

Decision Notice 002/2020

Legal Assistance Policy Committee paper: SLAB's equality duty

Applicant: The Applicant

Public authority: Scottish Legal Aid Board

Case Ref: 201901221



Scottish Information
Commissioner

Summary

SLAB was asked for a copy of a paper that was referenced in the minutes of a legal services policy committee meeting held on 17 September 2018.

SLAB initially refused the request, but after a review it disclosed a redacted version of the paper, with some information withheld.

The Commissioner investigated and was satisfied that SLAB complied with FOISA in withholding information, as either information whose disclosure would substantially prejudice the effective conduct of public affairs or information that was subject to legal professional privilege.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality)

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 16 May 2019, the Applicant made a request for information to the Scottish Legal Aid Board (SLAB). The information request was as follows:
I note the legal [assistance] policy committee had a meeting on 17th September 2018. Item 8 of the minutes refers to a paper they considered in relation to SLAB's equality duty. Under FOI may I have a copy even if peoples' names need to be redacted?
2. SLAB responded on 13 June 2019. It refused to comply with the request, arguing that the information was exempt from disclosure under sections 30(b)(ii) and 30(c) of FOISA.
3. On 14 June 2019, the Applicant wrote to SLAB requesting a review of its decision. He argued that disclosure of the information was clearly in the public interest.
4. SLAB notified the Applicant of the outcome of its review on 11 July 2019. It disclosed a copy of the paper with some information redacted under sections 30(b)(ii) and 30(c) of FOISA.
5. On 18 July 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of SLAB's review because it was in the public interest for the whole document to be released.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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 8 August 2019, SLAB was notified in writing that the Applicant had made a valid application. SLAB was asked to send the Commissioner the information withheld from the

Applicant. SLAB provided the information and the case was allocated to an investigating officer. In this email, SLAB also notified the Commissioner that it was relying on the exemption contained in section 36(1) to withhold some information from the Applicant.

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 to answer specific questions. These related to its reasons for withholding information under particular exemptions. The Applicant was also notified that SLAB was relying on section 36(1) of FOISA and was asked for his views on the application of the exemption and the public interest test. The Applicant did not provide any comments.

Commissioner's analysis and findings

9. 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 the Applicant and SLAB. He is satisfied that no matter of relevance has been overlooked.

Withheld information

10. SLAB is withholding eight paragraphs from the paper it disclosed to the Applicant. Seven of those paragraphs (page 3, paragraphs 7 and 8, page 6, paragraph 6, 7 and 8, and page 7, paragraphs 2 and 3) are being withheld under sections 30(b)(ii) and 30(c) of FOISA, and four paragraphs (page 3, paragraphs 7, 8 and 9 and page 7, paragraph 3) are being withheld under section 36(1) of FOISA.

Section 30(c) of FOISA

11. As noted above, SLAB is withholding seven of the eight paragraphs under section 30(c) of FOISA.
12. Section 30(c) of FOISA provides that information is exempt information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
13. The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
14. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur: therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
15. SLAB provided background information regarding the public sector equality duty (PSED) and its application to the administration of legal aid. SLAB noted that the paper requested by the Applicant was prepared in September 2018, but the work in this area is still continuing and the policy has not yet been finalised. SLAB noted that work is ongoing and the direction of travel has changed and developed, meaning that SLAB's current approach to the PSED does not necessarily align with that indicated in the withheld information.

16. SLAB indicated that disclosure of the information at the time of the request would cause confusion about the approach taken by SLAB to the application of PSED both generally and to applications and accounts, particularly in the specific context of the complexities of legal aid and the linkage with the PSED. SLAB argued that this would have an impact on its day to day administration of legal aid where resource would be required to correct confusion, specifically in circumstances where the policy is still under development and the misapprehension and confusion may relate to matters that have already developed past the point which has attracted interest but where the final policy position has yet to be determined.
17. SLAB also provided further detailed arguments explaining why disclosure of the information contained in the seven paragraphs would, or would be likely to prejudice substantially its ability to carry out its functions, and consequently prejudice the effective conduct of public affairs. These arguments were provided to the Commissioner in confidence, and SLAB has asked that they are not made public. Accordingly, while the Commissioner has carefully considered SLAB's arguments he cannot repeat the detail of SLAB's arguments in his decision notice.
18. Having considered the submissions and the withheld information in detail, the Commissioner is satisfied that the exemption contained in section 30(c) of FOISA applies to the seven paragraphs being withheld by SLAB.

Public interest test

19. As mentioned above, the exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
20. The public interest is not defined in FOISA, but has been described in previous decisions as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interests of the public", i.e. disclosure must serve the interests of the public.
21. SLAB has argued that the public interest is best served by non-disclosure of the withheld information. SLAB notes that while the public is entitled to understand the basis on which certain policy decisions are made, this is outweighed by the public interest in allowing SLAB to conduct its business effectively by discussing fully the improvements and development that could be made to embed the public sector equality duty in a complex decision-making environment.
22. SLAB provided other, more detailed arguments regarding the public interest test, which the Commissioner has considered but which he cannot reproduce in this decision notice, for reasons of confidentiality. While the Commissioner cannot provide details of these arguments, he notes that they relate to SLAB's public sector equality duty.
23. The Applicant argued that it appears that SLAB has failed, since 2010, to apply the public sector equality duty to decision making on accounts and legal aid applications, and that this failure only came to light in September 2018. The Applicant notes that the minutes of the meeting [held on 17 September 2018] that considered the paper, indicated that policies to rectify the position were anticipated to be in place by November 2018, but as of July 2019, they still were not in place.

