



Scottish Information
Commissioner

Decision 005/2005 – Mr S and Miss S and the Scottish Legal Aid Board

Request for information relating to legal aid application

Applicants: Mr S and Miss S
Authority: Scottish Legal Aid Board
Application: 200500686
Date of Decision: 30 June 2005

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 005/2005 – Mr S and Miss S and the Scottish Legal Aid Board

Request for the names of all legal aid employees involved in the decision to grant or withhold legal aid in a particular case – information withheld under section 38(1)(b) and section 30(b)(ii) and 30(c) – whether information withheld is “personal data” – whether release would constitute fair and lawful processing of that data.

Request for a declaration that all parties involved in this decision are fully conversant with the Children (Scotland) Act 1995 – not regarded as a request for information under the Freedom of Information (Scotland) Act 2002 (FOISA) – whether the public authority is required to hold such information.

Request for information about public liability insurance arrangements for the decision makers in this case and the legal firms involved – information not held

Request for a declaration that no decision maker in this case or the legal firms involved have any connections with Freemasonry or other secret societies – information not held – whether public authority is required to hold such information.

Facts

Mr S contacted the Scottish Legal Aid Board with five requests for information relating to the decision to grant or withhold legal aid for a child custody case. The Scottish Legal Aid Board withheld some information on the grounds that it is exempt under Section 38 of the Freedom of Information (Scotland) Act 2002 (FOISA) and did not provide information in response to some of Mr S's requests because the information is not held. The Scottish Legal Aid Board provided alternative information or explanatory comments in response to some of the requests.

Outcome

The Commissioner found that the authority had correctly applied the exemption in section 38 of the Freedom of Information (Scotland) Act (FOISA); that where the authority claimed the information was not held this has been supported by evidence.



Appeal

Should either the Scottish Legal Aid Board or Mr Ss 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 of receipt of this notice.

Background

1. On 18 January 2005, Mr S contacted the Scottish Legal Aid Board (SLAB) by email on behalf of himself and his daughter. He made five requests relating to a decision about legal aid for a case in which he and his daughter were involved.
2. SLAB replied to Mr S on 24 January 2005, addressing each of the five queries in turn. It asked for clarification of the first query in order to identify the information required, and pointed out that the information may already be available to Mr S on the legal aid certificate and associated correspondence relating to his case. Mr S has confirmed that because of his personal circumstances he has not been in a position to provide further clarification of this request, and so this decision will not consider the first query in his email of 18 January 2005.
3. The other parts of the information request made on 18 January 2005, and SLAB's responses, are summarised as follows:
4. Query 2. The names of all legal aid employees involved in the decision to provide the legal firms Balfour Manson, Solicitors and Cook Stevenson, Solicitors with legal aid in the case of S. v S. referred to in his request. SLAB confirmed that it holds this information but considered it exempt under section 38 of FOISA.
5. Query 3. Mr S sought a declaration that all parties who both applied for legal aid and the parties who made the decision to provide public money in the case of S. v S. are fully conversant with the Children (Scotland) Act 1995. SLAB replied that it did not regard this as a request for information under FOISA and intended to take no further action on this point in the context of Mr S's other requests for information.
6. Query 4. This was a request for details of the public liability insurers of the legal firms applying for legal aid and the decision makers in the case of S. v S referred to above. SLAB replied that information about the insurers of solicitors or the personal insurance arrangements of members of staff is not held. The letter explained that decisions to grant or withhold legal aid are decisions of SLAB, and that any claim or action in respect of a SLAB decision should be intimated to it at the address provided.



7. Query 5. Mr S sought assurances that neither of the law firms applying for legal aid nor the decision makers at SLAB have “sworn oaths to the first degree entered apprentice or have any connections with any secret society such as freemasonry or speculative society”. SLAB replied that this could not be regarded as a request for information under FOISA, but that it could confirm that it “does not hold information about membership by any individuals or groups, whether employed or not by the Board, of any of the sorts of bodies referred to in your email”.
8. Mr S was not satisfied with the reply received from SLAB and on 4 February 2005 sent an email asking for a review of the response to his request. SLAB wrote back on 11 February 2005 confirming its original decisions.
9. Mr S then applied to me for a decision in an email dated 23 February 2005.
10. Mr S has made several related information requests to SLAB, two of which are the subject of separate decisions (decisions 003/2005 and 004/2005).

The Investigation

11. Mr S’s appeal regarding queries 2, 3, 4 and 5 was validated by establishing that he had made a request to a Scottish public authority, and had appealed to me only after asking the authority to review its response to his request.
12. A letter was sent to SLAB on 29 March 2005, giving notice that an appeal had been received and that an investigation into the matter had begun.
13. In relation to Query 2 SLAB was asked:
 - a) to provide confirmation that the Board was replying specifically on section 38(1)(b) of FOISA (in correspondence with Mr S the Board simply cited section 38);
 - b) to provide the reasons for applying this exemption to the information requested;
 - c) to say whether the names of individual employees associated with a particular legal aid decision have ever previously been made available on request or otherwise made public;
 - d) to say whether employees have been given any expectation that their names will not be released in connection with a legal aid decision in which they have been involved; and
 - e) to say whether employees have been asked whether they would object to their names being released in this context.



