

Decision Notice



Decision 236/2011 Robert McKee and the Scottish Legal Complaints Commission

Information relating to complaints and communications with the Law Society of Scotland and its insurers

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Summary

Mr Robert McKee requested from the Scottish Legal Complaints Commission (the SLCC) a range of information concerning complaints concerning conveyancing and internal discussions relating to the operation of solicitors' indemnity insurance. The SLCC responded by providing some information to Mr McKee and withholding the remainder under a number of exemptions in FOISA. Following a review, Mr McKee remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SLCC had mostly complied with FOISA in dealing with Mr McKee's requests. However, he found that exemptions had been wrongly applied to a small amount of information and required the SLCC to disclose this information to Mr McKee.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(b) and (c) (Effect of exemptions); 26(a) (Prohibitions on disclosure); 30(b)(ii) and (c) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy); 36(2) (Confidentiality) and 38(1)(b), (2)(a)(i) and (b) and (5) (definitions of "data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions – definition of "personal data")

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.

Dumfries and Galloway Council v Scottish information Commissioner (2008) CSIH 12



Background

1. On 26 May 2010, Mr McKee emailed the SLCC requesting information in the following terms:
“Will you please supply further information about the complaints made relating to conveyancing including:
 - (i) How many of the complaints have been through your system to resolution?
 - (ii) A description of each complaint including whether it is still in process, whether (if completed), it was upheld and what the outcome was.
 - (iii) Confirmation that the Law Society and the Law Society indemnity insurers have not been represented at any of the complaint stages in any of the complaints you have reviewed.
 - (iv) Noting that you have had no interchange with the Law Society will you confirm that you have had no communications with them or their representatives?”Additionally, Mr McKee requested (not in the context of complaints made relating to conveyancing):
 - (v) “Will you let me have the information you have relating to the discussions within SLCC about the operation of the indemnity insurance and the actions you have taken or intend?”
2. The SLCC emailed Mr McKee on 21 June 2010. It advised him that, in order to provide the correct information, it required clarification of the information that he was seeking in relation to requests (iii) and (iv). In relation to request (v), the SLCC also provided information which explained how it oversees professional indemnity insurance, drawn from its annual report, and an explanation of research work planned in this area.
3. On 22 June 2010, Mr McKee emailed the SLCC providing clarification in relation to requests (iii) and (iv). Additionally, Mr McKee requested a review of the SLCC’s decision in relation to request (v). In particular, Mr McKee noted that he would have expected the SLCC to provide him with internal communications and discussions regarding the indemnity insurance cover.



4. On 28 June 2010, the SLCC emailed Mr McKee in response to requests (i) to (iv). It provided information which it considered met the terms of request (i) in full. In relation to request (ii), the SLCC provided some information, but withheld the remainder on the basis that it was exempt from disclosure in terms of sections 26(a) and 36(2) of FOISA. In relation to requests (iii) and (iv), the SLCC advised Mr McKee that, to the extent that it held the information, it was considered exempt from disclosure in terms of sections 26(a) and (for some information falling within the scope of request (iv)), 36(2) of FOISA.
5. Also on 28 June 2010, Mr McKee emailed the SLCC requesting a review of its decision in relation to requests (i) to (iv), indicating that he did not believe his requests had been properly considered by the SLCC.
6. In relation to request (v), the SLCC notified Mr McKee of the outcome of its review on 20 July 2010. The SLCC disclosed some information to Mr McKee, but withheld the remainder on the basis that it considered the information to be exempt from disclosure in terms of sections 26(a), 30(b) and (c), 33(1)(b), 36(2) and 38(1)(b) of FOISA.
7. In relation to requests (i) to (iv), the SLCC notified Mr McKee of the outcome of its review on 12 December 2010, upholding its previous decision in full.
8. On 11 January 2011, Mr McKee 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.
9. The application was validated by establishing that Mr McKee 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

10. On 13 January 2011, the SLCC was notified in writing that an application had been received from Mr McKee and was asked to provide the Commissioner with any information withheld from him. The SLCC responded with the information requested and the case was then allocated to an investigating officer.
11. The investigating officer subsequently contacted the SLCC, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. 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 responded on 21 March 2011 providing submissions on its application of the exemptions that had been applied following its reviews in relation to each request, with the exception of the exemption in section 30(b)(i) of FOISA, which it no longer claimed to apply. The SLCC also provided details of the searches it had undertaken in order to locate and retrieve the information sought by Mr McKee. At this stage, the SLCC also applied the exemption in section 36(1) of FOISA to some of the withheld information.
13. During the investigation, the SLCC disclosed some additional information to Mr McKee in relation to request (v).
14. The investigating officer also contacted Mr McKee during the investigation seeking his submissions on the matters to be considered in the case. Mr McKee responded with his submissions and also indicated that he was not interested in receiving any personal information of any kind. Mr McKee's submissions, along with those of the SLCC are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

15. 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 McKee and the SLCC and is satisfied that no matter of relevance has been overlooked.

