner is satisfied that this information is exempt from disclosure under section 30(b)(ii) of FOISA.
92. Document 24 is the minute of a meeting of SLCC members held on 14 July 2008. The SLCC withheld items 5.3 through to 5.3.1.8. The information withheld relates to recruitment issues, which remained unresolved at the time of Mr Cherbi's request. As above, the Commissioner is satisfied that the information is exempt from disclosure under section 30(b)(ii) of FOISA.
93. The SLCC also redacted item 8 on the basis that section 30(b)(ii) applied. The SLCC argued that Commission members need to receive and record information from external sources of relevance to decision-making processes and investigations by the Commission. The Commissioner has reviewed the content of item 8 and is not satisfied that its disclosure would result in the harm as suggested by the SLCC. This item records in a generic fashion a discussion of practice between the SLCC and an external agency. The Commissioner is unable to identify any sensitivities surrounding the information and is not satisfied that the disclosure of the information recorded under item 8 would, or would be likely to, prejudice substantially the free and frank exchange of views for the purposes of deliberation.
94. Document 26 comprises a minute of a meeting of SLCC members on 4 August 2008. Document 34 is a minute of a meeting of the SLCC's Staff Governance and Remuneration Advisory Committee on 21 November 2008. Item 4 of document 26 and item 3 of document 34 were both redacted on the basis that section 30(b)(ii) of FOISA applied. Both items concern issues surrounding staffing matters which were subject to ongoing discussions with other organisations. The Commissioner has considered these redactions and is satisfied that the information is exempt under section 30(b)(ii) of FOISA.

Documents 40 and 41



95. These documents comprise the minutes of the meetings of the SLCC's Mediation Advisory Forum, which took place on 23 May 2008 and 22 July 2008. The SLCC advised the Commissioner that the Forum had been established as a way for the SLCC to link best practice within mediation and to feed back its own experiences. Individual members were selected by the Chair of the forum to attend voluntarily. The Forum has no status within the SLCC, but the views of the various members and forum as a whole have assisted the SLCC to establish a mediation service.
96. The SLCC submitted that the Forum only operates well if the members feel able to freely express views and opinions within a private space. The SLCC explain that minutes are kept to aid the Forum Chair and to provide a way of sharing views within the SLCC. The SLCC argued that these redactions are appropriate to avoid inhibition of free and frank exchanges by voluntary members of this discussion forum.
97. With the exception of the details of the meetings and item 6 in document 40 and item 7 in document 41, the information in these documents has been redacted in full.
98. Having considered the content of these minutes, the Commissioner is not satisfied that section 30(b)(ii) has been applied correctly. The minutes reflect an innocuous discussion about the role of mediation within the SLCC. The Commissioner has not identified, nor has the SLCC been specific about, the sensitivities surrounding the content of these minutes. Although the Commissioner recognises the importance of this forum and its input into the work of the SLCC, he is unable to identify any particular sensitivities surrounding the minutes in question. The Commissioner therefore concludes that the information is not exempt under section 30(b)(ii) of FOISA.

Public interest test

99. Having concluded that the exemption in section 30(b)(ii) applies to some of the information withheld (see above), the Commissioner must go on to consider the public interest test set down in section 2(1)(b) of FOISA. As noted above, this means that, although he has found the information to be exempt under section 30(b)(ii), he must order the information to be disclosed unless, in all the circumstances of the case, the public interest is maintaining the exemption outweighs that in disclosing the information.
100. The SLCC acknowledge that there is an argument that disclosure of this information may contribute to ensuring transparency in the operations of the SLCC in terms of allowing an assessment by the public of whether the SLCC is carrying out its statutory functions in an effective manner. The SLCC also took account of other public interest factors in favour of maintaining the exemption, such as the effect of disclosure on the SLCC's operational effectiveness and its ability to interact with third parties in terms of finalising its governance arrangements and commercial relationships. The SLCC also considered that it was in the public interest for the SLCC to be able to discharge its statutory functions effectively.



101. Having considered all of these factors, the SLCC considered that the public interest in ensuring that the SLCC receive as much information and views from third parties as possible, and expressed in as frank terms as is necessary, in order to create and maintain an effective system of compliant handling, outweighs the public interest in disclosure of the information.
102. The Commissioner has considered the information he has identified as being correctly withheld under section 30(b)(ii) and notes that the redactions remaining largely relate to the staff harmonisation process and the SLCC's relationship with external bodies at an early stage in the development of the SLCC. Although the Commissioner recognises the need for transparency in the operations of the SLCC, he also recognises the public interest in allowing an open and frank forum at such an early stage in the development of the SLCC. The Commissioner concludes that, at the time of Mr Cherbi's request, and at such an early stage in the SLCC's development, the public interest in disclosure of the information was outweighed by that in maintaining the exemption and in ensuring an effective relationship with SLCC staff and external bodies.