14. SLAB replied regarding the points relating to Query 2 as follows:
- a) the Board confirmed that it was relying on section 38(1)(b) of FOISA;
 - b) the Board believes that releasing the names of staff associated with a particular decision would not be fair processing, as required by the Data Protection Act 1998. Their arguments in support of this view are considered below in paragraphs 22 – 39;
 - c) the Board pointed out that in terms of the Legal Aid (Scotland) Act 1986, it is the Board which carries out statutory functions such as deciding to grant or refuse civil legal aid, and any decision remains a decision of the Board even where it has been delegated to individual decision makers;
 - d) the Board confirmed that names of employees have sometimes been made available through standard administrative practices, for example in correspondence with applicants. However, these may not necessarily be the names of the decision makers;
 - e) the Board informed me that staff have been given detailed training in data protection, freedom of information and health and safety legislation, and are aware of what constitutes personal information and fair processing of personal data. They have a reasonable expectation that the Board will not take any action that would breach an employer's duty of care by exposing them to unnecessary risk of harm or distress. In addition, staff are aware of the policy decision to treat all decisions within cases as decisions of the Board, not of individuals; and
 - f) the Board informed me that staff have not been asked whether they would object to their names being released in this case.
15. In their letter the Board also stated that although they had informed Mr S that the information was being withheld under section 38 of FOISA, they additionally believe it to be exempt under section 30(b)(ii) and 30(c). Although authorities are discouraged from citing additional exemptions to me which have not been notified to Mr S, I will also consider whether the use of section 30 can be justified in this case.
16. Regarding Query 3 SLAB was asked:
- a) to provide confirmation that no such declaration is required, recorded or held by SLAB and
 - b) to describe any steps taken to establish that this information has not been collected and is not held by the Board.
17. SLAB replied regarding the points relating to Query 3 as follows:
- a) it confirmed that the declaration sought by Mr S is not required of or held by the SLAB and
 - b) this statement was supported by referring to the audit of information held by SLAB, which was carried out shortly before FOISA came into force.



18. Regarding Query 4, SLAB was asked to provide
- any information relating to public liability insurance cover for SLAB;
 - a list of any information which employees of SLAB are asked to supply, for instance when taking up employment with the Board (to establish whether employees are required to provide details of their personal insurance arrangements) and
 - any information to support the statement that SLAB does not hold information about the insurers of solicitors.
19. SLAB replied regarding the points relating to Query 4 as follows:
- it does not have any public liability insurance, referring to its status as a Non-Departmental Public Body and explaining that any payment required in respect of a successful claim against it would be met either from the its existing resources or from central funds;
 - it provided a list of information which new employees must supply. Employees are not required to supply information about their personal insurance arrangements; and
 - the information audit carried out by SLAB shows that no information is held about the insurance arrangements of solicitors, whether employed by SLAB or acting in legal aid cases. Copies of the information audit report relating to the Chief Executive's department and the Treasury department of SLAB were made available to the investigating officer.
20. Regarding Query 5, SLAB had already been asked to supply information in relation to another case (see decision 004/2005) to support the statement that information detailing Board Members' connections with secret societies are not held by SLAB. It was felt that, when considered together with the information requested in 18 (b) above, this would be sufficient to establish whether or not such information is held by SLAB. However, given that this query extended to the legal firms involved in Mr S's case, SLAB was invited to provide comments on the information held or not held about the law firms. SLAB referred to its recent information audit (see para. 19 (c) above) as evidence that this information is not held, either in relation to solicitors in private practice dealing with legal aid cases or solicitors employed by SLAB, who are subject to the same terms and conditions of employment as any other employee of SLAB.

The Commissioner's Analysis and Findings

Query 2

21. SLAB has cited two exemptions under which it was decided to withhold information about the names of decision-makers in the relevant applications for legal aid. The information was originally withheld from Mr S under section 38(1)(b) of FOISA. During the investigation of this case, SLAB also cited section 30(b)(ii) and 30(c) of FOISA.



