

# Decision Notice



Decision 250/2011 Frances McCartney and the Scottish Legal Aid Board

Board meeting paper

Reference No: 201101374

Decision Date: 16 December 2011

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Ms McCartney requested from the Scottish Legal Aid Board (SLAB) the information contained in a paper which was discussed during a board meeting. SLAB responded by disclosing the paper, subject to the redaction of a small amount of information which was considered exempt from disclosure under section 30 of FOISA. Following a review, during which SLAB additionally applied the exemption in section 27(1) of FOISA to the withheld information, Ms McCartney remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, SLAB disclosed the information that had previously been withheld to Ms McCartney. The Commissioner found that SLAB had acted in accordance with Part 1 of FOISA by withholding that information at the time of Ms McCartney's requirement for review. He found that it was exempt from disclosure under the terms of section 30(b)(ii) of FOISA, on the grounds that disclosure at that time would have been likely to inhibit the free and frank exchange of views for the purposes of deliberation. The Commissioner did not require SLAB 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)(b) (Effect of exemptions); 16(1) and (2) (Refusal of request) and 30(b)(ii) (Prejudice to effective conduct of public affairs)

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 30 March 2011, Ms McCartney wrote to SLAB with the following request:  
"I would be grateful if you could send me a copy of the paper which formed the agenda item 17 at the Board meeting of 7 February – 17, update on travel package."
2. By way of background information, the paper in question related to proposals by SLAB for the possible amendment of the travel mileage rates it pays to solicitors and SLAB staff, with those proposals, at the time, due to be discussed with the Law Society of Scotland (LSS) and the Faculty of Advocates (FOA) prior to any changes being implemented.



3. SLAB asked Ms McCartney if she could clarify what information she was seeking within the paper in question and Ms McCartney responded (on 5 April 2011) that she would like all the information contained in the paper, particularly in relation to travelling rates.
4. SLAB emailed Ms McCartney on 6 April 2011, disclosing a copy of the paper in question. A limited amount of information relating SLAB's proposals regarding the mileage reimbursement rates was redacted from this document on the basis that it was exempt from disclosure under section 30 of FOISA.
5. SLAB did not identify which exemption(s) in section 30 of FOISA was/were considered applicable to that information. It explained that it intended to engage in a negotiation process with LSS regarding the mileage rates. It went on to state that "this exemption" applies because disclosure of the withheld information would or would be likely to inhibit substantially the free and frank exchange of views for the purpose of deliberation during those negotiations (suggesting that section 30(b)(ii) was considered applicable), a situation which would be likely to prejudice substantially the effective conduct of public affairs (suggesting section 30(c) was possibly also being applied).
6. On 4 May 2011, Ms McCartney wrote to SLAB requesting a review of its decision. In particular, Ms McCartney stated that SLAB had not provided her with any specifics of what the alleged substantial prejudice was in relation to its application of section 30 of FOISA. She stated her view that there was no statutory basis for SLAB only negotiating with LSS and therefore SLAB's submission on that point should not be a factor in withholding any information.
7. SLAB notified Ms McCartney of the outcome of its review on 3 June 2011. It upheld its previous decision to withhold information in terms of section 30 of FOISA. At this stage, SLAB also applied the exemption at section 27(1) of FOISA, which applies to information intended for future publication, to the withheld information.
8. On 22 July 2011, Ms McCartney wrote to the Commissioner, stating that she was dissatisfied with the outcome of SLAB's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Ms McCartney 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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10. On 23 August 2011, SLAB was notified in writing that an application had been received from Ms McCartney and was asked to provide the Commissioner with any information withheld from her. SLAB responded with the information requested and the case was then allocated to an investigating officer.



11. The investigating officer subsequently contacted SLAB, 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, SLAB was asked to justify its reliance on any provisions of FOISA it considered applicable to the information withheld from Ms McCartney.
12. On 4 November 2011, SLAB disclosed a complete copy of the paper in question to Ms McCartney. It indicated that its intention had been to enter into negotiations over the implementation of a revised mileage rate, and it had previously felt that it would have prejudiced those negotiations if it had revealed the proposed rate. It indicated that, since SLAB no longer proposed to alter mileage rates, disclosure of the rate that had been proposed would no longer cause any prejudice to its affairs.
13. Ms McCartney subsequently advised the investigating officer that she remained aggrieved that the information previously redacted from this document had, in her view, been withheld without any justification. She indicated that she still required a decision from the Commissioner on whether SLAB had handled her request for information in accordance with FOISA.
14. On 11 November 2011, SLAB provided its submissions in support of its previous decision to withhold some information within the document requested by Ms McCartney. It confirmed that it considered that the exemptions in sections 27(1) and 30(b)(ii) of FOISA were applicable to that information at the time of its review concerning Ms McCartney's request.
15. Ms McCartney was also asked by the investigating officer for any further submissions she wished to make, but at the time of writing this decision no further submissions had been received from her.
16. All relevant submissions from SLAB and those which Ms McCartney provided in her application to the Commissioner of 22 July 2011 will be considered fully 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 Ms McCartney and SLAB and is satisfied that no matter of relevance has been overlooked.

