

# Decision Notice



Decision 011/2011 Mr Peter Cherbi and the Scottish Legal Complaints Commission

Board members' expenses and fees

Reference No: 200901871  
Decision Date: 19 January 2011

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## Summary

Mr Cherbi requested from the Scottish Legal Complaints Commission (the SLCC) information on expenses claimed by and monies paid to its Board members. The SLCC released figures for the total expenses. On review, the SLCC also provided Mr Cherbi with the total amount paid in fees to the members, but withheld a breakdown of the figures, as contained in individual claim forms, on the basis of exemptions in sections 36(2) (Confidentiality), 38(1)(b) (Personal information) and 39(1) (Health, safety, etc.) of FOISA. Mr Cherbi remained dissatisfied he had not been provided with the full breakdown of expenses and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SLCC had initially interpreted Mr Cherbi's request too narrowly. He ordered the SLCC to disclose the claim forms to Mr Cherbi, with certain, limited, information redacted.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(b) and (e)(ii) (Effect of exemptions); 36(2) (Confidentiality); 38(1)(b), (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) section 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)

Legal Profession and Legal Aid (Scotland) Act 2007 section 43 (Restriction upon disclosure of information: Commission)

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

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1. On 1 September 2009, Mr Cherbi wrote to the SLCC, requesting "records of board members expenses claims and money they have received from the SLCC."



2. The SLCC responded on 29 September 2009. The SLCC advised Mr Cherbi that, having checked the records and expenses claim sheets it held, it had extracted the total expenses claimed and paid to Members between 1 October 2008 (when the SLCC began operating) and 31 August 2009. It advised Mr Cherbi that members had claimed a total of £6,408.96 and the SLCC had paid a total of £6,408.96 to Members.
3. Later that same day, Mr Cherbi wrote to the SLCC, requesting a review of its decision. Mr Cherbi was dissatisfied that he had not been provided with a full breakdown of expenses (including copies of claims forms, etc.) which is what he considered he had originally asked for.
4. The SLCC notified Mr Cherbi of the outcome of its review on 19 October 2009.
5. The SLCC advised Mr Cherbi that it had concluded that it was correct not to provide him with copies of the records he had requested on the basis that it was entitled to extract the information from records held, namely what was claimed and paid. (The interpretation of Mr Cherbi's request is considered by the Commissioner below.) The SLCC also advised Mr Cherbi that the actual claim forms were exempt from disclosure under section 36(2) (Confidentiality), section 38(1)(b) (Personal information) and section 39(1) (Health, safety etc.) of FOISA.
6. The SLCC also advised Mr Cherbi that it had very carefully considered the exact wording of his request and that it considered that the request might be read two ways, i.e. either as a request for records of all claims for expenses and money paid as expenses (which the SLCC believed it had provided) or as a request for records plus a request for records of all money paid. The SLCC noted that it had not sought to clarify this with Mr Cherbi, but that it had interpreted the request expansively. It therefore advised Mr Cherbi that, between 1 October 2008 and 31 August 2009, members received total further payments of £128,624.00 by way of fees, arising from payment rates of £209 per member and £308 to the Chair to the SLCC. (In later correspondence with the Commissioner, the SLCC explained that remuneration of fees to Board members are not expenses, but amounts agreed by the Scottish Government in payment for the Board's time acting on the SLCC's behalf.)
7. On 27 October 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 questioned why he had been given two different sets of figures and made it clear that he had also expected a full release of expenses, including copies of claim forms, etc., which, in his view, was what he had originally asked for. He also argued that the information was not exempt from disclosure, commenting that many other public bodies, including Holyrood and Westminster, had released this type of information.
8. 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