Section 38(1)(b)

22. This decision will first consider whether SLAB was justified in withholding the names of employees involved in the decision to provide legal aid to both law firms involved in the court cases previously referred to on the grounds that this information is exempt under section 38(1)(b) of FOISA.
23. The issues to be addressed are whether the information requested by Mr S constitutes personal data, as defined by the Data Protection Act 1998 (the DPA), and whether the release of the information under FOISA would contravene any of the data protection principles.
24. The DPA defines personal data as “data which relate to a living individual who can be identified...from those data” (section 1(1)(a)). Clearly, an individual’s name meets this description and can be classified as personal data.
25. Section 38(1)(b) of FOISA exempts information from disclosure if it is personal data and if disclosure would contravene any of the data protection principles laid down in the DPA. The first data protection principle states that data must be fairly and lawfully processed. The question to consider here is whether the release of employees’ names in connection with decisions they take at work would be fair and lawful.
26. The Information Commissioner, who is responsible for regulating the DPA, has provided guidance on factors to take into account when considering a request for the release of information about an identifiable employee. In general, senior staff and those in public facing roles should expect that information about them will be available to the public.
27. I also took into account a decision of the Irish Information Commissioner (Case No 99146) in which she directed the release of the names of members of An Garda Síochána (police) which appeared in Health Board records in connection with an investigation in a childcare case. The Irish Commissioner found that the identity of a Garda as the Garda who was involved in particular matters in the course of his or her official duties was not personal information about that Garda. She also considered it relevant that these were members of the national police force and its officers are public servants.
28. The Irish Commissioner also noted that she was satisfied that the identities of the Gardaí were not subject to a duty of confidence.
29. The Information Commissioner’s guidance also advised that before the decision is taken to release personal data, the data controller should consider whether employees have been told that information about them will be disclosed, or what their reasonable expectations about disclosure are.
30. As noted above in para. 14, in the case of SLAB employees, SLAB has submitted that staff have been given detailed training in data protection, freedom of information and health and safety legislation. As a result, they are aware of what constitutes the fair processing of personal data and they have a reasonable expectation that SLAB will not take any action that would breach the its duty of care as an employer by exposing them to unnecessary risk of harm or distress.



31. In addition, staff are aware of a policy decision taken several years ago that all decisions within legal aid cases are to be treated as decisions of SLAB, not of individuals. This has given rise to an expectation that the names of individual employees will not be released in connection with decisions in which they have been involved.
32. SLAB has explained the procedure by which decisions relating to legal aid are taken. No individual employee or Board Member makes the decision to grant or withhold legal aid. Each application must meet three separate tests of eligibility, which are assessed by staff from different parts of SLAB in two decision-making processes which unite to form a single decision of SLAB. This is laid down in the statutory framework created by the Legal Aid (Scotland) Act 1986.
33. The Information Commissioner's guidance on the release of personal data also advises that the data controller (in this case, SLAB) should consider whether the release of the information could be damaging to the employee, and states that it is for the public authority itself to assess such risk.
34. SLAB has assessed the likely risk to employees involved in legal aid decisions, should their names be released on request. It is of the view that this could put staff at risk and could cause them unjustified distress
35. SLAB deals with a range of members of the public, including applicants for legal aid, people in receipt of legal aid, opponents of those applying for or in receipt of legal aid, those accused of or convicted of criminal offences, and victims of crime. These customers are encountered within the context of contentious civil or criminal legal problems or court cases. Emotions are often highly charged, and feelings of anger or grievance are often focused on decision-makers. Sometimes the decision has been SLAB's, such as a decision to grant or refuse legal aid. Sometimes the decision has been that of another party in the justice system, such as a court, which might for example order someone to pay their opponent's legal costs (it then falls to SLAB to take the necessary action to collect that money).
36. This sometimes results in transference of the individual's sense of grievance or anger to SLAB and its staff, and from time to time this has manifested itself in the form of actual abuse or threats of violence against SLAB staff. Measures to provide reasonable protection against the risk of assault have been put in place within SLAB's premises.
37. The Board provided me with examples of incidents, all reported to the police, which show that their concern that access to names of staff can place them in danger is not simply theoretical. This does not mean that in all circumstances it can or must withhold information on staff. However it does mean that the authority should consider the risks involved in releasing the information in response to a specific request. I am satisfied from the information received from SLAB that they are entitled to come to the view that releasing the information requested would constitute an unacceptable risk to their employees.



38. In coming to this view, I have taken account of guidance issued by the Information Commissioner on dealing with requests involving personal information (Freedom of Information Act Awareness Guidance No 1). In that guidance, the Commissioner makes it clear that it is likely to be fair for information which is about someone acting in an official or work capacity to be provided on request unless there is some risk to the individual concerned.
39. I accept therefore, given the circumstances in this instance, that were SLAB to release the names of staff involved in making particular decisions this would not constitute fair processing of personal data.

