

Decision Notice



Decision 089/2010 Mr Peter Cherbi and the Scottish Legal Complaints Commission

Master Policy and Guarantee Fund Research

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www.itspublicknowledge.info

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Summary

Mr Peter Cherbi (Mr Cherbi) requested from the Scottish Legal Complaints Commission (the SLCC) information relating to research it had commissioned on The Law Society of Scotland's Master Policy and Guarantee Fund.

In response, the SLCC disclosed a large amount of information to Mr Cherbi, but withheld the remainder of the information under various exemptions in FOISA. Following a review, Mr Cherbi remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which Mr Cherbi narrowed the scope of his application, and during which the SLCC released a small amount of additional information to Mr Cherbi, the Commissioner found that the SLCC had been entitled to withhold some of the remaining information. However, he also found that it had incorrectly applied the exemptions in sections 30(b)(ii) and (c), 33(1)(b), 36(2), 38(1)(b) and 39(1) of FOISA to some of the remaining information. He required the SLCC to disclose this information to Mr Cherbi.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(a), (c) and (e)(ii) (Effect of exemptions); 30(b)(ii) and (c) (Prejudice to the effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy); 36(2) (Confidentiality); 38(1)(b), (2) and (5) (definitions of "the 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(1))

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



Background

1. The SLCC commissioned research to be carried out with the aim of providing an understanding of the purpose and functioning of The Law Society of Scotland's Master Policy and Guarantee Fund. (The Law Society is required by legislation to maintain professional indemnity insurance arrangements for all practising solicitors in Scotland. It has chosen to do so by means of a Master Policy negotiated with Marsh Limited, an insurance broker. The legislation also requires the Law Society to have a Guarantee Fund from which it makes grants to persons who suffer pecuniary losses due to the dishonesty of solicitors.) The research was carried out by Professor Frank H Stephen and Dr Angela Melville of the Institute of Law, Economy and Global Governance in the School of Law at the University of Manchester. The research was published on 30 June 2009¹.
2. On 20 July 2009, Mr Cherbi wrote to the SLCC requesting all documentation and discussions relating to the SLCC's research on the Master Policy and Guarantee Fund, after the contract had been awarded to Professor Frank H Stephen and Dr Angela Melville and its publication by the SLCC.
3. The SLCC responded on 18 August 2009, releasing a large amount of information to Mr Cherbi, but withheld some information under the exemptions at sections 25, 30(b)(ii) and (c), 33(1)(b), 36(2) and 38(1)(b) of FOISA.
4. Later that day, Mr Cherbi wrote to the SLCC requesting a review of its decision to withhold information from him.
5. The SLCC notified Mr Cherbi of the outcome of its review on 25 August 2009, which was to uphold the original decision in full.
6. On 29 September 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.
7. 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.

¹ The published research can be read here:

<http://www.scottishlegalcomplaints.com/media/7495/final%20report%20to%20slcc.pdf>



Investigation

8. On 28 October 2009, the SLCC was notified in writing that an application had been received from Mr Cherbi 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.
9. The investigating officer contacted the SLCC on 25 November 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.
10. On 16 December 2009, the SLCC responded to the investigating officer's letter, but the response did not fully answer all of the questions set out in that letter. As a result, the investigating officer wrote again to the SLCC on 20 January 2010, asking for fuller responses to various questions.
11. The SLCC responded to the investigating officer's second letter on 18 February 2010 and, subsequently, further correspondence was exchanged between the investigating officer and the SLCC in order to further clarify the responses provided by the SLCC.
12. During this subsequent correspondence, the SLCC provided the Commissioner with copies of six notices, which had been served on it under section 10(1) of the DPA (Right to prevent processing likely to cause damage or distress) by various employees of the SLCC, asking the SLCC not to disclose certain personal data in response to information requests made under FOISA. In effect, this meant that the SLCC was claiming an additional exemption under Part 2 of FOISA, i.e. section 38(1)(b) as read with section 38(2)(a)(ii). These notices are addressed below.
13. During this subsequent correspondence, the SLCC also released a small amount of further information to Mr Cherbi.
14. Mr Cherbi was also asked for his views and submissions and he subsequently provided these to the investigating officer, indicating that he wished to narrow the number of redactions that he would like the Commissioner to consider.