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9. On 29 October 2009, the SLCC was notified in writing that an application had been received from Mr Cherbi. Once checks had been carried out to ensure that the application was valid, the SLCC was asked, on 17 November 2009, to provide the Commissioner with the information withheld from Mr Cherbi. The SLCC responded on 30 November 2009, providing the Commissioner with Members' individual claim forms (numbered 1 – 99) plus three spreadsheets (numbered 100-102 inclusive).
10. Items 1-99 are copies of forms completed and submitted by Board members. The standard form has four sub-sections under the main headings "Fee Claims", "Travel & Preparation", "Incidental Expenses" and "Travel & Subsistence". Items 100 – 102 are extracts from payroll spreadsheets.
11. The case was then allocated to an investigating officer. The investigating officer subsequently contacted the SLCC on 23 December 2009, 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. In particular, the SLCC was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
12. The SLCC replied on 27 January 2010, confirming that it wished to apply exemptions in sections 36(2), 38(1)(b) and 39(1) of FOISA.

## Commissioner's analysis and findings

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13. 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.

### Interpretation of Mr Cherbi's request

14. As noted above, Mr Cherbi requested "records of board members expenses claims and money they have received from the SLCC."
15. The SLCC did not seek any clarification from Mr Cherbi as to what information he was seeking and it initially responded by releasing only two figures, i.e. the total figure for all Board members' expenses claimed (£6,408.96) and the total figure for the money paid out to Board members by the SLCC (again, £6,408.96).



16. In his request for review, Mr Cherbi said he had expected to be provided with the full detail (including breakdowns) of what was being claimed by each board member (including copies of the claim forms) together with details of payments made to Board members. Following a review, the SLCC provided Mr Cherbi with additional information, i.e. the total amount (£128,624) paid to members by way of fees (as opposed to the amount paid to members by way of expenses). At this stage, the SLCC also indicated to Mr Cherbi that it was satisfied that it was entitled, under FOISA, to extract and provide the information from the records it held, instead of providing him with copies of actual claim forms. In later correspondence with the investigating officer, the SLCC referred to the judgement of the Court of Session in the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73 (the *Glasgow City Council* case), as support for the way in which it had responded to Mr Cherbi's request.
17. The Commissioner has considered carefully the wording of Mr Cherbi's request. Although it was only when he made his request for review that Mr Cherbi made a specific reference to wanting copies of the claim forms, the Commissioner considers that the wording of Mr Cherbi's original request (which was for records of members' expenses claims, etc.) makes it clear that his request was for the information contained in individual claim forms, as opposed to a total figure or figures. He must therefore disagree with the view taken by the SLCC that the response given was "expansive."
18. While the Commissioner accepts that the ruling of the Court of Session in the *Glasgow City Council* case (referred to in paragraph 16 above) means that the SLCC is under no obligation to provide Mr Cherbi with actual copies of the claim forms, this does not absolve the SLCC from the duty (subject to other provisions contained in FOISA) to provide the information which appears in the claim forms, etc. as opposed to total figures. In this regard, the Commissioner would refer the SLCC to the guidance he issued following the ruling of the Court of Session, and in particular to Part 4 of the guidance, which makes it clear that where copies of documents are not provided in response to a request for information, the information provided must nonetheless be complete and accurate<sup>1</sup>.
19. Mr Cherbi's request was in two parts, firstly, for records of board members' expenses and, secondly, for records of money the board members have received from the SLCC. Having viewed the claims forms provided to the Commissioner during the investigation, the Commissioner considers that the information on the claim forms under the headings "Travel & Preparation", "Incidental Expenses" and "Travel & Subsistence" falls within the first part of Mr Cherbi's request (being the breakdowns of expenses claimed).
20. He also considers that the information on the claim forms under the heading, "Fee claims" falls within the second part of Mr Cherbi's request. This clearly covers records of money the board members have received from the SLCC.

