

Decision Notice

Decision 128/2018: Mr Peter Cherbi and the Scottish Legal Aid Board

Information about a legal case

Reference No: 201702270

Decision Date: 22 August 2018



Scottish Information
Commissioner

Summary

SLAB was asked about a court case it had been involved in. SLAB disclosed some information, but withheld other information under a number of exemptions. SLAB disclosed more information during the Commissioner's investigation.

The Commissioner found that, for the most part, SLAB was entitled to withhold the information. However, he found that the information which SLAB disclosed during the Commissioner's investigation should have been disclosed in response to the request. He did not require SLAB to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1) and (2)(a), (b) and (d) (Effect of exemptions); 25(1) (Information otherwise accessible); 26(a) (Prohibitions on disclosure); 36 (Confidentiality); 37(1) and (2) (definition of "court") (Court records, etc.)

Legal Aid (Scotland) Act 1986 (LASA) section 34 (Confidentiality of information)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 1 November 2017, Mr Cherbi made a request for information to the Scottish Legal Aid Board (SLAB). The information he requested was:

"... information contained in documents, meetings, communications and discussions in relation to *A665/13 Niels Lockhart v The Scottish Legal Aid Board* [referred to in this decision as "the court case"].

How much this case has cost SLAB, who is representing SLAB, (law firms, QCs) what the case relates to, sums involved sought, if any."

Mr Cherbi sent a separate email on the same date making it clear that his request was also intended to cover details of any settlement, should one have been discussed or reached.
2. SLAB responded on 21 November 2017 and provided information on the costs it had incurred; who had represented SLAB; what the case related to; and the sum sought. SLAB stated that the court action had been terminated by agreement with decree of absolvitor granted in favour of SLAB with an order of expenses.
3. On the same day, Mr Cherbi wrote to SLAB requesting a review of its decision on the basis that SLAB had not responded to the first part of his request, for information contained in documents, meetings, communications and discussions relating to the case.
4. SLAB notified Mr Cherbi of the outcome of its review on 15 December 2017. SLAB identified the following information:
 - (i) *Documents - Written pleadings in the case.* SLAB stated that the information was exempt from disclosure under section 37 of FOISA (Court records, etc.) and referred

Mr Cherbi to *Decision 146/2007 Mr Alexander Doherty and the Common Services Agency for the Scottish Health Service*¹.

- (ii) *Documents - Documents which became productions in the case.* SLAB identified two inventories of productions for itself as defender and said there were no productions for the pursuer. SLAB supplied Mr Cherbi with the first inventory of productions for the defender, which contained one item. For the second inventory, SLAB supplied the cover sheet for the first inventory (to provide specification of the material), but withheld information under sections 25 and 26 of FOISA, the latter with reference to section 34 of the Legal Aid (Scotland) Act 1986 (LASA). (Section 25 of FOISA exempts information which is otherwise accessible, and section 26 of FOISA exempts information if there is an existing prohibition on disclosure.)
 - (iii) *Documents - Legal Advice.* SLAB withheld the advice from external counsel under section 36(1) of FOISA, stating that it was subject to legal privilege and that the public interest lay in withholding the information.
 - (iv) *Meetings – Minutes.* SLAB said it had retained no minutes of meetings, and had no information to produce under this heading.
 - (v) *Communications relating to the court case.* SLAB withheld this information under section 36(2) of FOISA on basis that Mr Lockhart’s solicitors had a legitimate expectation of confidentiality, which in turn imposed a duty which would be breached by disclosure, and the information was therefore exempt from disclosure. SLAB also considered that such communications fell under the exemption in section 36(1) of FOISA. SLAB supplied some information in the form of a timeline that it had prepared.
 - (vi) *Discussions:* SLAB stated that it did not hold information under this heading, other than as may have been covered in the previous headings.
5. On 18 December 2017, Mr Cherbi applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He believed that the pleadings and other documents should be disclosed and commented that there was a significant public interest in the information.