Section 30(b)(ii) and 30(c)

40. SLAB informed the investigating officer (in a letter of 20 April 2005) that it also believes the names of staff involved in making particular decisions are exempt under section 30 of FOISA. They later confirmed that it believes sections 30(b)(ii) and 30(c) are applicable.
41. SLAB argues that it is in the public interest that experienced and qualified staff are able to exchange free and frank views in cases and make decisions on applications without the fear of intimidation, harassment or threats of physical violence. They believe that if staff are exposed to such risks it will affect their ability to make well-informed decisions, their ability to provide a high quality of service will be impaired, and the subsequent adverse impact on the conduct of public affairs would not be in the public interest.
42. Section 30(b)(ii) exempts information where its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. Although Mr S has not asked for information relating to the discussions surrounding the decision in his case, SLAB has invited me to consider whether releasing the names of employees involved in the decision would be likely to substantially affect the way in which staff discuss decisions in future. As noted below in paragraph 44, the fear is that the release of their names will put staff at risk of intimidation, harassment or threats of physical violence.
43. Although I accept that these are genuine concerns, given the evidence cited in paragraph 37, Section 30(b)(ii) requires the public authority to show that the free and frank exchange of views would be *substantially* inhibited. I believe it would be difficult to prove that the general quality of discussions within SLAB would be affected to such an extent by the release of the names of staff associated with decisions. As SLAB has itself pointed out, the nature of its work means that staff must already have some expectation that they will have to deal with people who are unhappy about its decisions, and have some experience of such situations.
44. Section 30(c) exempts information if its disclosure under FOISA would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The argument is that the release of staff names will expose them to an increased level of intimidation, harassment and threats, which will have an adverse effect on the quality of decisions made and the quality of service provided.



45. I do not dismiss SLAB's concerns about the welfare of its staff, especially given the evidence they have submitted about previous threats and harassment. However, I feel that the picture painted here in relation to the application of section 30(c) may be too bleak. Names of some staff are already made available from time to time within SLAB's normal administrative practices, for example, in correspondence with applicants and opponents. As noted in paragraph 35, staff employed by SLAB already work in an environment where they may encounter aggrieved and potentially aggressive people. Although releasing the names of employees associated with a decision might increase their exposure to such people, I do not accept SLAB's argument that this would necessarily result in a substantially reduced standard of service to stakeholders.

Conclusion

46. Although SLAB has not made a compelling case for withholding the information under section 30(b)(ii) or 30(c), I am satisfied that SLAB has demonstrated that the exemption provided in 38(b)(i) does apply to the information requested by Mr S in Query 2.

Query 3

47. SLAB has stated that it does not hold any information which would meet Mr S' request for a declaration that all parties who applied for or decided to grant legal aid in the case of S. v S. are fully conversant with the Children (Scotland) Act 1995, and that no such declaration is required.
48. The Children (Scotland) Act 1995 does not require public bodies to ensure that staff are conversant with its provisions.
49. SLAB has recently carried out an audit of information held by it and has stated that as a result it is satisfied that this information is not held. Copies of the relevant sections of the information audit report were supplied to the investigating officer (see para. 19(c)).

Conclusion

50. I am satisfied that SLAB does not hold the information requested in Query 3.

Query 4

51. SLAB has stated that it does not hold any information which would answer Mr S's request that it provide the public liability insurers of both the legal firms applying for legal aid in his case and the decision makers in that case.
52. As detailed in para. 19 above, SLAB explained to the investigating officer that it does not have any public liability insurance on its own behalf.
53. In support of its statement that no information relating to Mr S's request is held, SLAB referred to its recent information audit. Relevant sections of the information audit report were provided to the investigating officer (see para 19 (c)).



54. SLAB also provided a list of information required from new employees as a condition of their employment. This list did not include any information relating to their insurance arrangements.

Conclusion

55. I am satisfied that SLAB does not hold any information relevant to Query 4.

Query 5

56. Mr S asked SLAB to provide assurances that the decision makers and the legal aid firms involved in Mr S's case have not "sworn oaths to the first degree entered apprentice or have any connections with any secret society".
57. Although SLAB did not consider this a valid request for information under FOISA, it informed Mr S that SLAB does not hold information about membership by any individuals or groups, whether employed or not by it, of any of the sorts of bodies referred to.
58. In many respects, Query 5 covers the same ground as a separate request submitted by Mr S in which he applied for the disclosure of Board Members' involvement in the Freemasons or secret societies. This is the subject of a separate decision notice (004/2005).
59. SLAB referred the investigating officer to the report of the recent information audit, which contains no reference to any information of the type requested in Query 5.
60. SLAB also supplied a list of information required from new employees as a condition of their employment (as referred to in para. 50 above). This list did not require employees to disclose membership or involvement in secret societies or the Freemasons.

Conclusion

61. I am satisfied that the evidence described in paragraphs 55 and 56, taken together with the investigation carried out in respect of decision 004/2005, confirms that the information requested in Query 5 is not held by SLAB.

Decision

I find that the authority has dealt with Mr and Miss S's requests for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA).

Kevin Dunion
Scottish Information Commissioner
June 2005