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<sup>1</sup> "Guidance on validity of requests following Court of Session Opinion on 30 September 2009"  
<http://www.itspublicknowledge.info/uploadedfiles/CourtofSessionGuidanceonValidity.pdf>



21. However, the Commissioner does not consider that the details of the authorising officer(s) on the forms fall within the scope of Mr Cherbi's request, given that Mr Cherbi did not ask who had authorised the claims or payments made and did not, for example, ask for completed copies of claim forms.
22. Based on what the Commissioner considers to be a reasonable interpretation of Mr Cherbi's request, the Commissioner will now go on to consider whether the exemptions cited by the SLCC apply to the information.

### **Section 36(2) – confidentiality**

23. Section 36(2) of FOISA provides that information is exempt 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 by any other person. 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 cannot apply to information the disclosure of which is necessary in the public interest.
24. Section 36(2), therefore, contains a two stage test, both elements of which must be fulfilled before the exemption can be relied upon. Firstly, the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and includes another living individual, another Scottish public authority or any other legal entity, such as a company or partnership.
25. The SLCC commented that the information (claims for expenses, etc.) was compiled by members of the SLCC and it is clear from their submissions that it considers that the information was, as a result, obtained from another person (i.e. the members).
26. However, while it is clear that the members are not employees of the SLCC (the Board of the SLCC is appointed by Scottish Ministers in consultation with the Lord President of the Court of Session), the Commissioner does not consider that the information held by the SLCC can be said to have been obtained from a third party. It is clear that the forms are internal SLCC forms for the purpose of submitting a claim for expenses. The information is completed by members claiming expenses in connection with their duties on behalf of SLCC and can be considered integral to the SLCC's internal administrative and financial frameworks. Having considered the withheld information and the circumstances of its provision, the Commissioner cannot accept that it was obtained by the SLCC from another person, as required for the exemption in section 36(2) to apply. Consequently, the Commissioner considers that the exemption cannot apply.

### **Section 38(1)(b) of FOISA (Personal information)**

27. 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 its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles in Schedule 1 to the DPA.



28. This exemption is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
29. The SLCC asserted that the first data protection principle would be breached by disclosure of any remaining information requested by Mr Cherbi.
30. When considering the exemption in section 38(1)(b) of FOISA, the Commissioner must first establish whether the information withheld is personal data. 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 (the definition is set out in full in the Appendix).

#### *Personal data of Members*

31. The SLCC commented that the claim forms contain names and payroll information pertinent to members' activities in relation to SLCC work.
32. The Commissioner is satisfied that the information which has been withheld is the personal data of the members. Living individuals, in this case the Board members, can be identified from the information, either by itself or read in conjunction with other information in the possession of, or likely to come into the possession of, the SLCC. The information clearly focuses on those individuals and is biographical of them in a significant sense; consequently, the Commissioner is satisfied that it relates to them.
33. The first data protection principle requires that personal data be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 (to the DPA) is also met. In this case, processing would be by disclosure of the personal data into the public domain in response to Mr Cherbi's information request. (The Commissioner has considered the definition of sensitive personal data contained in section 2 of the DPA, and he is satisfied that the personal data under consideration in this case do not fall into this category. Therefore, it is not necessary to consider the conditions in Schedule 3 of the DPA in this particular case.)
34. There are, therefore, 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 inter-linked. If there is a specific condition which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
35. The SLCC has argued that disclosure would be unfair, unlawful and contrary to the conditions in the schedules.
36. The Commissioner will first consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he will then go on to consider 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?*

37. Condition 6 allows personal data to be processed if 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 subjects (the individuals to whom the data relate).
38. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- Is there a legitimate interest in obtaining the personal data?
  - If yes, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the candidates in question?
  - Even if the processing is necessary for Mr Cherbi's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects? There is no presumption in favour of the release of personal data under the general obligation laid down by FOISA. Accordingly, any legitimate interests identified must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the SLCC was correct to refuse to disclose the personal data to Mr Cherbi.

