

# Decision Notice



Decision 118/2010 Mr Peter Cherbi and the Scottish Ministers

Discussions about the Law Society of Scotland and FOI

Reference No: 200901449  
Decision Date: 12 July 2010

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## Summary

Mr Peter Cherbi asked the Scottish Ministers (the Ministers) for information about discussions on bringing the Law Society of Scotland within the scope of Freedom of Information legislation. The Ministers provided some information but withheld other information covered by the request under sections 29(1) and 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Cherbi was not satisfied with the Ministers' response. Following a review, some additional information was provided but the decision to withhold other information was upheld. Mr Cherbi remained dissatisfied and applied to the Commissioner for a decision.

During the investigation the Ministers released more of the withheld information. After investigation, the Commissioner found that the Ministers had correctly withheld certain information under sections 36(1), 29(1)(a) and 25(1) of FOISA, most of this either being subject to legal professional privilege (section 36(1)) or relating to the drafting of correspondence. He found that one piece of information had been wrongly withheld under section 29(1)(a) of FOISA, however, on the basis that while it related to the development of Scottish Administration policy the public interest favoured disclosure. He required this to be provided to Mr Cherbi.

## 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 (Effect of exemptions); 25(1) (Information otherwise accessible); 29(1)(a) (Formulation of Scottish Administration policy etc.); 36(1) (Confidentiality)

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 June 2009, Mr Cherbi made a request for "all documents and materials relating to any discussions involving bringing the Law Society of Scotland within the scope of Freedom of Information legislation".
2. On 16 July 2009, the Ministers provided some information about an early review of the operation of FOISA which included reference to the Law Society of Scotland. The Ministers notified Mr Cherbi that any other information covered by his request had been withheld under sections 29(1) and 36(1) of FOISA.



3. On 16 July 2009, Mr Cherbi asked the Ministers for a review of their decision. He stated that as the information released to him was around 3 years old, he considered it to be in the public interest for all information relating to his request to be released.
4. The Ministers provided their review response on 10 August 2009. They provided Mr Cherbi with a number of additional documents which were now considered to fall within the scope of his request (having interpreted it more broadly) and which they did not consider to be exempt from disclosure under FOISA. However, the decision to withhold the remaining information under sections 29(1) and 36(1) of FOISA was upheld.
5. On the same day, 10 August 2009, Mr Cherbi sent an email to the Commissioner stating that he was dissatisfied with the outcome of the Ministers' review and applying for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Cherbi 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. The case was then allocated to an investigating officer.
7. It should be noted that the Ministers subsequently argued that Mr Cherbi's application for a decision from the Commissioner was invalid, before withdrawing these objections.

## Investigation

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8. On 13 August 2009, the Ministers were notified in writing that an application had been received from Mr Cherbi and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested on 28 August 2009, at which time the Ministers notified the Commissioner that some of the information was considered to be exempt from disclosure under section 38(1) and 25(1) rather than, or in addition to, the exemptions already cited. The case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Ministers, providing them with an opportunity to comment on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to provide detailed reasons for their reliance on the exemptions cited, and were invited to comment further on the public interest issues surrounding the disclosure or non-disclosure of the information withheld.



10. The Ministers provided their comments on Mr Cherbi's application, along with their reasons for considering that some information could lawfully be withheld under certain exemptions in FOISA. The Ministers advised that they had taken the opportunity to reassess the information withheld and had decided more should be released. This information was sent to Mr Cherbi on 2 October 2009. The submissions received from the Ministers and Mr Cherbi, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner has considered the withheld information and all of the submissions made to him by both Mr Cherbi and the Ministers and is satisfied that no matter of relevance has been overlooked.

### Information withheld under section 36(1) of FOISA

12. The Ministers applied the exemption in section 36(1) of FOISA to information in 8 of the documents identified as falling within the scope of Mr Cherbi's request (documents 2, 3, 8, 9, 10, 13, 14 and 15 as numbered on the schedule provided by the Ministers). Section 36(1) of FOISA provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.
13. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For the exemption in section 36(1) of FOISA to apply to this particular type of communication, certain conditions must be fulfilled. The information withheld must relate to communications with a legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser. The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of the legal adviser's professional relationship with his/her client.
14. The Ministers stated that the information withheld under section 36(1) of FOISA consisted of exchanges between solicitors of the Scottish Government Legal Department (the SGLD) and officials on a subject which, in their words, remained a "live" issue. The Ministers considered it vital to the successful working of any solicitor/client relationship that both parties could be confident that all information passing between them would be treated confidentially, as only then would the respective parties feel able to give a full and frank account of the facts, context, risks etc., as appropriate. They believed that any impediment to this full and frank exchange would gravely undermine the solicitor/client relationship and ultimately the quality of the advice provided.