24. The Applicant submitted that it was in the public interest to know that SLAB has failed to act lawfully in decision making and still hadn't addressed the situation almost a year after they became aware of it. The Applicant argued that the public interest favoured disclosure as mental health patients are being discriminated against by SLAB's failure and it needs to be made accountable so that changes are made as soon as possible. The Applicant argued that SLAB have had almost a year to make changes and haven't. He argued that disclosure is required to protect people's human rights in relation to this ongoing unlawful treatment.
25. In response to the Applicant's public interest arguments, SLAB submitted that there is no unlawful discrimination against mental health patients and that the issues have been considered by the Equality and Human Rights Commission (EHRC).

Commissioner's conclusions

26. The Commissioner accepts there is a general public interest in ensuring transparency and accountability, especially when a body, such as SLAB, is considering how it is meeting the requirements of PSED. PSED was created by The Equality Act 2010¹ and came into force in April 2011. Bodies subject to this duty must eliminate unlawful discrimination, harassment and victimisation, advance equality of opportunity between different groups, and foster good relations between different groups. Given the potential impact of this duty on members of the public (some of whom may be vulnerable) and the role of SLAB in determining legal aid payments, it is clear that there is a strong public interest in disclosure of the information.
27. However, the public interest in the disclosure of the information must be balanced against the public interest in withholding the information. The Commissioner has accepted that disclosure would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs, because the information could lead to SLAB being unable to carry out its functions. As noted above, SLAB has provided the Commissioner with detailed public interest arguments, but he cannot comment on these arguments in this decision, other than to say he has been persuaded by these arguments and he accepts the harm cited by SLAB is real.
28. Disclosing information that would require SLAB to divert significant resources from its day to day functions, to an extent that it would not be able to effectively carry out its functions, would not be in the public interest. Although there is a public interest in the disclosure of the information, the Commissioner does not consider it strong enough to outweigh the public interest in maintaining the exemption. On balance, therefore, the Commissioner is of the view that the public interest in withholding the information outweighs the public interest in disclosing it.
29. The Commissioner therefore finds that SLAB was entitled to withhold the information under section 30(c) of FOISA.
30. Given the Commissioner's decision in relation to section 30(c) of FOISA, he is not required to (and will not) go on to consider whether the information is also exempt from disclosure under section 30(b)(ii) of FOISA.

¹ <http://www.legislation.gov.uk/ukpga/2010/15/contents>

Section 36(1) - Confidentiality

31. As noted above, SLAB is withholding one paragraph under section 36(1) of FOISA, namely paragraph 9 of page 3 of the paper.
32. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. 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.
33. 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.
34. SLAB argued that the committee paper was prepared by one of its officials, based on and utilising legal advice from SLAB's legal advisor in relation to compliance with the law for the purposes of consideration by the SLAB Legal Services Policy Committee, who is the client. SLAB noted that this is made clear in paragraph 3 of the paper and it submitted that the relevant content is protected by legal advice privilege and should not be disclosed.
35. In relation to the information withheld under section 36(1) of FOISA, after considering the content and the circumstances under which it was created, the Commissioner is satisfied that the information meets the conditions for legal advice privilege to apply.
36. First, the document conveys advice from an in-house solicitor of SLAB acting in a professional capacity, as a legal adviser.
37. Second, the communications took place within the context of that legal adviser's professional relationship with their client (SLAB's staff, and therefore SLAB).
38. Finally, the Commissioner accepts that the information was, and remains, confidential. There is no evidence that the information in paragraph 9 of page 3 of the paper has been disclosed publicly or to others such that it would lose its confidentiality.
39. The Commissioner therefore accepts that the information falls within the terms of section 36(1) of FOISA.
40. The exemption in section 36(1) is a qualified exemption, which means that its application 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 test

41. As noted above, the Applicant has argued that the decision-making actions of SLAB in relation to its public sector equality duty should be made publicly available and that disclosure is in the public interest.

42. SLAB recognised that there was a public interest in the transparency and accountability of SLAB in relation to its compliance with the public sector equality duty; however it argued that this is outweighed by the overriding public interest in upholding the right to confidentiality of communications between legal advisors and client. SLAB further argued that the public interest in ensuring that its Board and Committee receive legal advice in confidence, overrides any public interest in disclosure.
43. SLAB argued that it must be allowed to continue to ensure that fully formed decisions can be taken with the benefit of legal advice in the knowledge that the advice is confidential. To disclose legal advice in this context would prejudice SLAB by exposing the advice to public scrutiny which is likely to inhibit future policy discussion leading to less well developed policies.

Commissioner's conclusions

44. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, on administration of justice grounds. 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* [2009] EWHC164 (QB)². Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
45. The Commissioner acknowledges that there will be occasions where the significant in-built public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where (the list is not exhaustive):
 - the privileged material discloses wrongdoing by/within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material discloses an apparently irresponsible and wilful disregard of advice
 - a large number of people are affected by the advice
 - the passage of time is so great that disclosure cannot cause harm.
46. Having examined the withheld information, the Commissioner cannot see that any of the above categories would apply. He does accept that the information would be of interest to the Applicant and to the general public. But having reviewed the information along with the arguments put forward by SLAB and the Applicant, he is not convinced that the public interest in disclosure outweighs that of maintaining the exemption.
47. The Commissioner must take account of the important public interest in legal professional privilege itself and the public interest in allowing public authorities to obtain confidential legal advice.

² [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o'brien+\)\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o'brien+)))

48. On balance, the Commissioner considers that greater weight should be afforded to the arguments which would favour withholding the information. There is a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, and he believes, that this outweighs the public interest in disclosing the information under consideration here.

Decision

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

Appeal

Should either the Applicant 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

16 January 2020

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.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (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.

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