Request (i)

16. This request was for information on how many complaints had been through the SLCC's complaint system to resolution.
17. In response, the SLCC provided Mr McKee with a document which listed conveyancing enquiries and complaints it had received (thereby confirming the number that had been through the SLCC's complaint system). This list indicated whether each case was closed or open and, for those closed, indicated its outcome using a series of general terms (for which definitions were also given).
18. In his submissions to the Commissioner, Mr McKee stated that he believed the information provided by the SLCC was out of date. He also contended that his request related to the general position on complaints and that the SLCC's response related specifically to complaints on conveyancing.
19. In its submissions, the SLCC explained the parameters and search terms that it had used that it had used in order to identify the relevant information requested by Mr McKee, explaining that the information disclosed covered the whole period that the SLCC had been in operation up to the date of Mr McKee's request.



20. The Commissioner notes that Mr McKee's requests of 26 May 2010 were prefaced by the sentence "*Will you please supply further information about the complaints made relating to conveyancing*". As such, he cannot agree with Mr McKee's contention that his question related to the general position. In the Commissioner's view, the request was clearly made in terms which could only reasonably be interpreted as restricting its scope to information regarding complaints relating to conveyancing.
21. Having considered all relevant submissions and the terms of request (i), the Commissioner accepts that the SLCC interpreted Mr McKee's request reasonably and took adequate steps to identify and provide the information that it held which fell within the scope of that request. Consequently, he is satisfied that it responded to this request in accordance with Part 1 and section 1(1) of FOISA.

Request (ii)

22. In this request, Mr McKee asked for a description of each complaint regarding conveyancing, including whether it is still in process, whether (if completed) it was upheld and what the outcome was.
23. The SLCC's position is that by disclosing the information described in paragraph 17 above, it has provided Mr McKee with summary information which was statistical in nature and showed the stage of a complaint and the outcome of a closed complaint. However, it considered that the specific details of each complaint were exempt from disclosure in terms of sections 26(a) and 36(2) of FOISA.
24. The Commissioner accepts that the information disclosed by the SLCC met all parts of request (ii) other than that seeking a description of the complaints received. He therefore went on to consider whether that outstanding information was exempt from disclosure.
25. Section 26(a) of FOISA states that information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) is prohibited by or under an enactment. Section 26(a) is an absolute exemption, and therefore is not subject to the public interest test. In this case, the SLCC argued that such a prohibition was created by section 43 of the Legal Profession and Legal Aid (Scotland) Act 2007 (the 2007 Act). Section 43 is reproduced in full in the Appendix to this decision.
26. Section 43(1) and (2) of the 2007 Act provide that, except as permitted by subsection (3), no information may be disclosed where the information is information contained in a conduct complaint, services complaint or handling complaint 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 any consideration of such a complaint or an investigation (including any report of such an investigation) into a services complaint or a handling complaint.
27. In its submissions, the SLCC contended that the information withheld in response to request (ii) was contained within a conduct, service or handling complaint and had been given to or obtained by the Commission for the purposes of the consideration of, or investigation into, a complaint.



28. Section 43(3) of the 2007 Act provides that such information may be disclosed (a) for the purposes of enabling or assisting the Commission to exercise any of its functions or (b) where the disclosure is required by or by virtue of any provision made by or under the 2007 Act or by any other enactment or rule of law.
29. The SLCC submitted that, although section 43(3)(b) appears to permit release of the information under “any other enactment”, i.e. FOISA, to release the information under FOISA would be inconsistent with the 2007 Act. The SLCC referred to the Court of Session Opinion in the case of *Dumfries and Galloway Council v Scottish Information Commissioner (2008) CSIH 12*¹ where the Court held that the exercise of a duty to release information under FOISA must not be inconsistent with the prohibitions or restrictions contained in the other enactment. Consequently, the SLCC contended that the information could not be released.
30. In this case, the Commissioner is satisfied that the information in question (details of the complaints listed by the SLCC) could only be drawn from a complaint of the type specified in section 43(2)(a) of the 2007 Act, obtained by the SLCC for the purposes specified in section 43(2)(b) of the 2007 Act.
31. Having considered the judgement of the Court of Session referred to above, the Commissioner is satisfied that the provisions contained in section 43 of the 2007 Act do create a prohibition on disclosure for the purposes of section 26(a) of FOISA and so the SLCC was entitled to withhold the details of the complaints under the exemption in section 26(a) of FOISA.
32. As the Commissioner has concluded that the information was correctly withheld under section 26(a), it is not necessary for him to consider the application of section 36(2) of FOISA in relation to this information.
33. The Commissioner is therefore satisfied that the SLCC complied with Part 1 of FOISA in its handling of request (ii).