Investigation

- 6. The application was accepted as valid. The Commissioner confirmed that Mr Cherbi made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
- 7. On 23 January 2018, SLAB was notified in writing that Mr Cherbi had made a valid application. SLAB was asked to send the Commissioner the information withheld from Mr Cherbi. SLAB provided the information and the case was allocated to an investigating officer.
- 8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. SLAB was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200500611.aspx>

9. Mr Cherbi confirmed that he wished the Commissioner to investigate whether SLAB had correctly withheld all information. In relation to information that SLAB had withheld under section 25 of FOISA, he only wished the Commissioner to ensure that SLAB had not withheld any information to which he had not had access.
10. During the Commissioner's investigation, SLAB identified some information that was not covered by the exemption in sections 36(1) and 36(2) of FOISA. SLAB sent this information to Mr Cherbi on 1 June 2018.
11. Mr Cherbi then commented that SLAB had only released documents relating to internal emails and correspondence. Given that further material had not been released in relation to the defences, he remained dissatisfied and required the Commissioner to issue a decision.

Commissioner's analysis and findings

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

Section 36(1) - confidentiality of communications

13. 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. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
14. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled:
 - (i) the information must relate to communications with a professional legal adviser, such as a solicitor or an advocate;
 - (ii) the legal adviser must be acting in their professional capacity; and
 - (iii) the communications must occur in the context of the legal adviser's professional relationship with their client.
15. SLAB withheld advice from, and correspondence with, external counsel under section 36(1) of FOISA. It submitted that the information was advice from a professional legal adviser acting in that capacity and was legal advice given to SLAB, as the client, in the context of litigation.
16. SLAB submitted that legal professional privilege is not restricted to advice from external counsel: the privilege applies equally to the supply of legal advice by internal solicitors to the organisation, in this case through emails with SLAB's Chief Executive Officer (CEO). It took the view that the exemption in section 36(1) of FOISA applied to such information; in context of solicitor and client, it was professional advice relating to the case, provided by solicitors acting as solicitors to the client organisation through the CEO, and the material was sensitive and confidential.
17. As stated above, during the investigation SLAB decided that some of the information it had withheld under section 36(1) did not meet all the tests for that exemption to apply and disclosed it to Mr Cherbi. The Commissioner agrees with SLAB that the exemption was not

correctly applied to the information disclosed on 1 June 2018. Failing to disclose this information at an earlier stage breached Part 1 of FOISA.

18. Having considered the content of the remaining withheld information, the Commissioner is satisfied that it meets the conditions for legal professional privilege to apply, and that the exemption in section 36(1) of FOISA is engaged.
19. The exemption in section 36(1) is a qualified exemption, which means that it is subject to the public interest test set out in section 2(1)(b) of FOISA. The exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in withholding it.

The public interest

20. SLAB submitted that the public interest in withholding the legal advice outweighed the public interest in disclosure. It relied on the arguments put forward in its review response of 15 December 2017, i.e. that it was in the public interest for SLAB to be able to obtain full and frank legal advice to allow proper and full consideration of litigation, and for the confidentiality of professional advice to be preserved.
21. Mr Cherbi made a number of arguments in favour of the information being disclosed. In his application to the Commissioner, he contended that there was a significant public interest in this case, given the amount of legal aid involved, and “the fact now revealed in documents that SLAB agreed not to report Mr Lockhart to the Police or Crown Office and would not seek recovery of funds, a fact SLAB concealed from public statements they made in this case.”
22. In a later submission, Mr Cherbi referred to SLAB’s report to the Law Society of Scotland on the Niels Lockhart case² (“the Section 31 Report”) stating that it contained numerous allegations and substantive investigative work by SLAB, and has been in the public domain for a number of years along with media coverage and information on Mr Lockhart’s activities in relation to legal aid. Mr Cherbi said it was a matter of record that Mr Lockhart’s legal representatives had complained to SLAB about disclosures to him under FOISA, including the Section 31 Report, and that Mr Lockhart had taken legal action against a national newspaper which had reported on SLAB’s account of Mr Lockhart’s activities. (Under section 31 of LASA, SLAB has the powers to exclude a solicitor or counsel from giving legal assistance.)
23. Mr Cherbi took the view that:

“...given the significant amounts of public cash legal aid payments to Mr Lockhart, before, and surprisingly, after the S31 report was released, and payments made long after Mr Lockhart ‘voluntarily’ stood down from the legal aid register, there is and remains a significant public interest in the release of SLAB’s defences in relation to Mr Lockhart’s legal action against SLAB”

Mr Cherbi believed it would be in the public interest to scrutinise SLAB’s defence of this case, in terms of the impact on the wider legal aid budget.
24. The issue for the Commissioner is whether the public interest in disclosing the legal advice outweighs the public interest in maintaining the exemption in section 36(1) of FOISA.