*Is there a legitimate interest?*

39. It is clear that Mr Cherbi considers that there is a legitimate interest in the disclosure of this information. In his application to the Commissioner, Mr Cherbi stated that he was not satisfied that "in the current climate" the SLCC can withhold the information, given that it had been in receipt of public money. He also commented that other public bodies have released the sort of data he has requested in this case.
40. The SLCC commented that it is now not funded by the public. Whilst start-up costs for the Commission were provided by the Scottish Government, thereafter the Commission is funded entirely by levies on the legal profession. In effect, once operational, the SLCC is not reliant upon direct funding from the public purse. The Scottish Ministers may make grants to the Commission of such amounts as they consider appropriate, or may lend to the Commission sums of such amounts as the Ministers may determine, on such terms and subject to such conditions as the Scottish Ministers consider appropriate, but the SLCC is responsible for setting its annual budget and is responsible for ensuring that its income is sufficient to meet its expenditure. In this respect, the SLCC argued, unlike some other public bodies, it retains a degree of financial autonomy from the Scottish Government in terms of its operation.





41. Although the Commissioner accepts that the SLCC is, in-effect, self-funding, public money has nonetheless been involved in establishing the organisation with a view to carrying out functions of a public nature as described above. Moreover, the Commissioner is mindful that the Scottish Parliament deemed the SLCC to be a Scottish public authority for the purposes of FOISA. The SLCC itself recognises on its website that it is carrying out functions of a public nature in that it handles service complaints against practitioners and reviews the way in which the Law Society of Scotland of Scotland and the Faculty of Advocates handle conduct complaints, in the public interest.
42. In all the circumstances, the Commissioner considers that Mr Cherbi (and, indeed, the wider public) has a legitimate interest in gaining insight into any expenses claimed and money paid by the SLCC to its Board members, given their public role within the context of the SLCC's public functions. The Commissioner considers there to be a legitimate interest in knowing the nature of the claims that prompted this expenditure.

*Is disclosure necessary to achieve these legitimate aims?*

43. The Commissioner notes that total figures have been disclosed to Mr Cherbi by the SLCC and that the SLCC has, for example, published the fees paid to board members for 2008/09 in bands of £5,000, broken down by individual board member in its 2009 Annual Accounts<sup>2</sup>.
44. However, the Commissioner considers that there is a legitimate interest in additional information being disclosed about these figures, both to show the nature of the claims and to give more information about the actual amounts being claimed. In the circumstances, the Commissioner cannot identify a means of meeting those legitimate interests which would be less intrusive than the disclosure of the withheld personal data. Consequently, he is satisfied that disclosure would be necessary to meet those legitimate interests.

*Would disclosure cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?*

45. The SLCC was asked why it considers that disclosure of the information would be unwarranted by reason of prejudice to the rights and freedoms of the members.
46. In response, the SLCC commented that the disclosure of forms from which personal data, including location of homes, may be inferred, would be inappropriate. The SLCC also stated that it would not be appropriate for where members live to be revealed, given that there have already been personal attacks on members.
47. The Commissioner's guidance on the exemption in section 38<sup>3</sup> sets out some factors which the Commissioner considers 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)

<sup>2</sup> <http://www.scottishlegalcomplaints.com/media/9477/slcc%20annual%20accounts%20final-unsigned.pdf>

