



Scottish Information
Commissioner

Decision 161/2006 – Mr Y and the Scottish Legal Aid Board
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<i>Request for documents related to three applications for legal aid</i>
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Applicant: Mr Y
Authority: Scottish Legal Aid Board
Case No: 200502496
Decision Date: 29 August 2006

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
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Decision 161/2006 – Mr Y and the Scottish Legal Aid Board

Request for documents related to three applications for legal aid – information provided by Mr Y released to himself, all other information withheld. The Commissioner was satisfied that the Scottish Legal Aid Board did comply with the Freedom of Information (Scotland) Act 2002.

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 17(1) (Information not held); 26(a) (Prohibitions on disclosure); 38(1)(b) (Personal information); 45 (Confidentiality of information obtained by or furnished to Commissioner).

Section 34 of the Legal Aid (Scotland) Act 1986.

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Y wrote to the Scottish Legal Aid Board (SLAB) for all documentation and correspondence regarding three applications for legal aid. SLAB responded to Mr Y stating that two of the application files had been destroyed; consequently it did not hold any information. However, SLAB did hold an application file for one of the applicants but refused to release any information to Mr Y under sections 26(a) and 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Y was dissatisfied with the response from SLAB and asked it to review its decision. On review SLAB confirmed that two application files had been destroyed: it released information provided by Mr Y himself under the Data Protection Act 1986 (DPA), but upheld its original decision to withhold all other information relating to the held application file under sections 26(a) and 38(1)(b) of FOISA.



Mr Y was dissatisfied with the response he received from SLAB to his initial request and subsequent request for review. He then submitted an application for a decision by the Scottish Information Commissioner in order to obtain the information he had been denied. Mr Y felt that SLAB was contravening his human rights by not releasing the information to him.

Following an investigation, the Commissioner found that SLAB had complied with Part 1 of FOISA in exempting information under sections 26(a) and 38(1)(b) and by advising that certain information was not held under section 17(1)(b).

Background

1. On 11 January 2005, Mr Y wrote to SLAB asking for all documentation and correspondence relating to three applications for legal aid.
2. SLAB responded in writing to Mr Y on 10 February 2005, stating that due to the ages of the cases in question it held only certain information. In particular:
 - it held two files for application 1 but refused to release the information under sections 26 and 38 of FOISA,
 - it believed that the file relating to application 2 had been destroyed,
 - the file for application 3 had been incorrectly referenced by Mr Y but SLAB had found the correct file and the file had definitely been destroyed in line with the SLAB's file destruction policy.
3. On 1 March 2005, Mr Y wrote to SLAB expressing his dissatisfaction with its response to his original request and asked that SLAB review its decision to release information relating to the three applications for legal aid.
4. On 8 April 2005, SLAB wrote to Mr Y responding to his request for review. SLAB partially upheld its original decision with regard to the file for application 1. It released certain internal documentation that it did not consider itself to be prohibited from disclosing and, under the DPA, gave Mr Y information which had originally been provided by him. It continued, however, to withhold the remainder of the information under sections 26 and 38 of FOISA. SLAB confirmed that the files for the other two applications had been destroyed inline with its file retention policy.



5. Mr Y wrote to my Office on 23 August 2005, stating that he was dissatisfied with the outcome of SLAB's review and applying to me for a decision on the release of information relating to the applications for legal aid. He believed that to withhold the requested information would be in contravention of his human rights.
6. The case was then allocated to an investigating officer. The application was validated by establishing that Mr Y had made a valid information request under FOISA to a Scottish public authority and had appealed to me only after asking the public authority to review its response to his request.

The Investigation

7. The investigating officer wrote to SLAB on 2 September 2005, giving notice that an appeal had been received and that an investigation into the matter had begun. The letter invited comments from SLAB as required by section 49(3)(a) of FOISA. SLAB was asked to supply the investigating officer with, amongst other items, comments on the claimed confidentiality of the information withheld and on the application of the exemptions claimed, together with copies of SLAB's records retention policy and the information withheld.
8. SLAB contacted the investigating officer by telephone and subsequently wrote to my Office on 14 September 2005 regarding the withheld information. The investigating officer had assured SLAB of the Commissioner's obligations under Section 45 of FOISA (confidentiality of information obtained by or furnished to Commissioner). However, SLAB commented that under Section 34 of the Legal Aid (Scotland) Act 1986, information regarding an application for legal aid cannot be released to a third party unless the individual who provided that information agrees to its release. SLAB had also included a copy of Section 34 of the Legal Aid (Scotland) Act 1986. SLAB said it would contact the individual who provided the information for their permission to release the withheld information to my Office.
9. On 30 September 2005, SLAB provided the investigating officer with a more detailed written response to the questions raised in the letter of 2 September, confirming that section 26(a) of FOISA did apply to the information withheld and that consent to the release of the information had been sought but not received. It provided a copy of its file retention policy and further information on the destruction of files.



10. The investigating officer wrote to Mr Y on 10 July 2006, asking him to expand upon the relevance to his application of the Human Rights Act.
11. Mr Y wrote to my Office on 31 July 2006, stating that SLAB had contravened certain provisions of the European Convention on Human Rights (in particular, articles 6 and 8 of the Convention and article 1 of the First Protocol) in its dealings with him. He also commented that following a recent Privy Council decision all prosecution evidence must be released to the defendant regardless of any damage it might do to the case.
12. The investigating officer also wrote to SLAB on 10 July 2006 asking it to clarify whether a schedule existed for the destroyed files and, if so, whether it had considered giving this to Mr Y. SLAB's file retention policy does specify that such a schedule would be permanently maintained for destroyed files.
13. SLAB emailed and faxed the investigating officer on 8 and 9 August 2006 respectively, responding to the questions raised. SLAB did have a copy of the destruction schedule for the two destroyed files, but had not considered giving a redacted version to Mr Y. Both files had been destroyed prior to Mr Y's request for information. SLAB confirmed that it had received a specific refusal from the subject of the information of its earlier request for consent to disclosure (even to me for the purposes of this investigation).