² <https://drive.google.com/file/d/1U8VOyS3gQr5TieVNOyfGplWqkkv8AkAG/edit>

25. The Commissioner accepts that disclosure of the legal advice would increase transparency, particularly in relation to SLAB's conduct in respect of a court action. Disclosure would allow the public to see and perhaps assess the actual advice that was given to SLAB by external counsel. The Commissioner accepts there is an identifiable public interest in disclosure of the legal advice in terms of accountability and transparency with respect to SLAB's actions as a public authority.
26. The Commissioner also accepts there is a public interest in disclosure of the advice, to the extent that it would increase transparency and allow scrutiny of the way in which SLAB administers legal aid, which is a fundamental aspect of the justice system in Scotland. (This is not the main focus of the legal advice.)
27. The public interest in disclosure of the legal advice must be balanced against the public interest in maintaining the right to confidentiality of communications between legal adviser and client and the courts have long-recognized the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, on administration of justice grounds.
28. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien Department for Business, Enterprise and Regulatory Reform*³. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
29. The Commissioner accepts that disclosing the legal advice, which relates to litigation, would have a restraining and suppressive effect and would hamper the ability of SLAB to communicate freely, frankly and fully with its legal advisers. He accepts that this, in turn, would be likely to affect SLAB's ability to carry out its core functions in the most effective way. There is a strong public interest in SLAB being able to receive, unhindered, full legal advice. Without such comprehensive advice being available to SLAB, its ability to make fully informed decisions would be restricted, which would not be in the public interest. There is a significant public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds.
30. On balance, the Commissioner is satisfied, in all the circumstances of this case, that the public interest in disclosure of this information is outweighed by the public interest in maintaining the exemption in section 36(1). He has concluded that SLAB was entitled to withhold the remaining information under section 36(1) of FOISA.

Section 36(2) - Confidentiality

31. SLAB withheld communications relating to the court case under section 36(2) of FOISA, arguing that Mr Lockhart's solicitors had a legitimate expectation of confidentiality, which in turn imposed a duty that would be breached by disclosure. SLAB considered that the expectation of confidentiality would extend both to the correspondence of Mr Lockhart's solicitors and to SLAB's own correspondence, where it reflected or responded to correspondence from Mr Lockhart's solicitors.
32. During the investigation, SLAB disclosed some information which it had previously withheld under section 36(2). In the circumstances, the Commissioner finds that this information was

³ <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

wrongly withheld under section 36(2) of FOISA. Failing to disclose this information at an earlier stage breached Part 1 of FOISA.

33. Section 36(2) of FOISA provides that information is exempt from disclosure if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person.
34. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is necessary in the public interest.

Obtained from another person

35. Section 36(2) contains a two stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
36. In light of SLAB's submissions above, and having considered carefully the withheld information, the Commissioner is satisfied that the withheld information can be said to have been "obtained" from another person, i.e. from Mr Lockhart's solicitors. The Commissioner accepts that this includes information which SLAB sent to Mr Lockhart's solicitors where it reflects or is based on information obtained from Mr Lockhart's solicitors. The Commissioner is therefore satisfied that the first test can be fulfilled.

Actionable breach of confidence

37. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
38. Generally, there are considered to be three key requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
 - (i) the information must have the necessary quality of confidence;
 - (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality, and
 - (iii) unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

39. The information must have the necessary quality of confidence about it. It must not be generally accessible to the public already. The information must have the basic attribute of inaccessibility. The Commissioner is aware that some information about this case was in the public domain at the time of Mr Cherbi's request, but accepts that the actual withheld information was not common knowledge and could not readily be obtained by Mr Cherbi through any other means. Consequently, he is satisfied that the information withheld under section 36(2) had the necessary quality of confidence at the time of Mr Cherbi's request.