<sup>3</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



- 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
48. The SLCC asserted that disclosure of the level of breakdown provided in the information in question would be fundamentally unfair to the members. It has not given explicit reasons for this view, but has, in correspondence, referred to the implicit confidentiality associated with the payments and the distress to the Board members it stated would, or would be likely to, result from disclosure.
49. The SLCC has confirmed that it did not seek permission from the members to disclose their personal data. No evidence has been supplied that would confirm whether or not members would have any expectation that data relating to their work for SLCC would be disclosed, other than the SLCC's assertion that such claims are treated in confidence.
50. However, it might also be noted that, since FOISA came into force in January 2005, it has been widely reported that information held by public authorities about how they make decisions, perform their functions and spend their funds might be the subject of an information request.
51. In this context, it might equally be assumed that any person or organisation appointed to the Board of a public authority (in a governance capacity for such a body) does so with awareness of the existence of FOISA (even if its implications are not fully appreciated), and with an expectation that some information about their role might be requested or disclosed under its terms. Certainly, it would be a matter of good practice generally for public authorities to alert prospective Board members to FOISA's existence and the possibility of requests for information about work undertaken.
52. The Commissioner further notes that the SLCC's website indicates that its Board members must adhere to the Eight Principles of Public Life set out by the Committee on Standards in Public Life. The SLCC website states that holders of public office are "accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office".
53. In the circumstances, the Commissioner considers that, on balance, the disclosure of the expenses claimed by the members (under the headings "Travel & Preparation", "Incidental Expenses" and "Travel & Subsistence") would not, except where disclosure would reveal the location of an individual member's home, cause unwarranted prejudice to the members' rights and freedoms or legitimate interests. The Commissioner is satisfied that information relating to the location of members' homes is information which relates to their private life as opposed to their public life.



54. Turning now to the information in the claim forms under the heading “Fees Claims”, when considering the balance of legitimate interests in this case, the Commissioner has had regard to the guidance note produced by the Information Commissioner (who is responsible for the enforcement of the DPA throughout the UK) entitled “*Public Sector Salaries – how and when to disclose*”<sup>4</sup>. This document is referred to in what follows as “the guidance”.
55. The guidance makes it clear that those who are paid from the public purse should expect some information about their salaries to be made public. However, it also notes that salary information relates to individuals' personal financial circumstances and so deserves some protection. In particular, the guidance notes that only in exceptional circumstances is disclosure of exact pay likely to be justified. The Information Commissioner suggests instead that, where disclosure of salary bands alone is insufficient to satisfy a legitimate interest in knowing remuneration levels, it may be appropriate to consider disclosing an approximate amount paid to an individual, for example to the nearest £5,000.
56. When addressing the expectations of the individual concerned, the guidance highlights a number of factors for consideration:
- how senior their role is, including their level of accountability and personal responsibility;
  - whether they have a public profile or public facing role;
  - whether they are responsible for major policy decisions or expenditure of public funds
57. Other points made in this guidance include
- more senior staff who are responsible for major policy and financial initiatives can expect greater scrutiny of their pay than more junior employees;
  - the fact that an individual has not been warned that their salary would be disclosed under FOI will not necessarily be a bar to disclosure;
  - you should take into account whether salaries for this type of post are generally made public
58. Clearly, the fees paid to members are not the direct equivalent of employee salaries (and the Commissioner notes the points made by the SLCC and referred to above in relation to public funding), but the Commissioner does consider the guidance to be useful in considering whether fees should be disclosed.
59. The work carried out by members equates to work carried out by staff employees at the most senior level given that the SLCC is governed by the members.
60. As noted above, the SLCC’s Annual Accounts for 2009 contain information relating to “Board Fees” in bands of £5000. All of these factors contribute to an expectation that details of remuneration for employees at board level will be disclosed in response to a request under FOISA, if only in bands of £5000.

<sup>4</sup> [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/practical\\_application/salary\\_disclosure.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/salary_disclosure.pdf)



61. The Commissioner considers that a distinction can be drawn between fees paid and salaries, given that, while disclosing a salary is likely to disclose a person's total annual income, the same cannot be said for fees, which depend very much on the amount of work required to be done by the SLCC. The amount paid in fees is likely to change from year to year and, in many cases, will disclose only part of a person's annual income.
62. The Commissioner also notes that other public bodies such as Scottish Natural Heritage and the Scottish Futures Trust publish exact amounts paid to Board members which may be considered as good practice.
63. The Commissioner has balanced the legitimate interests which he has identified in the disclosure of the fees paid to the Board members against those of the members. In so doing, he has given weight to the interests of the members in maintaining the privacy of their financial affairs, and to the inclusion of certain details of their remuneration in the annual accounts of SLCC. However, on balance, he has come to the conclusion that the disclosure of the fees paid to the Board members (and the basis of such claims) would not be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the Board members. The Commissioner is therefore satisfied that condition 6 of Schedule 2 to the DPA would permit the information to be disclosed.