Commissioner's analysis and findings

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



Scope of the investigation

16. After initially indicating that he wished the Commissioner to address all of the information which had been withheld from him, Mr Cherbi subsequently indicated that he only wished the Commissioner to consider the redactions to pages 13 and 14, 35, 49, 59, 60 – 62, 70, 73 and 83. The information within these pages was redacted on the basis of the exemptions contained in sections 30(b)(ii) and (c), 33(1)(b), 36(2), 38(1)(b) and 39(1) of FOISA.

Sections 30(b)(ii) and 30(c) of FOISA

17. The SLCC has applied these exemptions as follows:
- page 13: one phrase redacted twice under sections 30(b)(ii) and (c)
 - page 14: one sentence redacted under sections 30(b)(ii) and (c)
 - page 70: one sentence redacted under section 30(b)(ii)
 - page 73: one paragraph redacted under section 30(b)(ii)
18. In order for the SLCC to be able to rely on the exemption contained in section 30(b)(ii) of FOISA, it has to show that the 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.
19. As the Commissioner has noted in previous decisions, e.g. *Decision 089/2007 Mr James Cannell and Historic Scotland* and *Decision 105/2008 Mr Rob Edwards and the Scottish Ministers*, the standard to be met in applying these tests is high. The chief consideration is not whether the information constitutes advice or opinion, but whether disclosure of the information would, or would be likely to, have the effect of inhibiting substantially the free and frank provision of exchange of views for the purpose of deliberation. The Commissioner expects public authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly foreseeable) future, not simply that inhibition is a remote possibility. The inhibition must be substantial and therefore of real and demonstrable significance.
20. The exemption in section 30(c) applies where the disclosure of information would "otherwise" prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The use of the word "otherwise" signifies that this exemption is to be used in situations other than those envisaged by the exemptions in section 30(a) and (b).
21. However, section 30(c) remains a broad exemption, and the Commissioner expects any public authority citing it to show what specific harm would be caused to the conduct of public affairs by release of the information.
22. The exemptions in sections 30(b)(ii) and 30(c) of FOISA are both subject to the public interest test set out in section 2(1)(b) of FOISA.



23. The Commissioner will go on to consider these exemptions in relation to each of the pages below.

Pages 13 and 14

24. One phrase, repeated twice, has been redacted from page 13 and a three line sentence has been redacted from page 14.
25. In citing section 30(b)(ii) of FOISA, the SLCC noted its concern that, if disclosed, the terminology used in this email exchange could be misinterpreted, and argued that effective working relationships with key stakeholders outwith the SLCC requires a certain amount of private space for discussions to take place. The SLCC went on to argue that not being able to discuss cases freely and openly in email for fear of being misinterpreted would affect the way it records information in the future, requiring change to its whole way of working and adding expense and delay which would substantially prejudice the free and frank exchange of views.
26. In citing section 30(c) of FOISA, the SLCC argued that seeing the information out of context of an ongoing discussion might also sour working relationships with other bodies. The SLCC submitted that its recording of discussions formed a mode of communication between the SLCC and its stakeholders and that to compromise this would, by inhibiting external communication, prejudice substantially the effective operation of its Board.
27. The Commissioner has considered these arguments, but is not of the view that disclosure of the particular phrase on page 13, or of the three line sentence on page 14, would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation, in line with section 30(b)(ii) of FOISA, nor inhibit external communication, in line with section 30(c) of FOISA.
28. While the Commissioner accepts that disclosure may lead the SLCC to use different terminology in the future, or to record such types of information in a different way, the Commissioner does not consider that disclosure would, or would be likely to have, the substantially prejudicial effect required by section 30(b)(ii). Similarly, given the other information which has been disclosed about certain difficulties being faced with the research, the Commissioner does not consider that disclosure would, or would be likely to, prejudice relationships with other bodies in the way that is required for the exemption in section 30(c) to apply.
29. Having found that the exemptions at section 30(b)(ii) and(c) do not apply the Commissioner does not have to go on to consider the public interest test.