Obligation to maintain confidentiality

40. An obligation to maintain confidentiality can be either "express" or "implied". An implied obligation of confidentiality can arise as a result of the relationship between the parties or the particular circumstances in which the information was obtained. An express obligation could be stipulated in various forms, including by contract.
41. SLAB submitted that there was an implied obligation of confidentiality because Mr Lockhart's solicitors had a legitimate expectation of confidentiality. They would expect SLAB to treat their correspondence about the action in confidence.
42. The Commissioner accepts that there was an implied obligation on SLAB to maintain confidentiality in respect of the withheld information, at the time the SLAB dealt with Mr Cherbi's request and requirement for review. In the most general terms, Mr Lockhart's solicitors would owe duties of confidentiality to him, and there is no time limit to this obligation. The correspondence upon which they engaged on his behalf would also carry with it such an obligation of confidentiality.
43. The issue is correspondence in respect of a civil action. There would be an expectation and a common understanding that such information would include personal information and would have an attribute of privacy inasmuch as the civil case related to Mr Lockhart's professional reputation and private life can be seen to extend to professional activities. The Commissioner accepts that Mr Lockhart would have a reasonable expectation that communications from his solicitors to SLAB for the purpose of a civil court action would attract a reasonable expectation of privacy.

Unauthorised disclosure would cause detriment

44. The unauthorised disclosure of the information must be to the detriment of the person who communicated it. To meet this requirement, the damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence.
45. The Commissioner accepts that there was a general expectation between the parties that the information would remain confidential. The information at issue relates to a time period over seven years ago. The Commissioner must consider disclosure – and detriment - at the time of the request or review, not at the time the information was communicated or the intervening time.
46. The Commissioner accepts that disclosure of information even now could cause detriment to Mr Lockhart. The Commissioner does not believe the detriment is at the high end of the scale: there has been a considerable passage of time. Nonetheless, the Commissioner believes there would still be *some* detriment to Mr Lockhart by the public disclosure through FOISA of his agent's correspondence with SLAB in respect of the civil action and that is sufficient for the purposes of this test.
47. Having considered the submissions put forward by both SLAB and Mr Cherbi, the Commissioner is satisfied that the tests for an actionable breach of confidence are met here, and that SLAB correctly applied the exemption in section 36(2) of FOISA to the withheld information.

Public interest defence

48. As noted above, it is generally accepted in common law that an obligation of confidence cannot apply to information if its disclosure is necessary in the public interest. The law of confidence recognises that there is a strong public interest in ensuring that people respect

confidences and the burden of demonstrating that a failure to maintain confidentiality would be in the public interest is therefore a heavy one. However, in certain circumstances, the public interest in maintaining confidences may be outweighed by the public interest in the disclosure of certain information.

49. For example, if disclosure would expose wrongdoing, such as a public figure misleading the public, or where journalists wish to publish information on a matter of pressing public concern, it would be difficult to maintain confidentiality in such circumstances. There is no evidence of any such circumstance here.
50. The Commissioner can identify no public interest argument sufficiently compelling to outweigh those in maintaining confidentiality and allowing persons to communicate fully with SLAB in respect of ongoing court actions.
51. The Commissioner therefore finds that SLAB was entitled to withhold the information in its correspondence with Mr Lockhart's solicitors under section 36(2) of FOISA.

Section 26(a) - Prohibitions on disclosure

52. Under section 26(a) of FOISA, information is exempt information if its disclosure by a Scottish public authority, otherwise than under FOISA, is prohibited by or under an enactment. This is an absolute exemption in that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.
53. In terms of section 26(a), SLAB withheld two items on the Second Inventory of Productions:
 - (i) Letter from the Law Society of Scotland to SLAB dated 13 August 2010
 - (ii) Report by the Law Society of Scotland Reporter dated 13 July 2010
54. SLAB explained that it had received the letter and report of the Law Society in relation to procedure under section 31 of LASA. Accordingly, they constituted information furnished to SLAB for the purposes of LASA. As the Law Society of Scotland was neither an applicant for legal aid, nor a person acting for an applicant, section 34(1)(b) of LASA (as opposed to section 34(1)(a)) applied to the information. Section 34(1)(b) of LASA specifies that SLAB cannot disclose information it has received without the consent of the person (or body) that furnished it.
55. SLAB explained that it does not have consent from the Law Society of Scotland to disclose the information in its letter or report. SLAB had sought consent in 2011, which was declined. Accordingly, it was SLAB's view that it was prohibited from disclosing the information in the letter and report from the Law Society of Scotland, and section 26(a) of FOISA applied.
56. In *Decision 003/2010 Jonathan Mitchell QC and the Scottish Legal Aid Board*⁴, the Commissioner accepted that section 34(1)(b) of LASA prohibited the disclosure of certain information under FOISA, where the information had been furnished to SLAB for the purposes of LASA.
57. In the present case, the Commissioner accepts that the information was information "furnished" to SLAB by a third party (i.e. the Law Society of Scotland). Having considered SLAB's submission, as outlined in the previous paragraphs, the Commissioner accepts that information was furnished for the purposes of LASA: the information was provided to SLAB in