#### *Fairness*

64. The Commissioner will now go on to consider whether disclosure would be unfair. The Commissioner notes that the SLCC has not provided him with supplementary arguments as to why the disclosure would be unfair and he has concluded, for the reasons set out in paragraphs 39 to 63 above that, provided that information revealing the home address of members is redacted, disclosure would not be unfair.

#### *Lawfulness*

65. The Commissioner must now go on to consider whether disclosure would be unlawful. The SLCC argued that disclosure of the information would be an actionable breach of confidence (see the arguments on the exemption in section 36(2) above), but the Commissioner did not accept that this was the case. The SLCC did not put forward any other arguments as to why disclosure would be unlawful and, given that the Commissioner has concluded that condition 6 of Schedule 1 is met, he does not regard disclosure to be unlawful.
66. In all the circumstances, therefore, the Commissioner has concluded that the first data protection principle would not be breached by disclosure of the information in the way described above and therefore that the withheld personal data was incorrectly withheld under section 38(1)(b) of FOISA.



*Personal data of third parties*

67. The SLCC also withheld the personal data of third parties who can be identified from references to cases made in some of the content of the claim forms relating to SLCC work, on the basis that disclosure would breach the first data protection principle. As noted above, the first data protection principle requires that personal data be disclosed fairly and lawfully, and that one of the conditions in Schedule 2 (and Schedule 3 if the information is sensitive personal data) be met. The SLCC argued that the disclosure of some of the information requested by Mr Cherbi is prohibited by the Legal Profession and Legal Aid (Scotland) Act 2007 (the 2007 Act) where there is information relating to complainants to the SLCC and/or to its casework. The SLCC did not indicate to which parts of the withheld documents it was referring, nor did it not identify to which part of the 2007 Act it was referring.
68. The Commissioner notes, however, that section 43(1) of the 2007 Act prohibits the disclosure of information in certain circumstances (section 43 is set out in full in the Appendix). Having considered the information which has been withheld from Mr Cherbi, the Commissioner is satisfied that it falls within the definition of personal data contained in section 1(1) of the DPA, given that the claim forms identify the names of complainants, either by quoting complainers' surnames or initials. The Commissioner is satisfied that, in both examples, living individuals can be identified from the information, either by itself or read in conjunction with other information in the possession of, or likely to come into the possession of, the SLCC. The information clearly focuses on those individuals and is biographical of them in a significant sense; consequently, the Commissioner is satisfied that it relates to them.
69. He is also satisfied that such information (i.e. the references to complainants/cases within the claim forms) was obtained by the SLCC during and in connection with an investigation of a complaint to the SLCC and that such information was obtained from the complainants themselves in connection with their application to the SLCC (to investigate their complaints relating to the legal profession). He is therefore satisfied that it would not be lawful to disclose this personal data to Mr Cherbi.
70. He is accordingly satisfied that disclosure of this third party personal data would breach the first data protection principle and that it is exempt from disclosure under section 38(1)(b) of FOISA.

**Section 39(1) – Health, safety and the environment**

71. The SLCC has also relied on the exemption in section 39(1) of FOISA to withhold the information from Mr Cherbi.
72. 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 exemption is also subject to the public interest test contained in section 2(1)(b) of FOISA.