Page 70

30. One sentence has been redacted from this page, i.e. from an internal SLCC email. The redacted information relates to a discussion of certain sensitivity about a strategy for moving a project along.



31. The Commissioner accepts that the information in question falls within the scope of the exemption in section 30(b)(ii). Disclosure would, or would be likely to, prejudice substantially corporate intelligence or data in the future.
32. Having concluded that the exemption in section 30(b)(ii) applies to the information, the Commissioner must go on to consider the public interest test.

Public interest test – page 70

33. The information which has been redacted deals with the matters relating to the SLCC's tender for the research project, and the Commissioner accepts that there will always be a degree of public interest in knowing how public money is spent.
34. However, given the sensitivity of the information and the effect which disclosure would, or would be likely to have on the future work of the SLCC (to the detriment of the public interest), the Commissioner finds that the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemption.

Page 73

35. One five line paragraph has been redacted from this page from email sent by a third party to the SLCC. It relates to an exchange of views on a sensitive issue at a sensitive stage of the research project.
36. The Commissioner is satisfied that the information in question is exempt under section 30(b)(ii) of FOISA, given that the project was at a sensitive stage.
37. Having concluded that the exemption in section 30(b)(ii) applies to the information, the Commissioner must go on to consider the public interest test.

Public interest test – page 73

38. The SLCC submitted that the need for the SLCC to be able to have free and frank discussion, where ideas are bounced around, should not be underestimated.
39. The Commissioner has paid regard to the fact that the redacted information constitutes advice given in a professional capacity from a third party to the SLCC. He is aware that the SLCC depends on retaining such a working/professional relationship and as such must maintain a certain duty of confidence to its advisory partners. He must consider the public interest in the SLCC being allowed to continue to do so.
40. Again, the Commissioner must also consider the public interest in transparency and public scrutiny; however, he concludes that the sensitivity of the redacted information is such that the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemption.
41. The Commissioner therefore finds that the SLCC was entitled to uphold the exemption in section 30(b)(ii) of FOISA in relation to the redacted paragraph in page 73.



Section 33(1)(b) of FOISA

42. Under section 33(1)(b) of FOISA, information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). A public authority applying this exemption must be able to indicate the nature of the commercial interests involved and explain how these interests would, or would be likely to, be substantially prejudiced by disclosure of the information. Section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA.
43. There is no definition of "substantial prejudice" in FOISA. However, the Commissioner's view is that amongst the factors required to claim this exemption, the damage caused (or likely to be caused) by disclosing the information must be both real and significant, as opposed to hypothetical or marginal. Damage would also have to occur in the near future, and not at some distant time.
44. The SLCC applied the exemption in section 33(1)(b) to the information redacted from page 35, i.e. their available budget for the research. The SLCC submitted that the disclosure of the information would, or would be likely to, prejudice substantially Manchester University's commercial interests by making public the way in which they do business and undermining its future ability to remain competitive and win tenders.
45. However the Commissioner notes that the budgetary information redacted from page 35 had already been made publicly available by the SLCC when it sought expressions of interest from contractors who wished to be invited to tender for the research contract. This was already in the public domain when Mr Cherbi made his information request – see <http://www.scottishlegalcomplaints.com/news/master-policy-and-guarantee-fund-research.aspx>.
46. The SLCC has not provided the Commissioner with any evidence of harm arising from the publication of this figure, and, given that the information is in the public domain, the Commissioner has come to the conclusion that the disclosure of the information under FOISA would not, and would not be likely to, prejudice substantially the University's commercial interests.
47. As the Commissioner has found that the exemption in section 33(1)(b) is not engaged, he is not required to go on to consider the public interest contained in section 2(1)(b) of FOISA.