Requests (iii) and (iv)

34. In these requests, Mr McKee sought confirmation from the SLCC that the Law Society of Scotland (the Law Society) and its indemnity insurers had not been represented in any of the complaints that the SLCC had reviewed (request (iii)) and confirmation that the SLCC had had no communications with the Law Society or its representatives (request (iv)). Both of these requests were preceded by the text indicating that the information requested was in relation to conveyancing complaints.
35. The Commissioner has noted that these requests sought only the SLCC’s confirmation as to whether the Law Society had been represented in or communicated with the SLCC regarding conveyancing complaints. Mr McKee did not seek the content of any representations or communications that might be confirmed to have taken place, and so, in the Commissioner’s view, simple “yes” or “no” answers providing the relevant confirmation would fulfil each of these requests.

¹ <http://www.scotcourts.gov.uk/opinions/2008CSIH12.html>



36. In its responses in relation to both of requests (iii) and (iv), the SLCC advised Mr McKee that, any information that it held would have been obtained for the purposes of considering or investigating individual complaints and was therefore exempt from disclosure in terms of section 26(a) of FOISA. Additionally, the SLCC also considered some of the information was given to the SLCC in circumstances that created a duty of confidentiality and was therefore exempt from disclosure under section 36(2) of FOISA. The SLCC stressed that it had not corresponded with the Law Society on the subject of conveyancing outside the context of specific complaints, although it did correspond with the Law Society on certain other matters.
37. In its response to Mr McKee's request for review, the SLCC commented in relation to request (iii) that it was unclear about what was meant by the phrase "represented in any complaint". It explained that it was sometimes necessary to communicate with the Law Society about individual complaints, but this was in the context of the Law Society providing the SLCC with information to enable it to progress its enquiries into individual complaints. It reiterated that it would consider such information exempt under section 26(a) of FOISA. It went on to state that the SLCC was not "represented" in the sense of putting forward the professions view about complaints as a matter of course.
38. In relation to request (iv), the SLCC also confirmed that it communicated with the Law Society over a range of issues; those of which it considered case specific were considered to be exempt from disclosure under FOISA.
39. In its submissions to the Commissioner, the SLCC explained that the only situation in which the Law Society or its insurers would be "represented" in complaints would be if the complaint had been made by one of those organisations. However, none of the complaints made to it had been made by either of those bodies. The SLCC stated that there may have been occasions when it had corresponded with the Law Society about the complaint. However, it did not consider that these communications would amount to "representation" in a complaint.
40. The SLCC also explained that, whilst it does communicate with the Law Society in relation to specific complaints about conveyancing, it considered that any such information would be exempt from disclosure under section 26(a) of FOISA.
41. The SLCC submitted that it had explained to Mr McKee in its initial response to him of 28 June 2010 that it did hold information which constituted communications with the Law Society about conveyancing. However, it had made clear to him that this information had been obtained by the SLCC for the purposes of considering or investigating individual complaints.
42. Having considered the terms of Mr McKee's requests, and the submissions from the SLCC, the Commissioner is satisfied with the SLCC's explanation that, in relation to request (iii), the Law Society and its insurers were not formally represented in any complaints. In relation to request (iv), the Commissioner is satisfied with the SLCC's explanation of the types of communications that it may have with the Law Society in relation to complaints and the fact that it has had such communications with the Law Society.



43. The Commissioner notes that, in relation to request (iii), the SLCC provided (in its review response of 12 December 2010) an explanation to Mr McKee of its interpretation of the request and explained that the Law Society is not represented in any conveyancing complaints in the sense of putting forward the Law Society's view about complaints as a matter of course.
44. The Commissioner also notes, in relation to request (iv), that the SLCC has explained to Mr McKee that, whilst it had not corresponded with the Law Society (outwith the context of specific complaints) on the subject of conveyancing, it does correspond with the Law Society on certain other matters. The SLCC provided Mr McKee with examples of such matters.
45. It is the Commissioner's view that the SLCC's responses to these requests were initially expressed somewhat clumsily and appeared to consider the content of communications when they could essentially have been answered with a "yes" or "no" response and a short explanation which provided the confirmation requested on each point.
46. However, having considered the SLCC's responses to Mr McKee, the Commissioner is satisfied that it responded to requests (iii) and (iv) in accordance with Part 1 and in particular section 1(1) of FOISA. In particular, the Commissioner is satisfied that the explanations provided within its response and review response to Mr McKee provide adequate clarification of the SLCC's interpretation of the requests and provide the necessary confirmation sought by Mr McKee.