Section 30(c) – Prejudice to effective conduct of public affairs

103. The SLCC redacted information from six documents (documents 10, 12, 20, 24, 25 and 30) and withheld four documents in their entirety (documents 36-39) on the basis that the information was exempt under section 30(c) of FOISA.
104. Section 30(c) exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". (The word "otherwise" is used here to differentiate the exemption in section 30(c) from the other exemptions in section 30; section 30(c) can only apply when the effective conduct of public affairs will be prejudiced in a different way than that envisaged by sections 30(a) and (b).) This is a qualified exemption, and as such is subject to the public interest test contained in section 2(1)(b) of FOISA.
105. As noted, the exemption in section 30(c) only applies where disclosure would prejudice substantially, or would be likely to prejudice substantially, the effective conduct of public affairs. Guidance published by the Commissioner makes it clear that the damage caused by disclosure must be real and significant, as opposed to hypothetical or marginal. Authorities should therefore consider disclosing the information asked for unless it would (or would be likely to) cause real, actual and significant harm.
106. By way of background, the SLCC explained that it operates through a board of nine part-time members who work from locations across Scotland. It argued that for the Board to operate effectively, particularly in its initial stages of establishing the SLCC, it was required to be able to consider a wide range of options in terms of potentially sensitive governance issues. The SLCC explained that the minutes themselves have been used not only to record agreement of policy, but to record discussions and form a mode of communication between the SLCC and the Scottish Government while there were two project teams during the pre-opening phase.



107. The SLCC explained that it had therefore applied this exemption to protect these modes of working over a period when very few agenda items were standard governance issues. The SLCC argued that to disclose such minutes in full would substantially prejudice effective Board operation and communications with external agencies, potentially open other agencies up to legal challenge and impact upon its staff harmonisation process

Document 10

108. Item 3.5 was redacted from document 10 on the basis that it was exempt under section 30(c). The SLCC argued that the matters raised were particularly sensitive and that if the SLCC were to be deprived of a private space to discuss such matters and record such concerns, this would substantially prejudice the effective conduct of the SLCC's affairs in terms of overall corporate governance.
109. The Commissioner can appreciate that there will be occasions, such as at an early stage of its development, as is the case here, where an authority requires private space within which matters of sensitivity which reflect upon the SLCC 's relationship with external agencies and that organisations performance can be recorded and discussed. Having considered the content of this item, the Commissioner is satisfied that the information in question is exempt under section 30(c) of FOISA due to the impact disclosure would, or would be likely to have, on the SLCC's future relationship with particular agencies.

Document 12

110. Items 4.2 and 4.3 were redacted from this document on the basis that the information was exempt from disclosure under section 30(c) of FOISA. The SLCC explained that these items concerned property and reflects the developing relationship between the SLCC and a third party. The SLCC argues that this is a relationship which requires to work efficiently and effectively to ensure the effective conduct of public affairs. The SLCC explained that, given that it remains in discussions with the third party over status and relationship, it considered disclosure of this information could substantially prejudice the effective conduct of public affairs.
111. The Commissioner also notes that item 6.1(c) has been redacted and relates to the concerns and issues surrounding an issue, which was critical at the early stages of the SLCC's development. The release of the information at that time could have seriously harmed and undermined SLCC's relationship with third party organisations and impinge upon further developments.
112. The Commissioner has considered the information contained in these items and is satisfied that its disclosure at the time of Mr Cherbi's request would, or would be likely to, prejudice substantially the effective conduct of public affairs, namely the ongoing relationship between the SLCC and the third party. The Commissioner is therefore satisfied that the SLCC was entitled to withhold this information under section 30(c) of FOISA.



Document 20

113. The SLCC redacted information from the end of paragraph 7.2.1 of document 20 on the basis that it is exempt under section 30(c). (The SLCC also applied other exemptions to this information, but the Commissioner has not considered it necessary to consider those here.) The SLCC explained that the information in question related to sensitive information about operational matters of another public body. The SLCC argued that the disclosure of this information, which is confidential in nature and could potentially increase the risk to another body of legal challenge, would, or would be likely to, prejudice substantially the effective conduct of public affairs. The information redacted from item 7.2.1 is limited to the final six lines of this paragraph.
114. The Commissioner has reviewed the information withheld and notes that it conveys the internal thoughts of another organisation. In the circumstances, the Commissioner is satisfied that the disclosure of this information would, or would be likely to, prejudice substantially the effective conduct of public affairs, namely the relationship between the SLCC and the third parties and, in addition, those external bodies' relationship with another public body.