15. After examining the information withheld under section 36(1), the Commissioner is satisfied that in each case it is information to which a claim of confidentiality of communications could be maintained in legal proceedings, in consisting of communications between the Scottish Government's lawyers and their clients (their clients being Scottish Government officials seeking legal advice) in respect of which legal professional privilege could be claimed. The Commissioner therefore accepts that the exemption in section 36(1) applies, subject to the public interest test in section 2(1)(b) of FOISA.

*Public interest*

16. Under section 2(1)(b) of FOISA, exempt information can only be withheld if, in all circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
17. In his application to the Commissioner, Mr Cherbi submitted that it was in the public interest for all material relating to the Law Society of Scotland and FOI legislation to be made public, stating that for several years there has been no substantive attempt to bring the Law Society of Scotland within the scope of FOISA, which (he argued) had left an imbalance in regulation of legal services in Scotland due to the Scottish Legal Complaints Commission (the SLCC) being covered by FOISA.
18. In a later submission (27 November 2009), Mr Cherbi contended that there was a clear official policy of keeping the Law Society of Scotland outwith the scope of FOISA and there had been a deliberate attempt to mislead the public on this issue. He referred to correspondence with the Scottish Government in 2006, which indicated that the Ministers might or might not consider bringing the Law Society of Scotland within the scope of FOISA. Further correspondence from the Government, in 2008, stated that no decision had been taken but the matter continued to be under active review. However, an email dated 23 March 2009 (document 12 in the Ministers' schedule, released in response to Mr Cherbi's request) demonstrated, in his view, that there was no intention of bringing the Law Society of Scotland within the scope of FOI legislation. To allow questions to be asked on this point and full debate on the issue, he argued that the terms of the relevant legal advice required to be released.
19. Mr Cherbi also explained why he considered the Law Society of Scotland should be brought within the scope of FOISA for reasons of public interest. He argued that the SLCC, which is covered by FOISA, is much more transparent and publicly accountable than the Law Society of Scotland, the Faculty of Advocates or the Scottish Solicitors Discipline Tribunal, which are not covered. He questioned the need for secrecy being maintained in relation to the key regulators of the legal profession while the single gateway for complaints, the SLCC, had (in his view) operated without difficulty while covered by FOISA.



20. The Ministers considered any public interest in disclosure was wholly outweighed by the need to maintain the exemption in this case. They argued that the disclosure of legal advice, or requests for legal advice, would have serious consequences for the solicitor/client relationship and might undermine the free and frank way in which the SGLD and Government officials routinely engaged. The Ministers contended that this would be detrimental to the public interest.
21. Additionally, the Ministers argued that, given the importance which the courts (and many of the Commissioner's Decisions) placed on the strong public interest in maintaining the right to confidentiality of communications between legal advisor and client on administration of justice grounds, such communications should be released only in highly compelling cases. The Ministers did not consider this to be such a case.
22. The Commissioner notes that there is already a considerable amount of information in the public domain on the issue of extending coverage of FOISA. The Scottish Government issued a discussion paper on this issue in November 2008<sup>1</sup>, and has published the responses on its website<sup>2</sup>. Some of the respondents proposed that coverage of FOISA should extend to the Law Society of Scotland.
23. The Commissioner has considered whether disclosure of the information withheld under section 36(1) of FOISA would contribute to debate on a matter of public interest, and whether the value of such a contribution would create a compelling public interest in disclosure. The Commissioner accepts that there is generally a strong public interest in protecting the right to confidentiality of communications between a legal advisor and their client, as considered in previous Decision Notices such as *Decision 023/2005 Mr David Emslie and Communities Scotland*.
24. The Commissioner has identified a public interest in the disclosure of information which would show whether the Ministers are, or have been, actively considering whether the Law Society of Scotland should be brought under FOISA, given that previous communications from the Scottish Government have raised some doubt on this point and given that the issue of extending coverage to the Law Society of Scotland has been raised within the context of a public consultation. The Commissioner accepts that disclosure of the legal advice withheld in this case would increase understanding of a matter which, to some extent, has become a subject of public debate.
25. However, on balance the Commissioner does not find that the public interest associated with the disclosure of the legal advice is sufficiently compelling to outweigh the strong inherent public interest in maintaining the confidentiality of communications between a legal advisor and their client. The Commissioner does not accept that the lack of any published policy decision necessarily means that a matter has not been under review