Request (v)

47. This request was for information relating to discussions with the SLCC about the operation of solicitors' indemnity insurance and the actions the SLCC had taken or intended to take. As noted above, the SLCC provided Mr McKee with some information, both in response to his requirement for review and during the course of the investigation. The remaining information has been withheld under the exemptions in sections 26(a), 30(b)(ii), 30(c), 33(1)(b), 36(1), 36(2) and 38(1)(b) of FOISA.

Personal data

48. The SLCC withheld some information which it considered was exempt from disclosure in terms of section 38(1)(b) of FOISA on the basis that it comprised personal data, the disclosure of which would breach any of the data protection principles contained in the DPA.
49. As noted in paragraph 14 above, during the investigation, Mr McKee indicated that he was not interested in receiving any personal information of any kind. By "personal information", the Commissioner has assumed that Mr McKee was referring to "personal data".
50. "Personal data" is defined in section 1(1) of the DPA as 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 (the full definition is set out in the Appendix).



51. The Commissioner is satisfied that all of the information to which the SLCC has applied the exemption in section 38(1)(b) does indeed comprise personal data as defined in the DPA . As such, and given Mr McKee's comments, he has not gone on to consider it further in this decision.

Information withheld under section 26(a) of FOISA

52. As noted above, section 26(a) of FOISA states that information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) is prohibited by or under an enactment.
53. The SLCC applied this exemption to certain information within pages 176 and 177, and all content within pages 178 and 179. It submitted that the information was exempt from disclosure on the basis of the prohibition on disclosure contained in section 43 of the 2007 Act. The SLCC's did not provide any separate submissions in relation to this information in addition to those already summarised at paragraphs 27 to 29 above.
54. The information under consideration comprises the consideration of a matter relating to the indemnity insurance within the context of a complaint made to the SLCC.
55. Having viewed the information to which this exemption was applied, the Commissioner is satisfied that it is information contained in a complaint and was obtained by the SLCC in the course of, and for the purposes of, its consideration of the complaint. As such, the Commissioner is satisfied that the information in question was contained within a complaint of the type specified in section 43(2)(a) of the 2007 Act and was obtained by the SLCC for purposes specified in section 43(2)(b) of the 2007 Act.
56. As noted at paragraph 31 above, the Commissioner is satisfied that section 43 of the 2007 Act creates a prohibition on disclosure for the purposes of section 26(a) of FOISA. Since the Commissioner is satisfied that this prohibition applies to the information under consideration here, the Commissioner is also satisfied that the SLCC was entitled to withhold this information under the exemption in section 26(a) of FOISA. As noted above, this is an absolute exemption, and therefore is not subject to the public interest test.

Information withheld under section 30(b)(ii) of FOISA

57. In order to rely on the exemption laid down in section 30(b)(ii), the SLCC must show that disclosure of the information under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.



58. As the Commissioner has said in previous decisions, the standard to be met in applying the tests contained in section 30(b)(ii) is high. In applying this exemption, the chief consideration is not whether the information constitutes opinion (although this may also be relevant) but whether the release of the information would, or would be likely to, inhibit substantially the free and frank exchange of views. The Commissioner looks for authorities to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.
59. In his briefing on the section 30(b)(ii) exemption², the Commissioner notes that
- ‘Exchange of views’ implies that the views of more than one party were involved in the process during which the information was created. This makes it less likely that the exemption in 30(b)(ii) can apply to information which is simply presented as a report in situations where the author will not be involved in any subsequent discussion, or where the information is a statement of fact.
60. The SLCC applied this exemption to specific content within a number of documents. It stated that the information withheld under this exemption contained views expressed by parties for the purpose of deliberating on various issues such as the effectiveness of the Master Policy (providing indemnity insurance for solicitors) and Guarantee Fund and strategies for moving the SLCC’s research project on these matters along. It submitted that, for the SLCC to be able to carry out one of its functions (i.e. to monitor the effectiveness of the Guarantee Fund), it was essential that all relevant parties were not inhibited from contributing to a free and frank exchange of views for deliberation.
61. The SLCC also submitted that, in assessing the harm that would be caused by disclosure, it had considered the circumstances in which the views were given and the sensitivity of the views. The SLCC submitted that, if the information were to be released, the parties who provided their views would be substantially inhibited in the future from collaborating and cooperating in a free, frank and uninhibited manner with the SLCC in its efforts to exercise its functions.
62. In his submissions, Mr McKee commented that he had difficulty accepting the SLCC’s position regarding the substantial prejudice that would result from disclosure. He suggested that this exemption cannot be applied unless there were reasonable grounds for anticipating that disclosure would cause substantial inhibition.
63. Having considered the range of information to which this exemption has been applied, the Commissioner accepts that disclosure of the majority of that information would, or would be likely to inhibit officials or parties to discussions from expressing or exchanging views for the purposes of deliberation.