The Commissioner's Analysis and Findings

14. In its refusal notice to Mr Y and in its subsequent review of its original decision SLAB withheld the requested information relating to applicant 1 under sections 26(a) and 38(1)(b) of FOISA. I shall first consider section 26(a) and then section 38(1)(b) reviewing any arguments against the application of the exemptions. I shall also consider whether SLAB does hold information in relation to applications 2 and 3.

Section 26(a) – Prohibited by or under an enactment

15. SLAB stated in its refusal notice that the information supplied by a third party in their application for legal aid (i.e. the information withheld from the applicant in this case) was exempt under section 26(a) of FOISA.
16. The enactment that SLAB relied upon to withhold the information was section 34 of the Legal Aid (Scotland) Act 1986 (reproduced in the Appendix). SLAB provided a copy of this section of the 1986 Act and the investigating officer confirmed that it was a correct copy.



17. Section 34(1) of the Legal Aid (Scotland) Act 1986 is clear prohibition on disclosure of information provided to SLAB for the purposes of that Act without the consent of the person by or (in the case of the applicant for legal aid) on whose behalf the information was provided. Disclosure in contravention of section 34(1) is a criminal offence. None of the exceptions or qualifications to section 34(1) in subsections (2) and (3) are capable of applying to the information withheld or the circumstances of this application.
18. I take the requirement in section 34(1) of the 1986 Act to be a requirement for explicit consent. The person who had supplied the information was asked for such consent by SLAB but did not give it.
19. Section 34 of the Legal Aid (Scotland) Act 1986 was also used to withhold information from the Commissioner. SLAB did ask the individual who provided the information to SLAB in their application for legal aid if the information could be released to the Commissioner. As indicated at paragraph 13 above, this consent was refused..
20. Having considered the terms of section 34 of the Legal Aid (Scotland) Act 1986, I agree with SLAB that the information requested by Mr Y could not legally be released. I accept that the relevant prohibition on disclosure applies as much to disclosure to me for the purposes of FOISA as to disclosure to anyone else and therefore that SLAB could not legitimately have provided me with a copy of the information it had withheld from Mr Y. In all the circumstances, however, having considered the submissions and other information provided to me for the purposes of this investigation, I am satisfied that the information withheld would have fallen within the descriptions of information contemplated by section 34.
21. Section 26(a) applies to exempt information even if its disclosure is prohibited by or under an enactment. The enactment relied upon by SLAB was section 34 of the Legal Aid (Scotland) Act 1986, which I have confirmed does apply to prohibit disclosure of the information withheld.
22. Section 26(a) of FOISA is an absolute exemption and is not subject to the public interest test, and I therefore uphold SLAB's decision not to disclose the information to Mr Y on the basis of section 26(a).
23. In his application to me for a decision, Mr Y made reference to the Human Rights Act and a recent decision by the Privy Council. The investigating officer did ask Mr Y if he could elaborate on how these related to his request for information. Mr Y responded as detailed in paragraph 11 above.



24. While I note the points made by Mr Y, I can only consider whether the public authority (i.e. SLAB) acted in accordance with Part 1 of FOISA in withholding information from him. Given that I have upheld SLAB's application of section 26(a) to the information withheld, I am unable to consider the points raised by Mr Y (which have no bearing on the application of the exemption).

Section 38 – Personal Information

25. Under the DPA, SLAB did release to Mr Y his own personal information from the application file for applicant 1. However SLAB refused to supply personal information related to a third party. Since I have already considered section 26(a) of FOISA and agreed with its application to the information withheld, I do not need to consider the application of section 38(1)(b) to the information.

Information not held by SLAB

26. I have also considered whether any information was held by SLAB regarding applications 2 and 3.
27. In its response to Mr Y's request for review on 8 April 2005, SLAB stated that 'civil application files are normally destroyed within twelve months of the final decision to grant or refuse aid', but that a destruction schedule was kept for destroyed files.
28. Within SLAB's final retention policy (sent to the investigating officer on 30 September 2005) it is specified that files are destroyed within 1 year of the final decision having been made and that a schedule is kept for destroyed files.
29. The investigating officer confirmed with SLAB that the destruction schedule existed for application files 2 and 3 and that they had been destroyed prior to Mr Y's information request. Therefore, I am satisfied that the information was not held by SLAB either at the time of Mr Y's request or subsequently and that SLAB applied section 17 of FOISA correctly to the relevant parts of Mr Y's request.



Decision

I find that SLAB complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr Y's request for information, in applying the exemption under section 26(a) of FOISA to the information withheld and advising that certain of the information requested was not held and therefore applying section 17 of FOISA.

Appeal

Should either SLAB or Mr Y 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.

Kevin Dunion
Scottish Information Commissioner
29 August 2006



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),if it held the information to which the request relates; but
 - (b) the authority does not hold that information, it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.
- (2) Subsection (1) is subject to section 19.
- (3) Subsection (1) does not apply if, by virtue of section 18, the authority instead gives the applicant a refusal notice.

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;
 - (b) for the purpose of investigating , prosecuting or determining any complaint of professional misconduct—
 - (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).
- (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.