

# Decision Notice

---

**Decision 202/2016: Mr Jon Owens and the Scottish Legal Aid Board**

---

## **Legal advice and assistance**

Reference No: 201601243

Decision Date: 20 September 2016



Scottish Information  
Commissioner

## Summary

---

On 5 April 2016, Mr Owens asked the Scottish Legal Aid Board (SLAB) for information about whether a specific firm of solicitors had used any funding provided by SLAB to cover the costs of providing advice and assistance to a specific named client.

SLAB refused to confirm or deny whether it held relevant recorded information, or whether such information existed. Following investigation, the Commissioner found that SLAB was entitled to do this.

## Relevant statutory provisions

---

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 18(1) (Further provisions as respects responses to request); 38(1)(b), (2)(a)(i), (2)(b) and (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of personal data); Schedules 1 (The data protection principles) (the first data protection principle) and 2 (Conditions relevant for the purposes of the first principle: processing of any personal data) (condition 6)

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 27 and 29 January 2016, Mr Owens wrote to SLAB for information concerning letters he had received from a firm of solicitors on behalf of a named client. He informed SLAB that he wished to establish whether the named client had been granted legal aid for this.
2. On 15 February 2016, SLAB responded to Mr Owens and informed him that there were two types of legal aid for civil matters, "advice and assistance" and "civil legal aid", with an explanation of when each was applicable. Regarding whether the named individual had used legal aid, SLAB applied section 26(a) of FOISA (Prohibitions on disclosure), on the basis that section 34 of the Legal Aid (Scotland) Act 1986 (LASA)<sup>1</sup> prevents the disclosure of information provided to SLAB for the purposes of that Act.
3. On 4 March 2016, Mr Owens wrote to SLAB, stating that he did not see the relevance of section 34 of LASA as he was not seeking information provided to SLAB by the named person.
4. On 5 April 2016, SLAB responded to Mr Owens and explained that if a civil legal aid application had been received and he was the named opponent, it would have notified him of the application. It explained that in no other circumstances could it provide information about

---

<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.asp>  
<http://www.legislation.gov.uk/ukpga/1986/47/contents>

an application or requests made for funding. It again provided information regarding the two types of legal aid.

### **Request under consideration in this decision**

5. On 5 April 2016, Mr Owens made a request for information to SLAB. Mr Owens referred to a specific letter sent to him by the firm of solicitors on behalf of their named client. He asked SLAB whether the firm of solicitors had used any funding provided by SLAB for the purposes of providing advice and assistance to that named client. He confirmed he was not seeking information submitted to SLAB by a person seeking or receiving legal aid.
6. SLAB responded on 4 May 2016. It informed Mr Owens that it considered his request to be the same as his previous request, the response to which had informed him that section 34 of LASA imposed strict rules of confidentiality. It provided him with a copy of the previous response of 5 April 2016.
7. On 10 June 2016, Mr Owens wrote to SLAB, requesting a review of its decision on the basis that his request of 5 April 2016 was not the same as his earlier request. He commented that he was not seeking information that had been provided to SLAB (which is covered by section 34 of LASA); but that he was seeking information as to whether the firm of solicitors had used SLAB funds to provide legal advice and assistance to their client.
8. SLAB notified Mr Owens of the outcome of its review on 7 July 2016. It provided a further explanation regarding his earlier request and in this case responded in terms of section 18(1) of FOISA. This was on the basis that it would be contrary to the public interest to reveal whether the information existed, or whether it held that information. It further explained that if the information was held, it would fall within the definition of personal data under the DPA and, in its view, disclosure would be contrary to the data protection principles.
9. On 8 July 2016, Mr Owens wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Owens stated he was dissatisfied with the outcome of SLAB's review because he believed that an individual's recourse to public funds to be a matter of public concern.

### **Investigation**

---

10. The application was accepted as valid. The Commissioner confirmed that Mr Owens made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
11. On 25 July 2016, SLAB was notified in writing that Mr Owens had made a valid application. The case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 16 August 2016, SLAB was invited to comment on this application and asked it to respond to specific questions. In particular, SLAB was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with specific reference to the provisions of sections 18 and 38(1)(b) of FOISA.
13. SLAB responded on 30 August 2016, indicating that it was relying upon section 18 of FOISA, on the basis that (if held) the information requested would be exempt in terms of section 38(1)(b) of FOISA. It provided reasons for this position.

14. Mr Owens also made a number of submissions, applying various assumptions as to what may have taken place between the named client and solicitors. He provided his reasoning why he considered the information requested should be disclosed, including why he believed he had a legitimate interest in the information.