² <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2582&SID=117>



64. The Commissioner notes that much of the information comprises correspondence which comments on, asks questions about or seeks clarification on matters of ongoing discussion, or discusses matters of some sensitivity in a manner which includes expressions of opinion. He considers the context of the information would have given rise to some expectation of confidentiality by the individuals involved. He considers that disclosure of this information would be likely to cause the participants (or other individuals) to be much less open and frank in discussions of this type in future. Accordingly, he accepts that disclosure of this information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation and that the exemption in section 30(b)(ii) is therefore engaged.
65. However, the Commissioner is not satisfied that disclosure of the information withheld under this exemption in pages 86-106, 142 (points 6 to 8), 147 (points 6 to 8) and 171 (points 8 to 10) would have the inhibitive effect suggested by the SLCC. The Commissioner is unable to reveal the nature of the information under consideration in his decision, and so this limits his ability to explain his reasons for reaching this conclusion. However, having regard to the nature and content of this information, and the context in which it was exchanged, he is unable to conclude that the disclosure of this information would, or would be likely to inhibit substantially the free and frank exchange of views for the purposes of deliberation. He has therefore concluded that the exemption in section 30(b)(ii) is not engaged in relation to this information.

The public interest test

66. The exemption in section 30(b)(ii) is subject to the public interest test in section 2(1)(b) of FOISA. Where this exemption is found to have been correctly applied, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption in section 30(b)(ii).
67. In its submissions to the Commissioner, the SLCC argued that disclosure of the information would pose a risk to the future of its research into the effectiveness of the Guarantee Fund by preventing individuals from providing similar details in the future. It considered there was a high public interest in the SLCC being able to carry out its functions and it would be contrary to the public interest to disclose the information.
68. In considering the public interest test in relation to the information found to be exempt from disclosure under section 30(b)(ii), the Commissioner accepts that there is a general public interest in making information available to the public and a general need for transparency and accountability, but this must be balanced against any detriment to the public interest as a consequence of disclosure.



69. The Commissioner also recognises that there is a substantial public interest in ensuring that officials and those engaging with them are able to make their views known with candour. The Commissioner considers that disclosure of the information under consideration would be likely to inhibit participants in discussions and meetings to which the information under consideration relates from candidly expressing their opinions and views. He considers that such inhibition would be contrary to the public interest by hampering future policy and decision making within the SLCC and adversely affecting its ability to carry out its strategic and legal functions. For this information, the Commissioner finds that the public interest in favour of disclosure is outweighed by that in favour of maintaining the exemption contained in section 30(b)(ii) of FOISA.
70. Accordingly, the Commissioner concludes that the SLCC was entitled to withhold the information that he has found to be exempt in terms of section 30(b)(ii) of FOISA.

Information withheld under section 36(2) of FOISA

71. The SLCC applied the exemption in section 36(2) to a number of documents and parts of documents which generally comprised discussions on the Master Policy and Guarantee Fund or information obtained from third parties about the Master Policy and Guarantee Fund. The Commissioner will now go on to consider the information to which the exemption in section 36(2) has been applied, and which he has not already found to be exempt from disclosure in terms of section 30(b)(ii) above. This information has been redacted within pages 57 to 59, 79, 83 to 106 and 182 to 184.
72. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person and its disclosure by the authority so obtaining it would constitute a breach of confidence actionable by that person or 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, but 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.
73. 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. The second part of the test is that disclosure of the information by the public authority would constitute a breach of confidence actionable either by the person from whom the public authority obtained the information or by any other person.
74. Having reviewed the information, the Commissioner is satisfied that most of the information under consideration is either information supplied to the SLCC by third parties, or discloses information supplied by third parties. In either case, the Commissioner accepts that information has been obtained from another person.



75. However, the Commissioner is not satisfied that the information to which section 36(2) has been applied within page 79 has been obtained from another person. Whilst this information appears to make references to information supplied by or sought from third parties, it is expressed in terms which pose questions, perhaps arising from that information, without giving any indication of its content. As such, the Commissioner is unable to conclude that the information can itself be said to have been obtained from another person for the purposes of the exemption. Consequently, he must conclude that the exemption in section 36(2) was incorrectly applied to this information.
76. The Commissioner is, however, satisfied that the initial test is met in relation to the remainder of the information to which this exemption has been applied, and which has not already been found to be exempt from disclosure under section 30(b)(ii) of FOISA. The Commissioner will go on to consider the second stage of the test for the application of section 36(2) for that information.
77. 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 from whom the public obtained the information or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
78. There are three main 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:
- the information must have the necessary quality of confidence
 - the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality
 - there must be a disclosure which has not been authorised by the person who communicated the information but which would cause detriment
79. In its submissions, the SLCC has argued that the information received from third parties is not common knowledge and is not in the public domain. It has argued that it is information which a reasonable person would understand as involving an obligation of confidentiality and it has also provided certain parties with assurances in the past that any information provided by them to the SLCC would be treated confidentially, this creating an explicit expectation of confidentiality.