<sup>1</sup> <http://www.scotland.gov.uk/About/FOI/discussionpaper>

<sup>2</sup> <http://www.scotland.gov.uk/About/FOI/Responses>





26. The Commissioner therefore accepts that the Ministers have correctly withheld information in 8 documents under section 36(1) of FOISA. Where this exemption has been found to apply to all the information in the document (in documents 13, 14 and 15), the Commissioner will not go on to consider whether the exemption in section 29(1)(a) of FOISA would also apply.

### **Information withheld under section 29(1)(a) of FOISA**

27. In terms of section 29(1)(a) of FOISA, information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.
28. For information to fall under the exemption in section 29(1)(a), it must relate to government policy. The Commissioner considers that this can be defined as the development of options and priorities for the Ministers, who will subsequently determine which options should be translated into political action and when this should be done. The formulation of government policy suggests the early stages of the policy process where options are considered, risks are identified, consultation takes place and recommendations and submissions are presented to Scottish Ministers. Development suggests the processes involved in improving upon or amending already existing policy and could involve the piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
29. The Ministers applied the exemption in section 29(1)(a) to information in documents 5, 6, 8, 9, 10, 13, 14, and 15. Where the Commissioner has already found all the information in these documents to have been properly withheld under section 36(1) of FOISA, he will not consider the information in relation to any other exemption cited. The Commissioner will therefore consider the exemption in section 29(1)(a) of FOISA in relation to all the information in documents 5 and 6, and some of the information in documents 8, 9 and 10.
30. The Commissioner also notes that some of the information in documents 5, 6 and 8 is duplicated in one of the documents already provided to Mr Cherbi (document 7 – letter to Cathy Peattie MSP, November 2006), subject only to the redaction of personal data (which Mr Cherbi did not require – see paragraph 44 below). He will therefore consider only the remaining, undisclosed, information in these documents under section 29(1)(a) of FOISA.
31. The Ministers argued, and the Commissioner accepts, that documents 5, 6, 8, 9 and 10 all contain information which relates to the formulation of policy, in relation to the extension of coverage of FOISA.

### *Public interest*

32. The Ministers acknowledged a general public interest in freedom of information and its application to various bodies and organisations, whether public or private. They also acknowledged the public interest in openness and transparency in policy formulation.



33. However, the Ministers considered these public interest considerations to be outweighed in this case by the public interest in ensuring that officials were able to formulate policy in a private space without the fear of premature release. The Ministers stated that the extension of FOISA coverage (which remained very much an ongoing area of policy formulation) was a complex issue and not without controversy. Persuasive arguments could be made either way and officials required a degree of private space in which to test the competing claims, develop and formulate policy and then advise Ministers on all options, in order for Ministers to reach an informed view in private.
34. The Ministers argued that if they were required to disclose the withheld information in response to Mr Cherbi's request, this might affect future handling of such issues. Officials would be concerned that ideas in their early stages of formulation, with no guarantee or even expectation of further development, would be released entirely out of context. This could result in a far more conservative approach to policy formulation and make officials less inclined to fully consider and record a variety of options.
35. In particular, the Ministers did not consider it to be in the public interest to release (prematurely, in their view) discussion material which could lead to false expectations being raised or premature intervention from the affected or other interested parties. They strongly believed that the balance of public interest lay in allowing policy discussion to proceed without disclosing the content of that discussion before a settled view had been reached. They stated that once the Ministers had determined how to proceed, they would justify their approach.
36. The Ministers took the view that these arguments applied particularly to material which was in draft format, noting that the final version of the document had been released to the applicant.
37. Mr Cherbi's views on the public interest in disclosure of the information have been outlined above (paragraphs 17 – 19) and were considered by the Commissioner in reaching his decision.
38. The Commissioner finds that there is little substantive information in documents 5 and 6 which was not disclosed in the final version of the document (document 7, disclosed subject to redaction of personal data). In the circumstances, the Commissioner does not find that disclosure of the remaining information in documents 5 and 6 would contribute in any significant way to the public interest in understanding the decision-making process on the issue of extending FOISA coverage. Because the information is in draft format, he finds that the general public interest in openness and transparency in relation to formulation of policy is outweighed in this case by the public interest in allowing Ministers and officials to develop and refine that policy.
39. The Commissioner therefore finds that the Ministers correctly withheld the information in documents 5 and 6 under section 29(1)(a) of FOISA.