Document 24

115. The exemption in section 30(c) has been claimed in respect of the information redacted at item 5.1.1. This information conveys details of the SLCC's ongoing relationship with an external body. The SLCC argued that disclosure of this information would damage ongoing discussions about this relationship.
116. The Commissioner has reviewed the information in question and is satisfied that its disclosure, at the time of Mr Cherbi's request, where discussions between these organisations were ongoing, would have prejudiced substantially, or would have been likely to prejudice substantially, the relationship between the bodies. The Commissioner is therefore satisfied that the SLCC was entitled to withhold the information under section 30(c) of FOISA.

Document 25

117. The SLCC redacted the information in item 3.1 from this document on the basis that it was exempt from disclosure under section 30(c). The SLCC explained that the information records a discussion by Commission members of sensitive matters of corporate governance, including HR matters, dealing with conflicts of interest and insurance arrangements.
118. The Commissioner notes that what has been withheld are the amendments to the minutes of a previous meeting (document 24). The first amendment relates to material in respect of which he has already upheld the exemption in section 30(b)(ii). Given that this amendment does not differ significantly from the original text, the Commissioner has concluded that it was correctly withheld under section 30(b)(ii) (see above) and therefore does not consider it necessary to consider it further under section 30(c).



119. The second amendment relates to an amendment of text which has previously been released in full by the SLCC. The Commissioner therefore cannot accept the application of section 30(c) to this redaction. The third redaction relates to the amendment of text in item 8 of document 24. The Commissioner has determined that the content of document 24 to which this amendment relates was incorrectly withheld under section 30(b)(ii) of FOISA. The Commissioner has considered separately whether the amendment is exempt from disclosure under section 30(c), but has come to the conclusion that it is not. The amendment records a discussion about practice between the SLCC and an external agency and the Commissioner is unable to identify any sensitivities surrounding the information or its disclosure.

Document 30

120. Item 5.3 was redacted from document 30 on the basis that the information in the item is exempt under section 30(c). This item records a discussion about matters of staff pensions and harmonisation which had not been finalised.
121. The Commissioner has reviewed the information in question and is not satisfied that it has the necessary qualities to invoke the application of section 30(c) of FOISA. The information in question conveys a general discussion surrounding pension provision and as such the Commissioner is not satisfied that the SLCC was correct in its application of section 30(c) of FOISA.

Documents 36-39

122. Documents 36-39 were withheld in their entirety (with the exception of the attendee lists and the date and agenda items for the following meeting) under section 30(c) of FOISA. They are all minutes of meetings of the SLCC Audit and Finance Advisory Committee.
123. The SLCC submitted that records of the detail of discussion on these matters are considered essential to communications within the SLCC, particularly to the main Board to which this Committee reports in an advisory capacity, and that the disclosure of this information would cause substantial prejudice to the effective conduct of public affairs. It explained that they contain details of matters of a sensitive nature, including financial information, within a process of crucial importance to the functioning of the SLCC. It argued that there is a real risk that the disclosure of such information would have a significant impact on the ability of the SLCC to carry out its statutory functions. Certain other information relates to the internal issues, most of which, the SLCC submitted, are yet to be resolved.
124. The Commissioner has reviewed the content of documents 36, 37 and 38 and notes that these reflect general discussions relating to internal administrative duties such as external and internal audit. Having reviewed the information in question, the Commissioner cannot accept the SLCC's application of section 30(c) to the documents. The issues under discussion are not contentious and reflect duties which are incumbent on all public sector authorities. There is a clear expectation that such issues would be addressed by the SLCC and the Commissioner cannot accept that disclosure of such innocuous information would, or would be likely to, cause the harm perceived by the SLCC.



125. The Commissioner has come to the same conclusion with respect to all of the information contained in document 39, with the exception of item 4, which contains a detailed review of the SLCC's draft budget. The Commissioner accepts that disclosure of this information would, or would be likely to, prejudice substantially the SLCC's ability to discuss sensitive issues surrounding the draft budget submission. The Commissioner has also taken account of the timing of Mr Cherbi's request, which was made on the same day as the meeting took place and at a time when the draft budget had not yet been submitted.