⁴ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2010/200900527.aspx>

relation to procedure under section 31 of LASA, and is therefore information that falls within the terms of “information furnished for the purposes of [LASA] to the Board”.

58. Section 34(1)(b) of LASA prohibits disclosure of the information furnished to SLAB: the statutory language is clear in this respect: “no information ...shall be disclosed”; “shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.”
59. At the date of Mr Cherbi’s request and SLAB’s review of its response to that request, SLAB did not have consent from the Law Society of Scotland to disclose the information. Instead it was aware that the Law Society had refused consent, albeit some time before.
60. Section 34(2) of LASA specifies certain purposes for which information covered by section 34(1) of LASA may be disclosed. In this case, however, the Commissioner does not consider that disclosure would be for any of the purposes specified in section 34(2) and therefore he accepts that there is no applicable exception to the prohibition.
61. The Commissioner therefore accepts that the withheld information is exempt from disclosure under section 26(a) of FOISA. The Law Society has not consented to its disclosure and disclosure is therefore prohibited by section 34(1)(b) of LASA.

Section 37 - Court Records, etc.

62. Section 37(1)(a) of FOISA states that information is exempt information if it is contained in a document:
 - (i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter;
 - (ii) served on, or by, a Scottish public authority for the purposes of such proceedings; or
 - (iii) created by a court or member of its administrative staff for the purposes of, or in the course of, such proceedings.
63. The exemptions in section 37 are not subject to the public interest test in section 2(1)(b). Therefore, in essence, section 37(1) provides an absolute exemption in respect of all documents lodged with, or otherwise placed in the custody of, a court, or created by a court (or its staff) for the purposes of court proceedings, where the information is held by the authority solely because it is contained in such a document.
64. In its review outcome, SLAB withheld the written pleadings in the case under section 37 of FOISA, and referred to *Decision 146/2007 Mr Alexander Doherty and the Common Services Agency for the Scottish Health Service*. During the investigation, SLAB clarified that copies of pleadings documents were also held in the correspondence file; it considered that these, too, were exempt from disclosure under section 37 of FOISA.
65. The information withheld under section 37 is the adjusted Open Record for the civil action involving Mr Lockhart and SLAB. The Open Record contains the summons and the defences, set out so each statement of fact by the pursuer is followed by the answer of the defender.
66. The Commissioner accepts that the adjusted Open Record is recorded information that would fall within section 37(1)(a)(i) of FOISA. The pursuer must lodge an Open Record with

the court, which can be adjusted for a set period and then is closed. The Rules of Court⁵ (Rule 22.1) specifies the details. This information, withheld by SLAB, would therefore be a document lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter. In this instance, the court in question is the Court of Session

67. The Commissioner accepts that SLAB correctly withheld this information in terms of section 37(1) of FOISA.

Section 25 - Information otherwise accessible

68. Information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt from disclosure. This exemption is not subject to the public interest test in section 2(1)(b) of FOISA.
69. Mr Cherbi asked the Commissioner to ensure that SLAB had “not incorrectly or otherwise lumped some of the withheld information in with what they state I previously had access to”.
70. SLAB provided the following description of information withheld under section 25 of FOISA:
- (i) 7/2 Produced to Mr Cherbi on 16 March 2011
 - (ii) 7/5 - 7/7 Available to Mr Cherbi by virtue of being correspondence to which he was a party
 - (iii) 7/8 Information publicly available
71. The Commissioner is satisfied that the information withheld under section 25, as described above, is information which Mr Cherbi can reasonably obtain other than by requesting it under section 1(1) of FOISA as it comprises letters to him and the Commissioner’s published briefing on the exemption for personal data (section 38 of FOISA). The Commissioner therefore accepts that this information is exempt from disclosure under section 25(1) of FOISA.

