

# Decision Notice



Decision 003/2010 Jonathan Mitchell QC and the Scottish Legal Aid Board

Fees paid to Solicitor-Advocates

Reference No: 200900527

Decision Date: 15 January 2010

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Mitchell requested from the Scottish Legal Aid Board (the Board) information related to the payment of Solicitor-Advocates. The Board responded by supplying some information and withholding the remainder on the basis that sections 12, 25, 26 and 30 of FOISA applied (claiming in addition that it did not hold certain of the information). Following a review, Mr Mitchell remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, in the course of which further information was released to Mr Mitchell, the Commissioner found that the Board had dealt with Mr Mitchell's request for information in accordance with Part 1 of FOISA, by applying section 26 of FOISA to the remainder of the withheld information. He did not require the Board to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(b) (Effect of exemptions) and 26(a) (Prohibitions on disclosure)

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

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

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1. On 19 September 2008, Mr Mitchell wrote to the Board requesting nine different categories of information related to the practice of Solicitor-Advocates. A full copy of Mr Mitchell's request is annexed to this decision.



2. The Board responded on 17 October 2008. In response to parts 1, 3, 4, 5 and 6 of his request, the Board withheld information on the basis that sections 26 (Prohibitions on disclosure) (read in conjunction with section 34 of LASA) and 30 (Prejudice to effective conduct of public affairs) of FOISA applied. In response to part 2 of his request the Board cited section 25 (Information otherwise accessible) of FOISA, stating that the information sought could be obtained from the Law Society of Scotland. In response to parts 7 and 8 of his request (which sought detailed information relating to the payment of solicitor-advocates), the Board indicated that the information was not readily available and that the cost of complying with these parts would exceed £600 and, therefore, section 12 of FOISA applied. In response to part 9 of his request, the Board sought further clarification from Mr Mitchell but stated that on its strict interpretation of his request it did not hold information of the type sought.
3. On 23 October 2008, Mr Mitchell wrote to the Board requesting a review of its decision. In particular, Mr Mitchell was not satisfied with its application of sections 26 and 30 of FOISA. He also questioned the Board's interpretation of aspects of his request and its assertions that it did not hold certain information. He did not agree with the Board's use of section 25 of FOISA, given that he was not a solicitor and therefore not a member of the Law Society of Scotland.
4. The Board notified Mr Mitchell of the outcome of its review on 20 November 2008. It acknowledged that sections 26 and 30 of FOISA did not apply to *all* of the information withheld in relation to parts 1, 3, 4, 5 and 6 of his request, but maintained that these exemptions still applied to elements of the information sought. Specifically, the Board accepted that section 34 of LASA did not apply to internal material or material generated by the Board, except insofar as that material contained within it information furnished to the Board by a third party. As a result, the Board supplied further information to Mr Mitchell, while also advising him that it was actively seeking consent to disclose information which had been supplied to it by third parties. In relation to certain information, the Board continued to rely on section 30 of FOISA.
5. In relation to part 2 of Mr Mitchell's request, the Board supplied a copy of the paper in question, having consulted with the Law Society of Scotland. In relation to part 4, the Board cited section 25 of FOISA and provided Mr Mitchell with a link which would direct him towards the information he sought (along with some explanation of what was held there).
6. In relation to parts 3, 5 and 6 of Mr Mitchell's request, the Board provided Mr Mitchell with an explanation of the searches it had conducted to identify the information it held, confirming that it was currently undertaking a review of the information identified and would forward anything it considered releasable over the next few days. In relation to parts 7 and 8 of the request, the Board maintained its reliance on section 12 of FOISA and provided further explanation as to why it considered the cost of providing the information would exceed the prescribed amount. In response to part 9 of Mr Mitchell's request, the Board (while suggesting again that Mr Mitchell might wish to clarify his concerns) reiterated its view that on its own interpretation it did not hold any information of the kind requested.



7. On 23 December 2008, following a number of reminders from Mr Mitchell, the Board supplied him with further information which it considered to fall within the scope of his request. At this point, the Board also advised Mr Mitchell that it no longer wished to rely on section 30 of FOISA, confirming that no information was now withheld under that exemption. The Board also advised Mr Mitchell that it was still seeking consent from third parties to the disclosure of certain information those parties had provided. It advised Mr Mitchell that it would revert back to him once specific consent was received.
8. Despite further reminders submitted by Mr Mitchell, no further information or explanation was received from the Board at this stage.
9. On 15 March 2009, Mr Mitchell wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Board's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
10. The application was validated by establishing that Mr Mitchell 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.