Section 36(2) of FOISA

48. Section 36(2) of FOISA exempts information from disclosure if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or 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, 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.
49. 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 individual, another Scottish public authority or any other legal entity, such as a company or partnership.
50. The SLCC applied the exemption in section 36(2) to the information redacted from page 49, i.e. to (limited) information about with whom interviews had been carried out (or interviews that were arranged). Given that the information was obtained by the SLCC from Manchester University, the Commissioner accepts that the information was obtained by the SLCC from another person. The first part of the test is therefore met.
51. The second part of the test requires that the disclosure of the information by the public authority would constitute a breach of confidence actionable either by the person who provided the information to the public authority 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.
52. There are three main requirements which must be met before a claim for breach of confidentiality can be established. 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 the authority to maintain confidentiality; and
 - there must be a disclosure which has not been authorised by the person who communicated the information but which would cause damage to that person
53. The SLCC submitted that the information redacted from page 49 was not common knowledge and that the information was inaccessible to all but the researchers, the SLCC and those who took part in the research.
54. However, the Commissioner has taken account of the fact that the information redacted from page 49 had already been made public when the research was published on 13 July 2009 (see paragraph 1.2.3 of the research:
<http://www.scottishlegalcomplaints.com/media/7495/final%20report%20to%20slcc.pdf>).



55. Given that the information was already in the public domain when Mr Cherbi made his request, the Commissioner considers that the first requirement for establishing a breach of confidentiality, i.e. that the information in question must have the necessary quality of confidence, is not met and that the information is not exempt under section 36(2) of FOISA.

Section 38(1)(b) of FOISA

56. The information withheld by the SLCC under this exemption comprises:
- the signature of one individual, contained in page 62
 - information on views being sought from certain parties, contained in page 83
 - information relating to one individual, contained in pages 59, 60 and 61
57. The SLCC cited section 38(1)(b) in conjunction with section 38(2)(a)(i) in relation to the information which they consider contains the personal data of third parties, on the grounds that disclosure of the information would contravene the first data protection principle.
58. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), exempts information from disclosure if it is personal data and if its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles laid down in Schedule 1 to the DPA. Section 38(1)(b), as read with section 38(2)(a)(i) or (b) is not subject to the public interest test set down by section 2(1)(b) of FOISA.
59. The SLCC had also cited section 38(1)(b), read in conjunction with section 38(2)(a)(ii), in relation to information redacted from various pages pertaining to certain SLCC personnel
60. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(ii), exempts personal information if it is personal data and its disclosure to a member of the public otherwise than under FOISA would contravene section 10 of the DPA (the right to prevent processing likely to cause harm or distress).
61. However, during the investigation, Mr Cherbi indicated to the Commissioner that he no longer wished to pursue the information to which 38(1)(b) in conjunction with 38(2)(a)(ii) had been applied. The Commissioner is therefore not required to consider personal data withheld under this particular exemption in this decision.

Section 38(1)(b) in conjunction with section 38(2)(a)(i)

Is the information personal data?

62. "Personal data" is defined in section 1(1) of the DPA, which is reproduced in the Appendix to this decision.