⁵ <http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap22.pdf?sfvrsn=8>

Decision

The Commissioner finds that the Scottish Legal Aid Board (SLAB) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Cherbi.

The Commissioner finds that SLAB was entitled to withhold information under section 36(1) of FOISA. However, some information (which SLAB disclosed during the Commissioner's investigation) was wrongly withheld under this exemption. This was a breach of section 1 of FOISA.

The Commissioner accepts that SLAB correctly withheld information in terms of sections 25(1), 26(a) and 37(1) of FOISA.

The Commissioner accepts that SLAB correctly withheld information in terms of section 36(2) of FOISA, but wrongly applied this exemption to some information disclosed during the Commissioner's investigation. Again, this was a breach of section 1 of FOISA.

Given that SLAB has now provided Mr Cherbi with the information which was wrongly withheld, the Commissioner does not require SLAB to take any action in respect of these failures in response to Mr Cherbi's application.

Appeal

Should either Mr Cherbi or SLAB wish to appeal against this decision, they have the right to 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.

Margaret Keyse
Head of Enforcement

22 August 2018

Appendix 1: 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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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 –
- (a) the provision does not confer absolute exemption; and
 - (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;
 - (b) section 26;
 - ...
 - (d) section 37; and

...

25 Information otherwise accessible

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

...

26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;

...

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) Information is exempt information if-
 - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

37 Court records, etc.

- (1) Information is exempt information if it is contained in-
 - (a) a document-
 - (i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter
 - (ii) served on, or by, a Scottish public authority for the purposes of such proceedings; or
 - (iii) created by a court or a member of its administrative staff for the purposes of, or in the course of, such proceedings; or
 - (b) a document-
 - (i) lodged with, or otherwise placed in the custody of, a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration; or
 - (ii) created by such a person for such purposes,

and a Scottish public authority holds the information solely because it is contained in such a document.

- (2) In this section-
"court" includes a tribunal or body exercising the judicial power of the State; and

...

Legal Aid (Scotland Act 1986)

34 Confidentiality of information

- (1) Subject to subsection (2) below, no information furnished for the purposes of this Act to the Board or to any person acting on its behalf shall be disclosed-
- (a) in the case of such information furnished by, or by any person acting for, a person seeking or receiving legal aid or advice and assistance, without the consent of the person seeking or receiving legal aid or advice and assistance; or
 - (b) in the case of such information furnished otherwise than as mentioned in paragraph (a) above, without the consent of the person who furnished it,
- and any person who, in contravention of this subsection, discloses any information obtained by him when employed by, or acting on behalf of, the Board shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.
- (2) Subsection (1) above shall not apply to the disclosure of information-
- (a) for the purpose of the proper performance or facilitating the proper performance by the Secretary of State, the Board, any court or tribunal or by any other person or body of duties or functions under this Act;
 - (aa) for the purpose of any determination or investigation by the Scottish Legal Complaints Commission under the Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5) (“the 2007 Act”);
 - (b) for the purpose of investigating, prosecuting or determining any conduct complaint, remitted by the Scottish Legal Complaints Commission under section 6(2)(a) or 15(5)(a) of the 2007 Act-
 - (i) against a solicitor, by the Law Society or the Scottish Solicitors’ Discipline Tribunal;
 - (ii) against an advocate, by the Faculty of Advocates;
 - (c) for the purpose of investigating or prosecuting any offence or for the report of any proceedings in relation to such an offence;
 - (d) for the purposes of any investigation by the Scottish Public Services Ombudsman under the Scottish Public Services Ombudsman Act 2002 (asp 11);
 - (e) for the purposes of an inquiry by the Scottish Commission for Human Rights under section 8 of the Scottish Commission for Human Rights Act 2006 (asp 16);
 - (f) for the purposes of, or required by virtue of, section 50 of the Freedom of Information (Scotland) Act 2002 (asp 13);

- (g) in pursuance of a requirement made under section 10(1) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).
- (3) For the purposes of this section, information furnished to any person in his capacity as counsel or a solicitor by or on behalf of a person seeking or receiving legal aid or advice and assistance is not information furnished to the Board or to a person acting on its behalf.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info