Necessary quality of confidence

80. Having considered the information to that the Commissioner accepts to have been obtained from a third party, he is satisfied that some of it fulfils the criterion of having the necessary quality of confidence. The Commissioner accepts that the specific information under discussion is not generally known, nor could it be obtained by Mr McKee by other means.



81. However, the Commissioner is not satisfied that all of the information under consideration has the necessary quality of confidence. Having undertaken basic searches of relevant websites, the Commissioner has noted that some of the information withheld under section 36(2) is of a general nature and is available in the public domain, for example via a published research report, the Law Society of Scotland's website and its published annual reports. Since the Commissioner has found such information to be publicly accessible, he is unable to accept that information of this nature holds the necessary quality of confidence.
82. Turning to the information in pages 86, 87 and 88, the Commissioner has noted that it is sent to claimants on the Master Policy. Since this information is intended for distribution outwith the organisation which provided it to the SLCC, and there is nothing to suggest that its recipients were expected to treat it as confidential, the Commissioner is unable to accept that this information has the necessary quality of confidence.
83. Since the Commissioner does not accept that general information of this nature holds the necessary quality of confidence, he has concluded that disclosure of this information cannot constitute an actionable breach of confidence. The Commissioner has therefore concluded that the exemption in section 36(2) was wrongly applied to the information contained in pages 57, 58, 59 (first redaction in its entirety and the second paragraph of the second redaction), 86, 87, 88, 182, 183 (the first redaction, first two sentences of second redaction and first and third sentences of the third redaction) and 184 (third redaction) and it will not be considered further in the remaining tests looking at the application of section 36(2).
84. The Commissioner will go on to consider the remaining tests with respect to the information for which he has found that the necessary quality of confidence is held.

Obligation to maintain confidentiality

85. In its submissions, the SLCC, as noted above, argued that the information under consideration is information which a reasonable person would understand as involving an obligation of confidentiality. It argued that some of the information had been provided to it on the basis that it was to be used by researchers and not published. It also stated that it had provided various third parties with assurances in the past that any information provided by them to the SLCC would be treated confidentially, thus creating an explicit expectation of confidentiality.
86. In the circumstances outlined by the SLCC above, the Commissioner accepts that the information was communicated in circumstances that created an obligation of confidence which was still in existence at the time this request was made and at the time the review was carried out.

Unauthorised disclosure would cause detriment

87. The third part of this test requires that disclosure of the information must be unauthorised by, and cause damage to, the person who communicated it.



88. In its submissions to the Commissioner, the SLCC argued that the disclosure of the information would be to the detriment of the person who provided it, for example, because in some instances, it was commercially sensitive.
89. Having considered the relevant information withheld from pages 83 to 85, 96 to 106 and 184 (first redaction), the Commissioner is satisfied that there would be sufficient potential for detriment by disclosure for this requirement to be met. Given the nature and context of the information, he is satisfied that its disclosure would be capable of causing damage to the party that disclosed it.
90. Consequently, having considered the applicable tests, the Commissioner is satisfied in all the circumstances that disclosure of the withheld information contained in pages 83 to 85, 96 to 106 and 184 (first redaction) would constitute a breach of confidence actionable by the party who provided the information.
91. However, the Commissioner is unable to conclude that similar detriment would arise in relation to the remainder of the information under consideration. The Commissioner does not consider that the SLCC has provided any substantive arguments to show how and why any particular detriment would arise, beyond stating that, in some cases, the information was commercially sensitive (although the SLCC did not specify which particular information it considered to be commercially sensitive). For the remaining information, therefore, the Commissioner has concluded that the SLCC has not demonstrated that disclosure would constitute an actionable breach of confidence, and so the exemption in section 36(2) was incorrectly applied to this information.
92. As noted above, while the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2)(c) of FOISA, and is not subject to the public interest test in section 2(1)(b), the law of confidence recognises that in certain circumstances the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of the information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is generally known as the public interest defence.
93. The courts have considered that there may be a public interest defence to actions of breach of confidentiality where to enforce an obligation of confidence would, for example, cover up wrongdoing, allow the public to be misled or unjustifiably inhibit public scrutiny of matters of genuine public concern. In this case, the Commissioner has considered whether disclosure of the information detailed in paragraph 89 above would be necessary to secure effective scrutiny of legislative or other related processes, but sees no reasonable basis for concluding that the SLCC would have a sustainable defence to an action of breach of confidence on public interest grounds should they disclose this specific information.
94. On balance, the Commissioner does not consider there to be a reasonable argument in this case for the release of this confidential information on public interest grounds and consequently is satisfied that the exemption in section 36(2) was correctly applied to the information identified in paragraph 89.