## Investigation

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11. On 18 March 2009, the Board was notified in writing that an application had been received from Mr Mitchell.
12. On 19 March 2009, the Board provided the Commissioner with an email sent to Mr Mitchell on that day. This email apologised for the delay in responding to Mr Mitchell, advising him that the Board had now acquired consent to release further information to him. Accordingly, it supplied certain additional material and confirmed that other information would follow by post: it also advised Mr Mitchell that it was still awaiting consent to release a number of other documents. It believed itself to have discharged its obligations under FOISA fully in relation to Mr Mitchell's request.
13. Further to the email detailed above, on 27 March 2009 the Board supplied further information to Mr Mitchell, explaining that this was the last piece of information for which consent had been obtained.
14. On 6 May 2009, Mr Mitchell wrote to the Commissioner advising that he remained dissatisfied with the Board's responses to parts 3, 5 and 6 of his request.
15. As a result of this further correspondence, the Board was asked, later the same day, to provide the Commissioner with any information withheld from Mr Mitchell and falling within the scope of parts 3, 5 and 6 of his request. The Board responded with the information requested and the case was then allocated to an investigating officer.



16. The investigating officer subsequently contacted the Board, 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 Board was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested. The Board responded and Mr Mitchell was given an opportunity to comment on its submissions. The submissions of both parties will be considered in the Commissioner's analysis and findings below.

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

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17. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Mitchell and the Board and is satisfied that no matter of relevance has been overlooked.
18. Within his application to the Commissioner, Mr Mitchell explained that he was not satisfied with the Board's application of section 26 of FOISA.
19. Following all the correspondence detailed above, the Board ultimately withheld three documents falling within the scope of parts 3, 5 and 6 of Mr Mitchell's request. The Board submitted that these were not supplied to Mr Mitchell on the basis that they had been provided to it by a third party and consent to their disclosure was expressly withheld. Consequently, the Board argued, to release these items would have been in breach of section 34 of LASA and therefore the exemption in section 26(a) of FOISA applied.

#### **Consideration of section 26(a)**

20. 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 in that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.
21. The enactment that in the Board's view prohibited disclosure of the withheld information was section 34 of LASA, the full text of which is set out in the Appendix to this decision.

#### *Mr Mitchell's submissions*

22. Mr Mitchell accepted that section 34 was in principle capable of acting as a prohibition for the purposes of section 26, as demonstrated in the Commissioner's *Decision 161/2006 Mr Y and the Scottish Legal Aid Board*. However, he argued that section 34 could not be read as the Board had interpreted it, i.e. as a general exemption for any information furnished to the Board by any third party. If read in that way, argued Mr Mitchell, it excluded from public scrutiny the entire general administration and policy formation of the Board, an interpretation he argued was not compliant with the Human Rights Act 1998.



23. Mr Mitchell argued that section 34 was designed to protect the privacy of applicants (for legal aid) and other private persons. He considered the “purposes of the Act” to be, in substance, the provision of legal aid to natural persons, rather than the general administration of the scheme and law reform. He could not accept a construction of section 34 which, he believed, had the necessary consequence that multilateral negotiations, discussions or minutes of meetings relative to policy could not be disclosed. In conclusion, Mr Mitchell argued that third party was not necessary for the disclosure of the withheld information and that, therefore, the Board’s refusal on the basis that no consent was available had no foundation in law.

*Submissions made by the Board*

24. The Board stated that it was established under section 1 of LASA and given functions (a) of securing that legal aid and advice and assistance were available in accordance with LASA; and (b) of administering the Legal Aid Fund. Further, the Board highlighted that section 2(2)(e) of LASA specified that one of the Board’s powers was to “give to the Secretary of State [i.e. the Scottish Ministers] such advice as it may consider appropriate in relation to the provision of legal aid and advice and assistance in accordance with this Act”.
25. The Board therefore argued that the “purposes of the Act” included both general administration of the legal aid scheme and the formation and provision of advice to Ministers. While section 34(1)(a) made specific reference to information furnished by those seeking or receiving legal aid, subsection (b) also provided that other information furnished to the Board for the purposes of FOISA was to be treated as confidential, without the consent of the person who furnished it.
26. Reading sections 1, 2 and 34(1)(b) of LASA together, the Board argued that the duty of confidentiality clearly extended beyond information received from those seeking or receiving legal aid and encompassed information provided to the Board for a range of purposes, including the provision of advice on legal aid policy.
27. The Board contended that the process of consultation and negotiation forming the subject of Mr Mitchell’s request fell firmly within the scope of the development of policy advice and therefore also within the terms of section 34. In other words, in the Board’s view, information provided to it for that purpose by a third party could not be released without that third party’s consent.
28. As indicated by Mr Mitchell in his submissions, the Commissioner has previously concluded in *Decision 161/2006* that section 34(1) of LASA is a clear prohibition on disclosure of information provided to the Board for the purposes of LASA without the consent of the person by or (in the case of an applicant for legal aid) on whose behalf the information was provided. That previous case considered the application of section 34(1)(a), however, whereas in this decision the Commissioner is required to consider the implications of section 34(1)(b).