63. In relation to the signature redacted from page 62, the Commissioner accepts that the signature in question relates to a living individual who is identifiable from the signature or from the signature and other information in the possession of the data controller, i.e. the SLCC. In this instance the signatory has been named directly below the actual signature (and the name disclosed to Mr Cherbi).
64. The Commissioner also accepts that names of the individuals withheld by the SLCC under section 38(1)(b) is personal data. The names, read in context, go beyond the individuals' casual connection with the matter being discussed. The Commissioner accepts that the information redacted focusses on and is significantly biographical of those individuals. Consequently, he accepts that the information relates to them.
65. However, the Commissioner does not agree that name of a body which has been redacted from page 83 is personal data in line with the definition in section 1(1) of the DPA, given that the body is not a living individual and it is not able to identify, for example, the members of that body. As a result, the Commissioner finds that the name of the body is not exempt from disclosure under section 38(1)(b) of FOISA.
66. The Commissioner will now go on to consider whether the exemption in section 38(1)(b) applies to the information which he considers to be personal data.

Would disclosure of the information breach the first data protection principle?

67. The first data protection principle requires that the processing of personal data (in this case the disclosure of the personal data into the public domain in response to Mr Cherbi's information request made by Mr Cherbi) must be fair and lawful and, in particular, that personal data 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 (again, to the DPA) is also met.
68. The Commissioner has considered the definition of sensitive personal data in section 2 of the DPA and is satisfied in this case that none of the personal data which has been withheld constitutes sensitive personal data.
69. There are 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 interlinked. For example, 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.

Can any of the conditions in Schedule 2 of the DPA be met?

70. The Commissioner will first go on to 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.



71. Condition 6(1) allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued 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.
72. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- Does Mr Cherbi have a legitimate interest in obtaining this 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 individuals concerned?
 - Even if the processing is necessary for the legitimate purposes of Mr Cherbi, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the individuals concerned? This will involve a balancing exercise between the legitimate interests of Mr Cherbi and those of the individuals concerned. Only if (or to the extent that) the legitimate interests of Mr Cherbi outweigh those of the individuals concerned can the personal data be disclosed.
73. The Commissioner will now go on to consider these three tests in relation to the redacted information.

Does the applicant have a legitimate interest?

74. Mr Cherbi was asked for his views on what legitimate interest he had in the disclosure of this personal data. He argued that he had a legitimate interest as a journalist in seeing the information disclosed to the public. He also argued, more generally, that the public are entitled to know the names of the officials concerned, given their involvement with Master Policy and Guarantee Fund.
75. The Commissioner acknowledges that in this role Mr Cherbi does have a legitimate interest in seeking disclosure of the information in question for public dissemination. The Master Policy and Guarantee Fund, and the SLCC's research into the Policy and Fund, are clearly of interest to Mr Cherbi and, more generally, to the public.

Is disclosure of the information necessary to achieve those legitimate interests?

76. The Commissioner must now consider whether disclosure is necessary to achieve those legitimate interests and in doing so he must consider whether these interests might reasonably be met by any alternative means.
77. The information in question, the Commissioner notes, is specific and succinct and he can envisage no alternative means of satisfying the legitimate interest identified by Mr Cherbi other than by disclosure.



Would disclosure cause unwarranted prejudice to the legitimate interests of the data subjects?

78. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the individuals concerned. As noted above, this will involve a balancing exercise between the legitimate interests of Mr Cherbi and those of the individuals mentioned in the redacted information. Only if the legitimate interests of Mr Cherbi outweigh those of the individuals concerned can the information be disclosed without breaching the first data protection principle.
79. The Commissioner has issued guidance on the interpretation of the exemptions in section 38², and notes a number of factors which 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)
 - 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
80. The Commissioner will separately consider, in relation to the redacted signature and in relation to the other redacted information, whether disclosure would cause unwarranted prejudice to the legitimate interests of the data subjects.