95. As noted in his conclusions in relation to the tests considered above, the Commissioner has that the exemption in section 36(2) was wrongly applied to the other information under consideration in this section.

Information withheld under section 33(1)(b) of FOISA

96. This exemption has been applied to information contained in pages 25 to 30, 47, 48, 57, 58, 160, 163, 182 and 183. The Commissioner has not considered whether the exemption in section 33(1)(b) applies to the information in pages 160 and 163 since this has already been found to be exempt from disclosure under section 30(b)(ii) of FOISA.
97. The SLCC explained that it had applied this exemption to information relating to the tendering exercise that it carried out for its research project into the Master Policy and Guarantee Fund, including the tender from the successful bidder and the names of the unsuccessful tenderers. The SLCC also applied the exemption to information which it considered related to claims against the Master Policy and argued that this involved the insurer's commercial interests. The Commissioner also notes that the exemption has been applied to certain general information regarding the renewal of solicitors' practicing certificates, indemnity insurance cover and the operation of the Master Policy.
98. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
99. In its submissions, the SLCC argued that the release of the information would harm its commercial interests, those of the insurer and those of the University of Manchester (the successful tenderer).
100. The SLCC argued that it has commercial interests in ensuring that when it puts contracts out to competitive tender, it must ensure that the tendering process is genuinely competitive and carried out on the basis of a closed or private process. It submitted that the withheld information contains information which relates to claims against the insurance policy which involves the insurer's commercial interests. It also submitted that the University of Manchester's commercial interests are involved in respect of its tender submission which reveals its pricing structure and methodologies in describing and arranging service provision.
101. The SLCC argued that release of the information would substantially prejudice its ability to secure a genuinely competitive tendering process with a resulting impact on its ability to obtain the best deal. It also argued that disclosing information relating to claims against the insurance policy would reveal details which would damage the insurer's commercial interests. Additionally, the SLCC submitted that the University of Manchester's commercial interests would be harmed by disclosure of its pricing structure and methodologies to the public and its competitors.



102. In his submissions, Mr McKee stated that the SLCC had not substantiated its view that damage to its own commercial interests and those of other parties would result from disclosure.
103. In the Commissioner's view, even if the SLCC's arguments are accepted, it has not demonstrated how disclosure of the information withheld under this exemption would, or would be likely to, cause substantial prejudice to the commercial interests of the SLCC, the insurer or the University of Manchester. The Commissioner finds that the SLCC has failed to demonstrate how or why such harm was likely to follow from disclosure of the information under consideration. Additionally, the Commissioner notes that the University itself appears to have taken the view that there were no issues of commercial confidentiality in its tender. .
104. Additionally, the Commissioner is unclear why the disclosure of the names of the unsuccessful tenderers would cause substantial prejudice to the commercial interests of any of the parties mentioned by the SLCC, or indeed the individual tenderers. The Commissioner notes that the information withheld provides no details of any bids put forward by the unsuccessful tenderers.
105. As the SLCC has not shown how disclosure of the requested information would, or would be likely to, cause real harm to the commercial interests of the parties in question, the Commissioner finds that the exemption in section 33(1)(b) of FOISA is not engaged and was wrongly applied by the SLCC. He is not, therefore, required to go on to consider the public interest test in relation to this exemption.

Information withheld under section 30(c) of FOISA

106. The SLCC has applied this exemption to information within pages 47, 49 to 53, 83 to 85, and 175 – 80. The Commissioner has not considered the application of this exemption to pages 83 to 85 since this information was found to be exempt from disclosure under section 36(2). He has also not considered it in relation to pages 178 – 179 or the parts of 175 and 176 which have been found to be exempt in terms of section 26(a) of FOISA.
107. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of 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 citing 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
108. As with the exemption in section 30(b)(ii), this exemption is subject to the public interest test laid down by section 2(1)(b) of FOISA.
109. The SLCC contended that some of the information withheld under this exemption contained information about the SLCC's tender process for the research project into the Master Policy and Guarantee Fund. It submitted that disclosure of the information would substantially prejudice the conduct of tendering exercises by the SLCC since it must have a private forum to consider tender submissions from bidders and to decide to whom to award the contract.