The public interest

126. As noted above, the exemption in section 30(c) is subject to the public interest test set out in section 2(1)(b) of FOISA. This means that where the Commissioner has concluded the exemption in section 30(c) applies, he must go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.
127. Again, the SLCC acknowledged that disclosure of this information may contribute to ensuring greater transparency in the operations of the SLCC in terms of allowing an assessment of whether the SLCC is carrying out its statutory functions in an effective manner. The SLCC has balanced this against the public interest in ensuring the SLCC's operational effectiveness. Having considered all of the factors, the SLCC concluded that the public interest in ensuring that the SLCC can effectively conduct its governance arrangements, and continue internal negotiations as to the finalisation of certain issues in order to create and maintain an effective system of complaint handling, outweighs the public interest in disclosure of this information.
128. With particular reference to item 4 of document 39, the Commissioner recognises the strong public interest in accountability and notes that this information relates to the use of public funds. However, the Commissioner has taken account of the timing of Mr Cherbi's request, which was made on the same date that this meeting took place and prior to the budget submission. At this stage, the Commissioner recognises the public interest in allowing some private space to discuss budgetary concerns. In balancing the public interest, the Commissioner has determined that the public interest in disclosure of this information is outweighed by that in maintaining the exemption in these circumstances.
129. The Commissioner therefore concludes that the SLCC was entitled to withhold the information in item 4 of document 39 under section 30(c) of FOISA.
130. With respect to the remaining redactions, the Commissioner again acknowledges the public interest in transparency in the decision-making process, but also recognises the public interest in allowing these exchanges, which occurred an early stage in the SLCC's development and which relate to internal processes, to be conducted in an environment free from inhibition. In this instance, the Commissioner has balanced the public interest in favour of disclosing the information against the public interest in maintaining the exemption and has concluded that the public interest in maintaining the exemption outweighs that in disclosure. The Commissioner therefore concludes that the SLCC was entitled to withhold the information under section 30(c) of FOISA.

Summary



131. In summary, the Commissioner is satisfied that the SLCC was entitled to withhold much of the information it withheld from Mr Cherbi. However, the Commissioner has also concluded that the following information should have been disclosed to Mr Cherbi:
- all third party names withheld under section 38(1)(b) and 39(1) of FOISA
 - document 26 (item 3) (withheld under section 36(1))
 - documents 19 (tem 5), 24 (item 8), 40 and 41 (withheld under section 30(b)(ii))
 - documents 25 (item 3.1 - amendment to item 6.1.5 and to 8.10), 30 (item 5.3), 36, 37, 38, 39 (items 1, 2, 3, 5, 6 and 7) (withheld under section 30(c))

Other matters: handling of Mr Cherbi's request

132. In correspondence with the Commissioner, Mr Cherbi raised concerns that the SLCC had treated his information request differently from others because he is a legal journalist. He believes that information was withheld from him which was supplied to others. The SLCC was asked to comment on the concerns raised by Mr Cherbi.
133. The SLCC commented that it has received a range of information requests from Mr Cherbi and has provided him with comments on issues of interest to him by way of responses to additional email correspondence it receives from him.
134. The SLCC stated that, to its knowledge, Mr Cherbi had received all the information that others had received. The SLCC submitted that it was aware of Mr Cherbi's identity, profession and website, but that if it had it provided others with more information than it had initially released to him, this was done in error. The SLCC also stated that if Mr Cherbi wished to be more specific about the information that he sought that it would be willing to release further information to resolve at least part of his concerns.
135. Mr Cherbi, however, did not accept the SLCC's explanation and chose not to provide the SLCC with details of the information he considered had been disclosed to others but withheld from him.
136. The Commissioner has considered the submissions made by both parties and although there is clear evidence to suggest that the SLCC took account of Mr Cherbi's identity in relation to the submissions made to this office, he has no evidence to suggest that the SLCC's response to his request was any different from that to any other member of the public. In the absence of further evidence from Mr Cherbi (see the above paragraph) the Commissioner is unable to come to any finding as to whether the SLCC breached Part 1 of FOISA by not providing him with information which it had already disclosed to others (on the basis that it was not subject to any of the exemptions under Part 2 of FOISA).



137. Having viewed Mr Cherbi's website, it is clear that Mr Cherbi had access to an unredacted version of document 13, while the SLCC had only provided him with a redacted copy. However, the Commissioner has received no evidence to suggest that this information was disclosed as a result of an information request made under FOISA or that, if it was, the fact that it was withheld from Mr Cherbi was anything other than an oversight on the part of the SLCC.

DECISION

The Commissioner finds that the Scottish Legal Complaints Commission (SLCC) mostly complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Cherbi.

For the reasons set out above, the Commissioner finds that the SLCC was entitled to withhold information under the exemptions in section 30(b)(ii), 30(c), 36(1) and 38(1)(b) of FOISA. In doing this, the SLCC complied with Part 1 of FOISA.

However, also for the reasons set out above, the Commissioner finds that the SLCC was not entitled to withhold certain information from Mr Cherbi on the basis of the exemptions in sections 30(b)(ii), 30(c), 36(1), 38(1)(b) and 39(1) of FOISA. In failing to disclose this information, the SLCC failed to comply with Part 1 of FOISA.

The Commissioner therefore requires the SLCC to provide Mr Cherbi with the information set out in paragraph 131 above by 3 August 2010.

Appeal

Should either Mr Cherbi or the SLCC 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
Head of Enforcement
17 June 2010



Appendix

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.

...

- (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.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

- (a) section 25;

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.



25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...

38 Personal information

- (1) Information is exempt information if it constitutes-

...

- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

- (2) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles; or



...

- (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

...

- (5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

39 Health, safety and the environment

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.



Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...