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

---

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

### **Section 18(1) of FOISA – “neither confirm nor deny”**

16. SLAB applied section 18 of FOISA, refusing to confirm or deny whether it held any information falling within the scope of Mr Owens's request, or whether that information existed. Section 18(1) allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
  - (i) a request has been made to the authority for information which may or may not be held by it; and
  - (ii) if the information were held by the authority (and it need not be), it could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 38, 39(1) or 41 of FOISA; and
  - (iii) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
17. It is not sufficient for the public authority to simply claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that the authority must be able to give a refusal notice under section 16(1), on the basis that any relevant information it held would be exempt information under one or more of the listed exemptions. Where the exemption is subject to the public interest test in section 2(1)(b) of FOISA, the authority must also be able to satisfy the Commissioner that the public interest in maintaining the exemption outweighs any public interest there would be in disclosing any relevant information it held.
18. Where a public authority has chosen to rely on section 18(1) of FOISA, the Commissioner must first establish whether, if the information existed and was held by the public authority, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions provided for by sections 28 to 35, 38, 39(1) or 41 of FOISA (including any relevant public interest test). If it was, she must then go on to establish whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest.
19. While doing this, the Commissioner must ensure that her decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that she is unable to comment in any depth on the reliance by the public authority on any of the exemptions listed in section 18(1), or on other matters which could have the effect of indicating whether the information existed or was held by the authority.

20. In this case, SLAB submitted that if it did hold any information falling within the scope of Mr Owens's request, it could be withheld under section 38(1)(b) of FOISA. This particular exemption is not subject to the public interest test.
21. The Commissioner must first consider whether SLAB could have given a refusal notice under section 16(1) of FOISA in relation to the information in question, if it existed and was held.

### **Section 38(1)(b)**

22. SLAB stated that if it held the requested information, it would (and could) apply the exemption in section 38(1)(b) of FOISA to that information. Section 38(1)(b), 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", as defined in section 1(1) of the DPA, and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.
23. In order to rely on this exemption, SLAB must show, firstly, that any such information would be personal data for the purposes of the DPA, and secondly that disclosure of that information into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles to be found in Schedule 1. In this case, SLAB submitted that if the information was held, disclosure would be in breach of the first data protection principle.

#### *Is the information personal data?*

24. "Personal data" are defined in section 1(1) of the DPA as 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 (the full definition is set out in the Appendix).
25. SLAB stated that any information of the kind requested by Mr Owens would, by definition, be the personal data of the individual named in the request. If held, such information would relate to the individual's financial circumstances and their ability to pay for legal services. Having considered the type of information Mr Owens is seeking, the Commissioner accepts this: the request is about a single, named individual and the information sought is of such a nature that it must, if held, relate to them.

#### *Would disclosure contravene the first data protection principle?*

26. In its submissions, SLAB argued that disclosure of the information, if it existed and was held, would contravene the first data protection principle. It submitted that it did not consider any of the conditions of Schedule 2 of the DPA could be satisfied in relation to disclosure of the information and that disclosure would, therefore, be unlawful and in breach of the first principle.
27. The first data protection principle states that personal data shall be processed fairly and lawfully. The processing in this case would be disclosure of the information into the public domain in response to Mr Owens' request. The first principle also states that personal data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met. In the case of sensitive personal data, as defined in section 2 of the DPA, at least one of the conditions in schedule 3 to the DPA must also be met. Having considered the request, the Commissioner does not believe the information Mr Owens is seeking could fall into any of the categories of sensitive personal data in section 2 of the DPA.

28. The Commissioner will now consider whether there are any conditions in Schedule 2 which would permit the requested information to be disclosed, if it existed and was held. If any of these conditions could be met, she must then consider whether such disclosure would be fair and lawful.
29. There are three separate aspects to the first data protection principle:
- (i) fairness
  - (ii) lawfulness and
  - (iii) the conditions in the schedules.

These three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits disclosure, it is likely that disclosure will also be fair and lawful.

