



# Decision Notice 033/2023

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## Legal aid applications

**Applicant: The Applicant**

**Authority: Scottish Legal Aid Board**

**Case Ref: 202200086**

## Summary

The Applicant asked the Authority for information contained in multiple applications for legal aid by a third party. The Authority refused to provide the information on the basis that it was prohibited from doing so by section 34 of the Legal Aid (Scotland) Act 1986. The Commissioner found that the Authority had complied with FOISA in responding to the request.

## Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(a) and (2)(b) (Effect of exemptions); 26(a) (Prohibitions on disclosure); 47(1) and (2) (Application for decision by Commissioner)

Legal Aid (Scotland) Act 1986 (LASA) section 34 (Confidentiality of information)

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. On 21 July 2021, the Applicant made a request for information to the Authority. He referred to previous correspondence between himself and the Authority, and noted that he wanted access to the information and, if the Authority was not prepared to disclose it, it should provide him with a detailed explanation as to why it would not be released.
2. The Authority wrote to the Applicant on 30 July 2021, seeking clarification of the information the Applicant was requesting.

3. On 31 July 2021, the Applicant clarified that he was seeking copies of the information a named third party had used in their applications for legal aid.
4. The Authority responded on 10 August 2021. It confirmed that the third party had made five separate applications for legal aid, and it notified the Applicant that it was withholding all of the information in them under sections 26(a) and 38(1)(b) (Personal information) of FOISA. It provided reasons why it was relying on each exemption.
5. On 25 November 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant acknowledged that his requirement for review was late, but he asked the Authority to accept a late review request as he did not agree that the information should be withheld under section 26(a) and 38(1)(b) of FOISA.
6. The Authority carried out a review, notifying the Applicant of the outcome on 16 December 2021. It upheld its previous response, that the information was exempt under section 26(a) and 38(1)(b) of FOISA.
7. On 20 January 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because he did not agree that the information should be withheld under sections 26(a) and 38(1)(b) of FOISA.

## **Investigation**

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 21 January 2022, the Authority was notified in writing that the Applicant had made a valid application. Following this, the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions in relation to its reliance on sections 26(a) and 38(1)(b) of FOISA. The Authority provided submissions in response.

## **Commissioner's analysis and findings**

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### ***Section 26(a) (Prohibitions on disclosure)***

12. Under section 26(a) of FOISA, information is exempt information if its disclosure by a Scottish public authority, otherwise than under FOISA, is prohibited by or under an enactment. This is an absolute exemption and so is not subject to the public interest test contained in section 2(1)(b) of FOISA.

### ***Submissions from the Applicant***

13. In his application to the Commissioner, the Applicant explained that, after hearing representations from the third party in Court, he was of the view that they provided factually inaccurate information in their applications for legal aid. He contended that they obtained

legal aid fraudulently and that they had therefore committed a criminal offence. The Applicant noted that he had raised his concerns with the Authority itself and also with Police Scotland both informing him that they could not take any action or instigate any investigation unless he provided documentary evidence to support his allegations.

#### *Submissions from the Authority*

14. The Authority submitted that section 34 of the Legal Aid (Scotland) Act 1986 (LASA) is an enactment that prohibits disclosure of the information under FOISA. The full text of section 34 of LASA is set out in the Appendix to this decision.
15. The Authority submitted that the requested information related to a third party's legal aid applications. It argued that this information was "furnished for the purposes of [LASA]" to the Authority by a "person acting for, or a person seeking or receiving legal aid or advice and assistance."
16. The Authority argued that, under section 34 of LASA, it was prevented from disclosing information furnished by a person seeking or receiving legal aid or advice and assistance without their consent, except in prescribed circumstances.
17. The Authority explained that it did not have the third party's consent to disclose the requested information. In light of this, the Authority argued that the information fell within the scope of section 34(1) of LASA.
18. Having considered this explanation and the requested information, the Commissioner is satisfied that it is information to which section 34(1) of LASA applies.
19. The Authority explained that such information can only be disclosed without consent in prescribed circumstances, as detailed in section 34(2) of LASA. The Authority noted that, one of these prescribed circumstances (section 34(2)(c)) is for the purpose of investigating or prosecuting any offence or for the report of any proceedings in relation to such an offence.
20. Section 34(2)(c) of LASA provides that information provided to the Authority may be disclosed if it is;  
  
