

Decision Notice



Decision 251/2013 Glasgow Bar Association and the Scottish Legal Aid Board

Papers presented to Board meetings

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Summary

On 21 March 2013, Glasgow Bar Association (GBA) asked the Scottish Legal Aid Board (SLAB) for papers presented to two specific Board meetings. SLAB provided some information to GBA and notified GBA that other information was not held. The remaining information was redacted on the basis that disclosure would substantially prejudice the effective conduct of public affairs. Following investigation, during which further information was disclosed, the Commissioner found that SLAB was entitled to withhold the remaining information for the reasons argued, and did not hold any further information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Information not held); 30(b) (Prejudice to effective conduct of public affairs)

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 21 March 2013, GBA, wrote to SLAB requesting two papers relating to contracting presented to the Board at meetings on 5 November and 17 December 2012.
2. SLAB responded on 2 May 2013. It explained that no papers on contracting were presented to the Board at either of the meetings mentioned in the request. It added that a background briefing note was provided to Board members before the December meeting, while a financial paper considered at the November meeting made a passing reference to contracting. SLAB provided GBA with a copy of the briefing note, along with two other papers (summarised in the note) considered by the Board at previous meetings. SLAB redacted information under section 30(b)(i) and 30(b)(ii) of FOISA, explaining why it had done this.
3. On 21 May 2013, GBA wrote to SLAB requesting a review of its decision to withhold information. GBA later wrote to SLAB stating that it believed the exemptions 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. It stated that only the background briefing note fell within the scope of GBA's request and upheld its decision to redact information from this in terms of section 30(b)(i) and 30(b)(ii) of FOISA. It also upheld its decision that no information was held in respect of the November 2012 meeting.
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 from GBA. 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. SLAB was asked to explain the steps it had taken to establish what relevant information it held, and to justify its reliance section 30(b)(i) and 30(b)(ii) of FOISA for withholding information.
9. SLAB submitted that the only information held and falling within the scope of GBA's request was the background briefing note referred to above. It stated that it was now prepared to disclose further information to GBA and provided submissions to the effect that the remainder was withheld in terms of section 30(b)(i), 30(b)(ii) and 30(c) of FOISA.
10. On 23 September 2013, SLAB provided GBA with a further copy of the background briefing note with fewer redactions. GBA acknowledged receipt of this information, but wished the Commissioner to come to a decision regarding the information that SLAB continued to withhold.

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.



Information held by SLAB

12. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to certain qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
13. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information the authority *should* hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
14. SLAB provided submissions to the Commissioner on the steps it took to establish whether it held further information falling within the scope of GBA's requests. It also explained why it did not consider the other papers referred to in its initial response to GBA to fall within the scope of the request.
15. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that SLAB interpreted GBA's request reasonably and took adequate, proportionate steps in the circumstances to establish what information it held and which fell within the scope of the request. Given the explanations provided, on a reasonable interpretation of the request, she is satisfied that the background briefing notes prepared for the meeting of 17 December 2012 was the only relevant information held by SLAB.
16. The Commissioner is therefore satisfied that SLAB was correct to give GBA notice, in terms of section 17(1) of FOISA, that (with the exception the information it did identify) it held no information falling within the scope of the request.

Section 30(b)(i), (ii) and (c) – Prejudice to effective conduct of public affairs

17. SLAB intimated that it was relying upon sections 30(b)(i), 30(b)(ii) and 30(c) of FOISA to withhold the information redacted from the briefing note. In order for SLAB to rely on these exemptions, it must show that the disclosure of the information would (or would be likely to) inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)), or otherwise substantially prejudice the effective conduct of public affairs (section 30(c)). These exemptions are subject to the public interest test in section 2(1)(b) of FOISA.
18. It is the Commissioner's view, as stated in previous decisions, that there is a high standard to be met in applying the tests in the section 30(b) exemptions. In applying the exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.



19. As with other exemptions importing a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely, there needs to be at least a significant probability of it occurring.
20. Each request should be considered on a case by case basis, taking into account the effects on the future provision of advice or exchange of views anticipated from disclosure of the particular information involved. The content of the withheld information must be considered, taking into account factors such as its nature, subject matter, manner of expression, and also whether the timing of disclosure would have any bearing. Releasing advice or views while a decision was being considered, and for which further views were still being sought, for example, could be more substantially inhibiting than disclosure once advice had been taken.
21. SLAB submitted that the section 30(b)(i) and 30(b)(ii) exemptions applied to all of the information that remained redacted as, in its opinion, release of the information would be likely to substantially inhibit officials in providing free and frank advice or views of a similar nature in writing in future.
22. SLAB provided submissions which explained the nature and context of the withheld information, and why it believed disclosure would be likely to lead to the substantial inhibition claimed. Given the extent to which these submissions focus on the actual content of the withheld information, the Commissioner cannot describe them in detail in this decision.
23. Having considered the remaining withheld information, together with SLAB's submissions, the Commissioner accepts that disclosure would be likely to result in substantial inhibition to the free and frank provision of advice, and to the free and frank exchange of views for the purposes of deliberation, as argued by SLAB. As a result, she is satisfied in the circumstances the all of this information is exempt from disclosure in terms of section 30(b)(i) and 30(b)(ii) of FOISA. She must now go on to consider the application of the public interest test.

