

Decision Notice



Decision 247/2013 Glasgow Bar Association and the Scottish Legal Aid Board

Rates for external legal advice

Reference No: 201301658

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Summary

On 19 April 2013, Glasgow Bar Association (GBA) asked the Scottish legal Aid Board (SLAB) for information which included the rates used to calculate payments for external legal advice. SLAB provided some information but redacted the payment rates as commercially sensitive and exempt in terms of section 33(1)(b) of FOISA. Following an investigation, during which further information was provided to GBA, the Commissioner found that SLAB was entitled to withhold the remaining information under this exemption.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy)

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

Background

1. On 19 April 2013, GBA wrote to SLAB asking for a monthly breakdown of how much it had spent on external legal representation over a specific period. GBA also asked for the rates (whether calculated on an hourly or other basis) SLAB was paying or incurring in respect of such legal advice, for each month of the period specified.
2. SLAB responded on 13 May 2013. It provided GBA with a breakdown of the amount spent over the specified period but withheld information on the rates paid. It explained that the information was exempt in terms of section 33(1)(b) of FOISA, as disclosure would be commercially prejudicial to those providing such services.
3. On 21 May 2013, GBA wrote to SLAB requesting a review of its decision to withhold the information. GBA followed this up with a letter stating that it believed the exemption had been wrongly applied and that there was an overriding public interest in disclosure.
4. SLAB notified GBA of the outcome of its review on 1 July 2013. SLAB upheld its original decision that the information was exempt in terms of section 33(1)(b) of FOISA, with further explanation of why it considered the public interest favoured maintaining the exemption.



5. On 17 July 2013, GBA wrote to the Commissioner, stating that it was dissatisfied with the outcome of SLAB's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that GBA made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 22 July 2013, SLAB was notified in writing that an application had been received from GBA and was asked to provide the Commissioner with any information withheld in this case. SLAB responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted SLAB, 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, SLAB was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with particular reference to the requirements of section 33(1)(b) of FOISA.
9. In response, SLAB stated that it had reconsidered its position and provided GBA with some of the information previously withheld. It continued to withhold the remaining information (the hourly rate(s) paid to external solicitors) under section 33(1)(b) of FOISA.
10. GBA confirmed receipt of the information disclosed during the investigation but required a decision as to whether the remaining information was properly withheld.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both GBA and SLAB. She is satisfied that no matter of relevance has been overlooked.

Section 33(1)(b) – commercial interests and the economy

12. SLAB submitted that the remaining withheld information was exempt in terms of section 33(1)(b) of FOISA. This 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.



13. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to indicate:
 - (i) whose commercial interests would (or would be likely to) be harmed by disclosure,
 - (ii) the nature of those commercial interests and
 - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
14. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear. Generally the final decision on disclosure (at request and review) will be one for the authority to take. However, it is good practice to consult the third-party on the elements referred to above and may assist decision-making.
15. In the circumstances of this case, the Commissioner accepts that both SLAB (in procuring the service in question in a commercial market) and those providing the service would have relevant commercial interests in the information requested. Having reached this conclusion, the Commissioner must go on to consider whether those commercial interests would, or would likely to, be prejudiced substantially by the disclosure of the information withheld.
16. In its initial response to GBA, SLAB argued that the exemption applied as the rate charged was commercially sensitive to the service provider. Disclosure would be prejudicial to that provider in that it would harm its ability to compete against other firms or persons. In the review outcome, SLAB added that it considered the disclosure would impact on the willingness of the supplier to provide services at the most advantageous prices for the taxpayer, or indeed at all.
17. In its submissions to the Commissioner, SLAB also identified substantial prejudice to its own commercial interests. This was because it believed it would be less likely to secure or maintain advantageous rates for services if the rate paid to solicitors (which it described as a very competitive one) was disclosed.
18. SLAB explained that the identity of those providing it with legal services was in the public domain, and accordingly the provider would be less likely to give an advantageous rate to SLAB when that rate could be identified by other actual and potential clients.
19. SLAB believed its submissions were reinforced by comments received from the legal service provider. These highlighted the competitive nature of the market for legal services and the risk of disclosure conferring an unfair advantage on its competitors.
20. The provider had also drawn attention to the similarity of the present circumstances to those in *Decision 016/2008 Mr Tom Gordon and the Scottish Parliamentary Corporate Body*, which concluded that the disclosure of a contractor's daily rates would substantially prejudice the ability of the contractor to compete in future tendering exercising and the general public interest could be satisfied by disclosure of the total fee paid (see further below on the public interest).