"for the purpose of investigating or prosecuting any offence or for the report of any proceedings in relation to such an offence."
21. The Authority recognised that the Applicant had requested this information as he wanted to investigate an allegedly fraudulent legal aid application, but it considered that this criterion only applied to relevant authorities (i.e. Police Scotland or the Crown Office and Procurator Fiscal Service (COPFS)) undertaking such steps in accordance with formal law enforcement.
22. The Authority submitted that if Police Scotland or COPFS sought information for the purposes of investigating a crime then, in terms of s34(2)(c) of LASA, it would be in a position to release the information. However, the Authority rejected the notion that section 34(2)(c) of LASA could be used by members of the public who wanted to carry out their own investigation.
23. The Authority contended that the investigation or prosecution of crime referred to in section 34(2)(c) of LASA was that carried out by the prevailing authorities (e.g. Police Scotland or COPFS). It argued that any other interpretation would mean that the whole confidentiality mechanism of section 34 of LASA would collapse if any member of the public stated their purpose in obtaining the information is their personal investigation of a possible crime. It

noted that the confidentiality provisions of section 34 of LASA were clearly intended to be seriously enforced, given that the ultimate penalty for non-observance is a criminal sanction.

#### *The Commissioner's view on section 26(a) of FOISA*

24. The exemption in section 26(a) is absolute. This means that if the information is "prohibited from disclosure", the public authority responding to the request does not have to go on to apply the public interest test. This also means that if the information falls under section 26(a) of FOISA, the Commissioner has no power to order its disclosure. If there is an enactment which prohibits disclosure of the information, the Commissioner cannot order its release under FOISA.
25. The Commissioner's [briefing on section 26\(a\) of FOISA](#)<sup>1</sup>, makes clear that "Enactment" means any primary legislation (an Act of the UK or Scottish Parliament) or secondary legislation (orders, rules or regulations made under an Act of the UK or Scottish Parliament).
26. In [Decision 003/2010](#)<sup>2</sup>, the Commissioner accepted that section 34(1)(b) of LASA prohibited the disclosure of certain information under FOISA, where the information had been furnished to the Authority for the purposes of LASA. The same issue must be addressed in this case.
27. In the present case, the Commissioner accepts that the information was information "furnished" to the Authority by a third party. Having considered the Authority's submissions, as outlined in the previous paragraphs, the Commissioner accepts that the information contained in the legal aid applications was furnished to the Authority for the purposes of LASA.
28. Section 34(1)(b) of LASA prohibits disclosure of the information furnished to the Authority: the statutory language is clear in this respect: "no information ... shall be disclosed"; "shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale."
29. The Authority has made it clear that it does not have consent (from the third party) to disclose the information contained in their applications for legal aid.
30. As noted above, section 34(2) of LASA specifies certain purposes for which information covered by section 34(1) of LASA may be disclosed: in this case, it is only the purpose set out in section 34(2)(c) of LASA which may be relevant.
31. Having considered the arguments made by both parties in this case, along with the wording of sections 34(1) and 34(2)(c) of LASA, the Commissioner must accept the Authority's interpretation of LASA, particularly its view that section 34(2)(c) only applies to requests made by the relevant authorities, and that it cannot be used by individuals seeking to investigate matters by themselves.
32. The Commissioner accepts that, if members of the public could obtain information included in a third party's application for legal aid, solely on the grounds that they suspected fraud and wanted to assess the information for themselves (before passing on to Police Scotland or COPFS), the confidentiality provisions contained in LASA would essentially be meaningless. Given the sensitive nature of the information likely to be found in an application for legal aid, the Commissioner cannot accept that this would be a reasonable reading of LASA,