110. The SLCC also applied this exemption to information contained within internal and external correspondence regarding a specific complaint which was considered by the SLCC. The SLCC argued that, in the course of carrying out its statutory functions, it was essential for the SLCC to be able to generate internal documentation and liaise with complainers, practitioners or professional organisations without fear that sensitive information about the complaint would be put into the public domain.
111. The Commissioner has considered the remaining information withheld under this exemption that he has not found to be exempt from disclosure under any of the other exemptions cited by the SLCC.
112. Having done so, the Commissioner accepts that the exemption is engaged in relation to the information under consideration contained in pages 50 to 53 and 175, 176, 177 and 180. In particular, the Commissioner accepts that the disclosure of the information would have the effect of undermining the effectiveness of the SLCC's policy setting in relation to tender exercises and the confidentiality of its liaison with complainers and other bodies in relation to its investigatory functions.
113. However, the Commissioner is unable to conclude that the exemption is engaged in relation to the information contained in pages 47 and 49. The Commissioner's view is that the SLCC has failed to demonstrate to his satisfaction why the disclosure of this information, which comprises standard documents (or comments thereon) relating to a tender conducted in 2008, would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The Commissioner does not consider that the SLCC has demonstrated what harm would, or would be likely to follow disclosure, how that harm would manifest itself or when it would occur, other than to identify the need to conduct certain of its activities without fear of disclosure. Having considered that information, it is not evident to the Commissioner from its content why its disclosure should cause substantial prejudice to the effective conduct of public affairs.
114. The Commissioner does not accept, therefore, that the SLCC was correct to withhold the information contained in pages 47 and 49 under the exemption in section 30(c) of FOISA. As the Commissioner is not satisfied that this information was correctly withheld under section 30(c) of FOISA, he is not required to go on to consider the application of the public interest test in section 2(1)(b) in relation to it.

The public interest test

115. The Commissioner will now go on to consider the public interest test in section 2(1)(b) of FOISA to the information identified at paragraph 112 above.
116. In its submissions, the SLCC argued that disclosure of the information would damage the tendering process and the SLCC's ability to ensure that it obtains best value for money. The SLCC also argued that there is a strong public interest in it being able to carry out its statutory functions and in maintaining its ability to engage fully with individuals without inhibition.



117. In his submissions, Mr McKee argued that the public interest is best served by releasing information which permits a better understanding of where conveyancing is failing.
118. The Commissioner accepts that there is a public interest in permitting public authorities to obtain best value for money and carry out their statutory functions effectively. He also accepts the more general public interest in accountability and transparency. In this case, having balanced the public interest for and against disclosure, the Commissioner has concluded that the public interest is better served by withholding the information he has identified as being exempt under section 30(c) as he is not satisfied that its disclosure would add so materially to public understanding of the issues as to outweigh any resulting prejudice to the public interest.
119. Consequently, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information in this instance, and therefore is satisfied that the SLCC was correct to withhold the information identified at paragraph 112 above under section 30(c) of FOISA.

Conclusion on request (v)

120. In the light of the findings above, the Commissioner has concluded that the SLCC was entitled to withhold much of the information withheld from Mr McKee in response to request (v). However, he has found that the SLCC was not entitled to withhold the following information under any of the exceptions cited, and so he requires the disclosure of this information to Mr McKee: 25 to 30, 47 to 49, 57, 58, 59, 79, 86 to 95, 142 (points 6 to 8), 147 (points 6 to 8), 171 (points 8 to 10), 182, 183 (except for the second sentence of the third redaction) and 184 (second and third redactions).
121. Since Mr McKee has indicated that he does not wish to receive personal data, the SLCC may continue to withhold any information to which the exemption in section 38(1)(b) of FOISA was applied within the items specified in paragraph 120.

DECISION

The Commissioner finds that the Scottish Legal Complaints Commission (the SLCC) partially failed to comply with Part 1 of FOISA in dealing with Mr McKee's requests for information.

The Commissioner finds that by providing information that fell within the scope of request (i) to Mr McKee, the SLCC complied with section 1(1) of FOISA.

The Commissioner finds that the SLCC provided some of the information falling within the scope of request (ii), in compliance with section 1(1), and it was entitled to withhold the remaining information on the basis that it was exempt from disclosure in terms of section 26(a) of FOISA.

The Commissioner finds that, in relation to requests (iii) and (iv), the SLCC complied with section 1(1) of FOISA.

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In relation to request (v), the Commissioner finds that the SLCC was correct to withhold certain information on the basis that it was exempt from disclosure in terms of sections 26(a), 30(b)(ii), 30(c) and 36(2) of FOISA.

However, the Commissioner also finds that the SLCC failed to comply with Part 1 (and in particular section 1(1)) of FOISA by wrongly applying the exemptions in sections 30(b)(ii), 30(c), 33(1)(b) and 36(2) to certain withheld information falling within the scope of request (v).

The Commissioner requires the SLCC to provide Mr McKee with the information noted at paragraph 120 above (with the continued redaction of information withheld in terms of section 38(1)(b) of FOISA) by 9 January 2012.

Appeal

Should either Mr McKee or the SLCC wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
24 November 2011



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (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;
- (c) section 36(2);

...

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;



...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

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

...

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

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

33 Commercial interests and the economy

(1) Information is exempt information if-

...

(b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

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.



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;

...

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.

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- (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.