Signature contained in page 62

81. The signature which has been redacted consists of the signature of an employee of Marsh Ltd. Mr Cherbi is aware of this as the letter, with the signature redacted, was disclosed to him in response to his information request.
82. The Commissioner has commented in previous decisions that for the most part it would not be unfair to disclose the signature of a person with a high public profile, whose signature was already in the public domain.
83. However, the Commissioner considers that the individual in question's public profile is not so high that he would expect his signature to be in the public domain.
84. The Commissioner has also taken into account that there could be a risk of fraud should an individual's signature be publicly disclosed.
85. Having balanced the legitimate interests of Mr Cherbi with those of the employee, the Commissioner is satisfied that any prejudice to the rights, freedoms and legitimate interests of the employee is not outweighed in this instance by Mr Cherbi's legitimate interests.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



86. Accordingly, the Commissioner is satisfied that condition 6 of Schedule 2 of the DPA is not met in relation to the signature. He is satisfied that there are no other conditions in Schedule 2 which could be met in this case and must therefore find that the disclosure of the signature would breach the first data protection principle and that the signature is therefore exempt from disclosure under section 38(1)(b) of FOISA.

Views sought from a third party in page 83

87. The SLCC redacted certain information from page 83 relating to the views of an individual on the subject matter of the research. The Commissioner notes, however, that the individual's name in a very similar context was left unredacted elsewhere.
88. No specific arguments have been put forward by the SLCC as to how disclosure of the information would cause unwarranted prejudice to the legitimate interests of the third party in question. Given that the information is already in the public domain, and given that the Commissioner considers that the individual in question would have no expectations that the information would not be disclosed, the Commissioner can only conclude that disclosure would not cause unwarranted prejudice to the legitimate interests of the individuals concerned. As such, he has concluded that disclosure would be in line with condition 6(1) of Schedule 2 of the DPA.
89. No submissions have been made by the SLCC as to why disclosure would be unlawful, other than by contravening the first data protection principle, and the Commissioner can find no reason to suggest that the disclosure would be unlawful. He will therefore go on to consider the issue of the fairness of such disclosure.
90. The Commissioner is satisfied generally that the processing of the information in question (i.e. by disclosure) should not be considered to be unfair, for similar reasons to those outlined in paragraphs 87-88 above.
91. Having found disclosure to be both fair and lawful, and in line with condition 6(1), the Commissioner does not accept that disclosure of the personal data would breach the first data protection principle, and so does not accept that this information is exempt under section 38(1)(b).
92. The SLCC has also applied the exemption contained in section 39(1) of FOISA to the name of the individual on page 83, and the Commissioner will consider this exemption below.

Other information relating an individual in pages 59, 60 and 61

93. The SLCC redacted the name of an employee of a third party where it appears on pages 59, 60 and 61.
94. The SLCC argued that there was no clear reason why Mr Cherbi would require this personal data as his interest was in the Master Policy of the Law Society and the Guarantee Fund. The SLCC submitted that the disclosure of such personal data would add nothing to Mr Cherbi's understanding of this matter.



95. The Commissioner notes, however, that the SLCC disclosed this name to Mr Cherbi in another document and considers that, given the other information which has been disclosed to Mr Cherbi, and the context in which the information was disclosed, it is clear who this individual is. The SLCC has not provided the Commissioner with any evidence of any harm or distress suffered by the individual concerned since this disclosure took place and, given the disclosure, the Commissioner considers that the individual would not have any expectations that the name would not be disclosed.
96. Having balanced the legitimate interests of Mr Cherbi with those of the individual in question, the Commissioner is satisfied that any prejudice to the rights, freedoms and legitimate interests of the employee in question is outweighed in this instance by Mr Cherbi's legitimate interests. As such, he has concluded that disclosure would be in line with condition 6(1) within schedule 2 of the DPA.
97. In the absence of any submissions by the SLCC which suggest that disclosure of the information requested by Mr Cherbi would be unlawful, other than by contravening the first data protection principle, and having considered the question carefully, the Commissioner can find no reason to find that the disclosure would be unlawful. He will therefore go on to consider the issue of the fairness of such disclosure.
98. The Commissioner is satisfied generally that the processing of the information in question (i.e. by disclosure) should not be considered to be unfair, for similar reasons to those outlined in paragraph 95 above.
99. Having found disclosure to be both fair and lawful, and in line with condition 6(1), the Commissioner does not accept that disclosure of the information under consideration would breach the first data protection principle, and so does not accept that this information is exempt under section 38(1)(b).
100. As the SLCC has also applied the exemption at section 39(1) of FOISA to these redactions, the Commissioner must now go on to consider this exemption.