### Documents 14(a), 14(b), 15 and 16

29. Documents 14-16 were not supplied to Mr Mitchell on the basis that they were provided to the Board by third parties for the purposes of LASA and were therefore subject to section 34 of LASA. The Board did not consider itself to be under any obligation to seek consent to release information covered by section 34, but agreed to do so as a matter of courtesy.
30. The Board advised that between November 2008 and March 2009, as and when consent had been received (and therefore the Board satisfied itself that it would not be committing a criminal offence in releasing individual items), it released further information to Mr Mitchell. However, the Board stated that consent was expressly withheld in relation documents 14(a), 14(b), 15 and 16. Therefore, it remained of the view that the disclosure of this information was prohibited under section 34.
31. Documents 14(a) and 14(b) are drafts of a minute of a meeting. The final version of the relevant extract of this minute was provided to Mr Mitchell. Document 14(a) differs slightly from the version provided, but version 14(b) is identical to the copy supplied to Mr Mitchell. In the circumstances, the Commissioner takes the view that the information in document 14(b), insofar as falling within the scope of Mr Mitchell's request, is the same as that provided to Mr Mitchells in the final version and therefore takes the view that it is unnecessary to consider any further the application of section 26 to document 14(b).
32. Documents 15 and 16 are emails from external bodies to the Board and document 14(a) is a draft minute prepared by a third party. The Commissioner is satisfied that all of this information has been furnished to the Board by a third party, and that consent to its disclosure has been expressly withheld by the persons who furnished it. Having considered the relevant provisions of LASA, he accepts the Board's arguments that the purposes of LASA include both the general administration of the legal aid scheme and the formation and provision of advice to Ministers. He is also satisfied that the information which has been withheld from Mr Mitchell relates to these purposes. Given the breadth of section 34(1)(b) of LASA, therefore, the Commissioner considers himself obliged to conclude that the information in these documents falls within the scope of this prohibition. Disclosure would not, in the Commissioner's view, be for any of the purposes specified in section 34(2) and therefore no exception to the prohibition applies.
33. In all the circumstances, therefore, the Commissioner is satisfied that the withheld information in documents 14(a), 15 and 16 is exempt under section 26(a) of FOISA.



## **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 Mitchell.

## **Appeal**

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Should either Mr Mitchell or the Scottish Legal Aid Board 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**  
**15 January 2010**



## Appendix

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### 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

...

- (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;

...



## 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(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.



## Copy of Mr Mitchell's original request

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FOI REQUEST OF SCOTTISH LEGAL AID BOARD RELATIVE TO THE PRACTICE OF SOLICITOR-ADVOCATES WHO ARE NOT QUEENS COUNSEL SEEKING PAYMENT OF FEES ON THE BASIS THAT THE EMPLOYMENT OF SENIOR COUNSEL HAS BEEN SANCTIONED BY THE BOARD

1. The paper by Douglas Haggarty referred to at paragraph 9 of the minutes of the Legal Services Committee of the Board of 27 June 2005 (these minutes being themselves publicly available).
2. The consultation paper referred to in the same paragraph.
3. Any further correspondence on this subject between the Board and any third party, including in particular the Law Society, the Scottish Executive/Government, or the Society of Solicitor Advocates; and any representations made to the Board on this subject; and also any representations made to the Board on this subject; and also any representations made by the Board on this subject; and also any representations made by the Board to the Scottish Executive/Government thereon.
4. Any Board, or committee, minutes, in which this subject is discussed after 27 June 2005, and any further documents put before the Board or committee thereon.
5. Any documents showing whether the policy referred to in the final sentence of that paragraph remains the policy of the Board; and also whether there are plans or proposals to implement that policy, and if so what they are and to what timetable; and also any documents showing or suggesting why it has not been implemented in the past three years.
6. Any notes or minutes of the discussions referred to in the Journal of the Law Society of Scotland for April 2008 on this subject (see <http://www.journalonline.co.uk/news/1005175.aspx>), and any further correspondence following thereon on this subject between the Board and any third party, including in particular the Law Society and the Scottish Government, and any representations made to the Board on this subject insofar as not included in 3 above.
7. Information, so far as readily available and in any convenient form, of the extent to which solicitor advocates who are not Queens Counsel have in (a) criminal legal aid and (b) civil legal aid cases acted or been paid as 'senior counsel' under Regulation 2(1A) of the Fees Regulations in the last three financial years; and of the total cost to the Board of this practice in these years.
8. The identity of any solicitor advocate paid fees under these provisions as 'senior counsel' and the amounts paid to them on this basis (i.e. a subset of the information provided by the Board in respect of all solicitor advocates and advocates in its annual reports).



9. Any internal papers or notes or memoranda or other documents, redacted so far as appropriate to exclude the names of individuals, expressing concern as to inappropriate or excessive feeing by individual solicitor advocates claiming payment as senior counsel under Regulation 2(1A) (criminal or civil), and in particular documents expressing concern that the employment of senior counsel was authorised by the Board in light of the special circumstances of the case but that no senior counsel as such was in fact employed.

Note:

- a. This request is for information held in either paper or electronic form. It is my preference to receive it in electronic form, but if that is not reasonably convenient to the Board I am content to receive it in paper form.
- b. It is appreciated that some information sought may be less readily to hand than other information, and I am content to be sent material in tranches as available.