21. GBA submitted that the argument of commercial confidentiality was fallacious, because the services were being provided by virtue of a tender process, resulting in a contract for a number of years. It presumed the rates paid were not of current competitive relevance in a market in which any future tender for similar services would afford all parties (including the present supplier) to offer and accept price rates depending on the circumstances of the market at that time.
22. The Commissioner has considered the information remaining withheld, along with the submissions received. In this case, she accepts that disclosure of the requested information would be likely to have a substantially prejudicial effect on the provider's business and on SLAB's ability to obtain best value from future tenders. The Commissioner considered carefully GBA's comments in relation to the current commercial relevance of the withheld information. She is satisfied in the circumstances of this case that, at the time SLAB dealt with GBA's information request and requirement for review, the information was still of sufficient commercial relevance to engage the exemption.
23. The Commissioner is therefore satisfied that the information requested is exempt under section 33(1)(b): its disclosure would, or would be likely to, prejudice substantially the commercial interests of both SLAB and the provider of the legal advice.

Public interest test

24. The exemption under section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA. Having established the exemption applies, the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption. In this case, the key consideration was whether the public interest in demonstrating best value was outweighed by that of commercial sensitivity and competitiveness.
25. In its correspondence with GBA and the Commissioner, SLAB agreed that there was a general public interest in knowing that it achieved best value in the use of public funds.
26. However, SLAB went on to submit that it was also in the public interest for its suppliers to be able to continue to operate in a commercially successful manner and that there was a public interest in Scotland having a vibrant and competitive legal market. For SLAB itself, there was a public interest in being able to secure appropriate legal services, at a price that was fair and reasonable, thus securing best value from its expenditure.
27. SLAB concluded that, while it was clearly in the public interest for it to achieve best value, it did not believe disclosure of the withheld information was necessary in order to give such assurance. Disclosure would have a series of negative consequences, as narrated above, which would be harmful to the public interest. On balance, it believed that the public interest lay in the information being withheld.
28. In its request for review, GBA submitted that there was an overriding public interest in the public knowing that SLAB was securing best value in respect of its spending of public funds.



29. GBA went on to submit to the Commissioner that the question of the cost of justice and, in particular, of the legal aid system throughout the United Kingdom (particularly in Scotland) was of great public interest, due to comments from Ministers and others that costs needed to be brought down. Therefore, there was a real and substantial public interest in knowing and thus ensuring that SLAB was obtaining best value for money. Consequently, it believed disclosure of the rates paid to be reasonable and proportionate.
30. GBA submitted that the hourly rate paid by SLAB to solicitors providing legal aid was public information and had been fixed for a significant period. This related to work for the least well-off in society, facing serious and potentially life-affecting charges. It believed there was a public interest in knowing whether SLAB was paying a different rate to those providing legal advice to SLAB in relation to its own affairs (which did not, it submitted, have the same potential consequences for the individual).
31. GBA also noted that SLAB had provided details of rates paid to advocates and saw no reason not to provide the same information for the solicitors SLAB had instructed.
32. GBA further commented that there was an inequality in the information disclosed by SLAB. It explained that SLAB published statistics showing the gross amounts paid to solicitors providing services under the legal aid scheme, so presumably SLAB did not consider the same issues of confidentiality to apply to these figures.
33. The Commissioner accepts the general public interest in transparency and accountability, particularly where this involves expenditure from the public purse. She acknowledges that the withheld information might cast some light on these matters. The Commissioner has also taken into account that those entering into contracts with Scottish public authorities should be aware that at times information relating to these contracts will require to be released as a result of a request under FOISA. She is not satisfied that the other points made by GBA are as directly relevant to the information remaining withheld in this case.
34. As regards the submissions made by SLAB, the Commissioner has already acknowledged the risk of substantial commercial prejudice in this case. She accepts that in this respect, disclosure would not be in the public interest. It is in the public interest for SLAB to be able to procure services competitively, to best value for the public purse and for suppliers to remain commercially viable.
35. The Commissioner also acknowledges the public interest in accountability and transparency has already been largely met by the information disclosed by SLAB.
36. On balance, the Commissioner finds that the public interest in disclosing the remaining information is outweighed by that in maintaining the exemption in section 33(1)(b) of FOISA.
37. Consequently, the Commissioner is satisfied that SLAB correctly withheld the remaining information in terms of section 33(1)(b) of FOISA.



DECISION

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

Appeal

Should either Glasgow Bar Association or the Scottish Legal Aid Board wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Rosemary Agnew
Scottish Information Commissioner
6 November 2013



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

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).

...