Section 39(1) of FOISA

101. 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 is a qualified exemption and is subject to the public interest test required by section 2(1)(b) of FOISA.
102. The SLCC applied section 39(1) of FOISA to some of the redacted information after the Commissioner had begun to investigate Mr Cherbi's application. The SLCC submitted that it wished to apply section 39(1) to any redactions of personal information of individuals, other than a Commission member, senior Commission staff member, or Commission staff member with a public facing role.



103. This exemption, the Commissioner notes, was applied by the SLCC to several redactions in the first instance but Mr Cherbi subsequently stated that he no longer wished to pursue that information which made up the names and email addresses of SLCC personnel.
104. The Commissioner notes that the only remaining cases where the personal data of someone other than a Commission member, senior Commission staff member, or Commission staff member with a public facing role, is that the name of the employee of the insurance and risk company (pages 59, 60 and 61) and that of the third party (page 83), both mentioned in the preceding paragraphs.
105. The SLCC submitted that disclosure of such information would impact upon the physical or mental health of the individuals concerned as anonymous threats had been received by individuals and other individuals connected to the SLCC. However, the Commissioner has not received any evidence of such threats to people such as the individuals in question.
106. The Commissioner notes that the individuals who are the data subjects in this case are not employees of the SLCC and do not work in the SLCC buildings.
107. The Commissioner must also give weight to the fact that the names of the individuals in question were disclosed to Mr Cherbi in documents disclosed in response to his information request and the Commissioner has not been made aware by the SLCC of any harm or distress having arisen in relation to the individuals in question in the interim period.
108. Given the above, the Commissioner finds that the disclosure of the names redacted from pages 59, 60, 61 and 83 would not, and would not be likely to, endanger the physical or mental health or the safety of an individual. As such, he is not required to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Summing up of the Commissioner's findings in this decision

109. The Commissioner finds that the SLCC was correct to withhold:
 - the information contained in page 70, redacted under 30(b)(ii) of FOISA
 - the information contained in page 73, redacted under 30(b)(ii) of FOISA
 - the signature of the individual in page 62, redacted under 38(1)(b) of FOISA
110. The Commissioner finds that the SLCC should disclose to Mr Cherbi:
 - the information contained in page 35, redacted under 33(1)(b) of FOISA
 - the information contained in page 49, redacted under 36(2) of FOISA
 - the information contained in pages 13 and 14, redacted under 30(b)(ii) and 30(c) of FOISA
 - the information contained in the references to the employee of the third party, contained in pages 59, 60 and 61, redacted under 38(1)(b) and 39(1) of FOISA.



- the information contained in the references to the individual and group of individuals, contained in page 83 and redacted under 38(1)(b) and 39(1) of FOISA.

DECISION

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

However, as noted above, he finds that the SLCC was not entitled to withhold information in other parts of the information request made by Mr Cherbi under the exemptions in sections 30(b)(ii) and (c), 33(1)(b), 36(2), 38(1)(b) and 39(1) of FOISA. The SLCC therefore failed to comply with Part 1 of FOISA in this respect, in particular, with section 1(1).

The Commissioner therefore requires the SLCC to disclose to Mr Cherbi the information noted in paragraph 110 of this decision by 30 July 2010.

Appeal

Should either Mr Cherbi 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
11 June 2010



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 –

...

- (c) section 36(2);

...

- (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.



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-
 - (i) the free and frank provision of advice; or
 - (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.



38 Personal information

- (1) Information is exempt information if it constitutes-
- (a) personal data of which the applicant is the data subject;
 - (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) section 10 of that Act (right to prevent processing likely to cause damage or distress); and
 - (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 meanings 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.

...