40. In relation to document 8 the Commissioner again notes that some of the information is duplicated in document 7, which has already been disclosed to Mr Cherbi. Another letter forming part of document 8 has also been disclosed (document 4), with the exception of some personal data relating to the writer (see paragraph 44 below in relation to the redaction of personal data). Most of the remaining undisclosed information relates to the drafting process for document 7: again, the Commissioner finds in relation to this information that the general public interest in openness and transparency in relation to formulation of policy is outweighed by the public interest in allowing space to Ministers and officials to develop and refine that policy.
41. The remaining part of document 8 is the email (sent 30 October 2006 at 10:01, with subject "Law Society & Freedom of Information") which gave rise to the letter to Cathy Peattie MSP (document 7). The Commissioner does not find that the public interest arguments put forward by Ministers apply strongly to this information, and concludes that in this instance the balance of public interest supports the disclosure of information providing a context to the information already disclosed.
42. After considering the information withheld under section 29(1)(a) of FOISA in documents 9 and 10, the Commissioner accepts that this information relates to the drafting process for the letter which was eventually disclosed as document 7. As in the case of documents 5 and 6 (and, in part, document 8), the Commissioner finds in relation to this information that the general public interest in openness and transparency in relation to formulation of policy is outweighed by the public interest in allowing Ministers and officials space to develop and refine that policy.
43. The Commissioner therefore finds that in general the exemption in section 29(1)(a) of FOISA was correctly applied, but also that part of document 8 was wrongly withheld under this exemption as the balance of the public interest favoured disclosure.

#### **Personal data withheld under section 38(1)(b) of FOISA**

44. The Ministers redacted some information from the documents provided to Mr Cherbi on the grounds that it was personal data which was exempt from disclosure under section 38(1)(b) of FOISA. During the investigation, Mr Cherbi confirmed that he did not require disclosure of this information: the Commissioner has therefore not considered further whether this information was correctly withheld under section 38(1)(b).

#### **Information withheld under section 25(1)**

45. The Ministers withheld one document under section 25(1) of FOISA, which exempts information which the applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA. This exemption is not subject to the public interest test set down by section 2(1) of FOISA.



46. The information withheld under section 25(1) consists of a letter sent to Mr Cherbi by a Scottish Government official (December 2008). The Commissioner therefore finds that Mr Cherbi can reasonably obtain the information contained in this document other than by making an information request for it, and consequently accepts that the Ministers were correct in their application of section 25(1) of FOISA to this information.
47. The Commissioner notes that Mr Cherbi was not advised by the Ministers that any information was considered exempt from disclosure under section 25(1).

### **Conclusion**

48. Having considered all the information withheld from Mr Cherbi and the relative submissions, the Commissioner finds that the Ministers generally complied with Part 1 of FOISA in dealing with Mr Cherbi's request. The Commissioner cannot take this view, however, in relation to some of the information in document 8, which he considers to have been wrongly withheld under section 29(1)(a) of FOISA (the public interest in disclosing that information outweighing the public interest in maintaining the exemption). The Commissioner therefore requires the Ministers to provide Mr Cherbi with the email identified in paragraph 41 above.

### **DECISION**

The Commissioner finds that the Scottish Ministers generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Cherbi. The Ministers correctly withheld information under sections 25(1), 29(1)(a) and 36(1) of FOISA.

The Commissioner also finds, however, that information within one document was wrongly withheld under section 29(1)(a) of FOISA, and that in doing this the Ministers breached Part 1 (and in particular section 1(1)) of FOISA. The Commissioner requires the Ministers to provide Mr Cherbi with this information (as described in paragraph 41 above) by 2 September 2010.



## Appeal

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Should either Mr Cherbi or the Scottish Ministers 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**  
**12 July 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
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (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 –

- (a) section 25;

...

##### 25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

##### 29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to–

- (a) the formulation or development of government policy;



...

**36 Confidentiality**

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...