73. This exemption does not contain the usual harm test of “substantial prejudice” and, in referring simply to endangerment, appears to set a lower threshold of harm. However, as the Commissioner has indicated in *Decision 071/2008 Mr S and the Chief Constable of Strathclyde Police* the exemption still requires that the harm be at least likely and therefore he will expect a realistic prospect of danger to the health and safety of one or more identifiable individuals, based on evidence or convincing arguments to that effect.
74. The SLCC submitted that the home addresses of the members could be inferred from the content of the claim forms and that disclosure of such information would be likely to endanger the physical safety of an individual. In their view, this information would, by definition, enable the identification of places. The SLCC further argued that, given the background of threats to members, disclosure of such information would, or would be likely to, endanger all its board members.
75. As noted above, the Commissioner has already found any information from which the location of an individual member’s home can be inferred to be exempt under section 38(1)(b) of FOISA. As a result, he is not required to go on to consider whether the exemption in section 39(1) also applies to this information.
76. It is not entirely clear from the submissions received from the SLCC whether it considers that disclosure of other information in the forms is exempt under section 39(1). It has commented that it believes that all of its staff and members are at risk and that this risk needs to be minimised to secure continuity of acting of members and staff.
77. However, the Commissioner considers that the SLCC has not sufficiently evidenced any specific threats to the actual members listed as members of its Board. He also notes that much of the SLCC’s concerns relate to the misrepresentation of information (released under FOISA) in various blogs and other web publications which, it argues, are often inaccurate and distressing. It referred to the disruptive effects of either an individual or any group acting in concert and to the use of freedom of information material being used to attack the reputations of Board members and their families. However, while the Commissioner accepts that the use of material in such a way may make for unpleasant reading, he is not sufficiently persuaded that such circumstances constitute a threat of the kind to which the exemption in section 39 of FOISA applies.
78. Consequently, on the basis of the submissions provided by the SLCC, the Commissioner must therefore conclude that any likelihood of danger is too remote to engage the exemption in section 39(1) of FOISA.
79. As the Commissioner is not satisfied that the exemption in section 39(1) of FOISA applies to this information he is not required to go on to consider the application of the public interest test in section 2(1)(b).



## DECISION

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

While the SLCC was entitled to withhold some personal data on the basis of the exemption in section 38(1)(b) of FOISA, the Commissioner does not consider that the exemptions in section 36(2), 38(1)(b) and 39(1) of FOISA apply to the remaining information. In applying these exemptions, the SLCC failed to comply with Part 1 of FOISA and, in particular, with section 1(1).

The Commissioner therefore requires the SLCC to disclose the information contained in the claims forms provided to him for the purposes of his investigation (numbered 1-99), with the redaction of information which would (i) reveal the home addresses of the Board members and (ii) identify complainants to the SLCC. As noted in paragraph 21, the Commissioner does not consider that details of the authorising officer(s) fall within the scope of Mr Cherbi's request and, accordingly, he does not require the SLCC to disclose this information.

This information must be provided to Mr Cherbi by 7 March 2011.

## Appeal

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Should either Mr Cherbi or the Scottish Legal Complaints Commission 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.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**19 January 2011**



## Appendix

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### 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 –
  - (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 –
  - (b) section 26;  
...
  - (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.  
...





### 36 Confidentiality

...

- (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.

### 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
  - (ii) ...
- (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 meaning 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.

...

## Legal Profession and Legal Aid (Scotland) Act 2007

### 43 Restriction upon disclosure of information: Commission

- (1) Except as permitted by subsection (3), no information mentioned in subsection (2) may be disclosed.
- (2) The information is information—
  - (a) contained in a conduct complaint, services complaint or handling complaint;
  - (b) which is given to or obtained by the Commission or any person acting on its behalf in the course of, or for the purposes of—
    - (i) any consideration of such a complaint;
    - (ii) an investigation (including any report of such an investigation) into a services complaint or a handling complaint.
- (3) Such information may be disclosed—
  - (a) for the purpose of enabling or assisting the Commission to exercise any of its functions;
  - (b) where the disclosure is required by or by virtue of any provision made by or under this Act or by any other enactment or other rule of law.
- (4) Any person who, in contravention of subsection (1), knowingly discloses any information obtained when employed by, or acting on behalf of, the Commission is guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.