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<sup>1</sup> <https://www.itspublicknowledge.info/sites/default/files/2022-03/BriefingSection26ProhibitionsOnDisclosure.pdf>

<sup>2</sup> <https://www.itspublicknowledge.info/decision-0032010>

specifically the provision contained in section 34(2)(c) of that Act. The Commissioner considers that a more reasonable reading of section 34(2)(c) is that such a request must come from a law enforcement authority, not simply from an individual.

33. Given this, the Commissioner does not consider that disclosure would be for any of the purposes specified in section 34(2) of LASA and he accepts that there is no applicable exception to the prohibition.
34. The Commissioner is therefore satisfied that the withheld information is exempt from disclosure under section 26(a) of FOISA.
35. As the Commissioner has found the information to be wholly exempt under section 26(a) of FOISA, he will not go on to consider the application of section 38(1)(b) of FOISA.

## **Decision**

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

## **Appeal**

Should either the Applicant or the Authority 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.

**Margaret Keyse**  
**Head of Enforcement**

**18 April 2023**

## **Appendix 1: 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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
  - ...
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
  - ...
  - (b) section 26;
  - ....

#### **26 Prohibitions on disclosure**

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;
- ...

#### **47 Application for decision by Commissioner**

- (1) A person who is dissatisfied with -
  - (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) state the name of the applicant and an address for correspondence; and
- (c) specify –
  - (i) the request for information to which the requirement for review relates;
  - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
  - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

## **Legal Aid (Scotland) Act 1986**

### **34 Confidentiality of information**

- (1) Subject to subsection (2) below, no information furnished for the purposes of this Act to the Board or to any person acting on its behalf shall be disclosed-
  - (a) in the case of such information furnished by, or by any person acting for, a person seeking or receiving legal aid or advice and assistance, without the consent of the person seeking or receiving legal aid or advice and assistance; or
  - (b) in the case of such information furnished otherwise than as mentioned in paragraph (a) above, without the consent of the person who furnished it,

and any person who, in contravention of this subsection, discloses any information obtained by him when employed by, or acting on behalf of, the Board shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.
- (2) Subsection (1) above shall not apply to the disclosure of information-
  - (a) for the purpose of the proper performance or facilitating the proper performance by the Secretary of State, the Board, any court or tribunal or by any other person or body of duties or functions under this Act;
  - (aa) for the purpose of any determination or investigation by the Scottish Legal Complaints Commission under the Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5) ("the 2007 Act");
  - (b) for the purpose of investigating, prosecuting or determining any conduct complaint, remitted by the Scottish Legal Complaints Commission under section 6(2)(a) or 15(5)(a) of the 2007 Act-
    - (i) against a solicitor, by the Law Society or the Scottish Solicitors' Discipline Tribunal;
    - (ii) against an advocate, by the Faculty of Advocates;
  - (c) for the purpose of investigating or prosecuting any offence or for the report of any proceedings in relation to such an offence;
  - (d) for the purposes of any investigation by the Scottish Public Services Ombudsman under the Scottish Public Services Ombudsman Act 2002 (asp 11);

- (e) for the purposes of an inquiry by the Scottish Commission for Human Rights under section 8 of the Scottish Commission for Human Rights Act 2006 (asp 16);
  - (f) for the purposes of, or required by virtue of, section 50 of the Freedom of Information (Scotland) Act 2002 (asp 13);
  - (g) in pursuance of a requirement made under section 10(1) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).
- (3) For the purposes of this section, information furnished to any person in his capacity as counsel or a solicitor by or on behalf of a person seeking or receiving legal aid or advice and assistance is not information furnished to the Board or to a person acting on its behalf.