Public Interest test

24. As stated in previous decisions, the "public interest" is not defined in FOISA, but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.

Submission from GBA

25. GBA submitted that the matter was of great public interest to both the legal profession and the wider public (the latter as users and as the ultimate paymasters through their taxes). GBA believed it important for there to be as open a process as possible, and considered this public interest to be strong enough to outweigh any justification for withholding the information.



26. GBA submitted that the remaining redactions appeared to be narrative rather than policy options or recommendations. It considered it unclear whether the redactions affected the content and tenor of the briefing note and considered their disclosure necessary to ensure the provision of information which was full, comprehensive and not misleading (which it believed the public interest required). It noted that the impression and view which might have been taken from SLAB's initial disclosure was "significantly changed" following the disclosure of further information during the investigation, and suggested that the remaining redactions might give "a misleading or at least incomplete picture".

Submission from SLAB

27. SLAB recognised that there was a considerable interest amongst the legal professions and the public in the development of this policy area (i.e. contracting with legal aid suppliers). It also recognised that it was in the public interest for the profession to be in a position to contribute effectively to the policy development process in this area, and to have sufficient notice of whatever changes the Ministers might ultimately decide upon.
28. However, SLAB considered there to be a stronger public interest in the effective development of workable policy options for ensuring sustainability of criminal defence work as a cornerstone of the Scottish criminal justice system. In this connection, it highlighted the importance of being able to inform itself of the arguments in respect of contracting, in order to develop advice for Government on options for implementation. It explained that its role was to advise Ministers and for them to be able to consider that advice prior to formal consultation with stakeholders. This process allowed the input of the profession and others to focus on options under active consideration, rather than options that might yet be rejected.
29. In SLAB's view, disclosure of the withheld information in response to GBA's request could reasonably be anticipated to interfere in the process of providing advice, delaying or otherwise harming the development of Government policy, which it believed would not be in the public interest.
30. SLAB noted that after it responded to GBA's request it had published the disclosed information and additional information on its website¹, and had since added further information, setting out in both narrative and data form some of the background and context for contracting and the four basic models it had identified. It explained it had also held a number of meetings with practitioners and some of their representative groups, alongside four public events at which it had set out the background to the process and some of the issues to be considered as it developed advice for Ministers.
31. SLAB stated that this process was still continuing and that the options and its advice to Ministers remained to be finalised. It submitted that it was not in the public interest to release initial views at a time when final views were still being developed, as disclosure would harm the ongoing process of policy development and lead ultimately to less effective policies. On balance, SLAB submitted that the public interest was best served by non-disclosure of the remaining withheld information.

¹ <http://www.slab.org.uk/providers/reforms/criminal/Contracting.html>



The Commissioner's view

32. The Commissioner recognises that GBA has a strong professional interest, along with its individual members, in fully understanding the information SLAB has considered in developing its position in this area. She accepts that the withheld information would offer insights into the matters considered by SLAB in relation to future policy.
33. However, in considering disclosure under FOISA, the Commissioner must ask herself whether this information should be made available to the public at large, and not just to those who may have a professional interest in the matter. As stated above, the public interest should be considered in the context of FOISA as "something which is of serious concern and benefit to the public".
34. The Commissioner recognises that that there is a significant public interest in disclosure of the information, as this would assist the public in understanding the basis on which SLAB make recommendations to Ministers in relation to policy development and decisions. The Commissioner accepts that the controversy surrounding these policy considerations lends weight to this argument, and the matters covered are of concern to most of the people of Scotland, whether as potential users of legal services or (the sums involved being substantial) as taxpayers.
35. On the other hand, the Commissioner acknowledges that the policy development process in this area was still underway at the time SLAB dealt with GBA's request and requirement for review, and indeed is continuing. Having considered SLAB's submissions in this connection, and having considered each of the redactions individually, the Commissioner accepts the likelihood of harm to the public interest, in relation to key functions of both SLAB and the Scottish Ministers.
36. Having carefully considered the particular circumstances of this case, the Commissioner is not satisfied that the public interest in disclosure is strong enough to outweigh that in withholding the information in question. In coming to this decision, she acknowledges the extent to which the public interest has been met by the information disclosed by SLAB (enhanced by further disclosures and publication after SLAB responded to the request and requirement for review).
37. On balance, therefore, the Commissioner finds that the public interest in disclosing the remaining withheld information is outweighed by that in maintaining the exemption in section 30(b)(i) and 30(b)(ii) of FOISA. Consequently, she is satisfied that SLAB correctly withheld the remaining information under these exemptions.
38. Given that the Commissioner has concluded that all of the information still withheld by SLAB was correctly withheld in terms of section 30(b)(i) and (ii) of FOISA, she is not required (and does not intend) to consider the exemption in section 30(c) in relation to that information.



DECISION

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

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
14 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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
- ...
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (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

...