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

30. In his submissions, Mr Owens questioned whether any processing would necessary for the administration of justice (condition 5 in Schedule 2). Having considered Mr Owen's brief submission on this point, and bearing mind the limited scope of legal advice and assistance (which stops short of actual preparation for court proceedings), the Commissioner is not satisfied that processing (by way of disclosure, in this particular case) could be said to be necessary for the administration of justice.
31. In the circumstances, it appears to the Commissioner that condition 6 in Schedule 2 is the only one which might permit disclosure of the information, if held. Condition 6 allows personal data to be processed if 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 (the individual(s) to whom the data relate).
32. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- (i) Is Mr Owens pursuing a legitimate interest or interests?
  - (ii) If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subject?
  - (iii) Even if the processing is necessary for Mr Owens' legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?
33. There is no presumption in favour of the disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, the legitimate interests of Mr Owens must outweigh the rights and freedoms or legitimate interests of the data subject before condition 6 will permit disclosure. If the two are evenly balanced, the Commissioner must find that SLAB would be able to refuse to disclose the requested information (if held) to Mr Owens.

Is Mr Owens pursuing a legitimate interest or interests?

34. Mr Owens submitted that he had a legitimate interest in knowing whether public funds have been misused. He explained that he had received a solicitors' letter sent on behalf of the individual named in his request and that he had a legitimate interest, which he stated extended to a public interest, in knowing whether legal aid had been used. Mr Owens made submissions as to how the law firm in question might have discussed matters with their client, which he believed gave rise to a legitimate interest in disclosure of the information.
35. SLAB pointed out that there were statutory tests which required to be met before a solicitor could grant legal advice and assistance. The grant could not be withdrawn and the other party had no right to object. This was to be contrasted with an application for civil legal aid (where actual court proceedings are contemplated), which had to be intimated to the opponent and about which the opponent could make representations. In the circumstances, SLAB could not identify a legitimate interest.
36. Having considered all relevant submissions she has received on this point, the Commissioner does not accept that Mr Owens could be said to be pursuing a legitimate interest in this case. Mr Owens may have his personal concerns as whether public funds were used to provide advice and assistance, but the Commissioner does not accept that it follows that he would be pursuing a legitimate interest in seeking the information he has requested.
37. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the requested information, if it existed and was held by SLAB.
38. In the absence of a condition permitting disclosure, that disclosure would be unlawful. Consequently, the Commissioner finds that disclosure of the information, if it existed and was held, would breach the first data protection principle. The information would therefore be exempt from disclosure (and properly withheld) under section 38(1)(b) of FOISA.

**Section 18(1)- The public interest**

39. Having accepted that SLAB could have given a refusal notice under section 16(1) of FOISA on the basis that any relevant information, if it existed and was held, would be exempt information by virtue of section 38(1)(b) of FOISA, the Commissioner must go on to consider SLAB's application of the remaining element of section 18. She is required by section 18(1) to consider whether SLAB was entitled to conclude that it would be contrary to the public interest to reveal whether the information existed or was held.
40. Mr Owens explained to the Commissioner why he believed the information requested, if it existed and was held, should be disclosed. These related to the potential misuse of public funds.
41. SLAB provided reasons for concluding, on balance, that it would not be in the public interest to reveal whether it held the information, or whether it existed. These were in line with its submissions regarding the application of section 38(1)(b) of FOISA, and an individuals' right to confidentiality.
42. SLAB explained that there were two types of legal aid. In this case, Mr Owens had asked whether the client in question had obtained legal advice and assistance.
43. SLAB submitted that it would be contrary to the public interest to reveal whether or not information was held because individuals had no expectation that such information would be made public. To do so, it submitted, would have an adverse impact, both in creating anxiety

and distress, and in preventing individuals from resolving disputes. It stated that confirmation may dissuade people from seeking advice (which need not lead to litigation) in the future and commented that whether an individual had approached a solicitor for help was a confidential matter.

44. SLAB also explained that the provision of funding for legal advice and assistance would never be known to a third party: Parliament had concluded that input from a third party was not required at that stage. Only when civil legal aid was applied for would any opponent in the case be informed, and given the opportunity to make representations.
45. SLAB stated that it published information about the types of case that received funding and the value of that funding. It did not believe the public interest extended to confidential information about individuals, the problems they sought to resolve and the fact that their financial circumstances were such that they qualified for advice and assistance.
46. Having considered the submissions of both parties, the Commissioner is satisfied, in all the circumstances of this case, it would have been contrary to the public interest for SLAB to reveal whether the information requested by Mr Owens existed or was held by it.
47. As a result, the Commissioner is satisfied that SLAB was entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether it held the information requested by Mr Owens, or whether such information existed.

## Decision

---

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

## Appeal

---

Should either Mr Owens 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**

**20 September 2016**



### 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

...

(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 –

...

(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.

#### 18 Further provision as respects responses to request

(1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.

...

#### 38 Personal information

(1) Information is exempt information if it constitutes-

...

(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

...

(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;

...

## **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

...

**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.

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**