### Background information

18. By way of background, SLAB highlighted that the paper sought by Ms McCartney was not exclusively about the determination of mileage rates, but that it sought to establish both a rate for the hourly fee paid to private legal practitioners when travelling on legal aid business and also to develop a mileage rate for reimbursement of car travel costs.



19. SLAB went on to explain that the hourly fee paid to private legal practitioners when travelling on legal aid business, in common with all legal aid fees, is set by the Scottish Government through regulation. It noted that there is no statutory or regulatory basis for the Scottish Government to determine the mileage rate, nor had it been the custom or practice of the Scottish Government to signal the rates at which mileage can be reimbursed for travel costs.
20. SLAB commented that the redaction in the paper was minimal, and related solely to a proposed new mileage rate.
21. It indicated that there is no established negotiation or consultation process for the setting of mileage rates and that, unlike the majority of fees for legal aid, it is SLAB's responsibility to set a rate for mileage. However, it would normally do so only after consultation with the legal profession, customarily through LSS.
22. SLAB stated that it had envisaged a communication process that provided for sharing the detail of the proposals with the Legal Aid Committee of LSS, prompting a process of negotiation of the rate, ahead of dissemination of the agreed arrangements with the profession at large. It noted that the paper disclosed to Ms McCartney clearly indicated that it had been agreed that the proposals would be discussed with both LSS and FOA.
23. It explained further that there was no defined timescale for a negotiating process, nor any deadline for reaching an amended mileage rate. However, given a Scottish Parliamentary election was imminent at the time the proposals were drawn up, it decided, given that the costs are met from Government funds, that it would be inappropriate to embark on such negotiations until the election had been settled.
24. Planned discussions after the election did not take place, and after further internal discussions and deliberations on the matter, SLAB determined (in October 2011) that it would not pursue its proposal to alter mileage rates, and it would continue with the status quo.
25. SLAB explained that, once it had been established that negotiations over the mileage rate were no longer necessary, it had disclosed the redacted information within the paper to Ms McCartney in full.
26. While the information has now been disclosed, this decision considers whether SLAB was entitled to withhold the redacted information from Ms McCartney under the exemptions at sections 30(b)(ii) and 27(1) of FOISA at the time of its response to her review request on 3 June 2011.
27. The withheld information under consideration is limited, comprising two references to the proposed mileage rate, a sentence indicating that no change was proposed in relation to another mileage rate and two further sentences outlining SLAB's reasoning for its proposals.
28. The Commissioner will consider section 30(b)(ii) in the first instance.



### **Section 30(b)(ii) of FOISA**

29. In order to rely on the exemption laid down in section 30(b)(ii), SLAB must show that disclosure of the information under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
30. As the Commissioner has said in previous decisions, his view is that the standard to be met in applying the tests contained in section 30(b)(ii) is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion (although this may also be relevant), but whether the release of the information would, or would be likely to, inhibit substantially the free and frank exchange of views.

### **Submissions from SLAB**

31. SLAB submitted that to have pre-empted discussion of the proposed mileage rate with the LSS negotiating team, by its prior release to Ms McCartney, would have inevitably jeopardised an effective process of negotiation, which (SLAB maintained) relies entirely on the unfettered free and frank exchanges of views between the negotiating parties which may result in reaching agreement on a rate other than that being proposed.
32. SLAB stated that its intention in entering negotiation on the rate would have been to discuss and debate the proposed changes and consider any additional or alternative proposals. SLAB submitted that releasing the withheld information would have had a substantial inhibiting effect on both the LSS negotiating team and on SLAB itself. SLAB believed that if the proposed rate had been in the public domain and if a rate other than the proposed rate were settled upon, either of the parties may have found themselves criticised, and as such, the participants would be extremely unlikely to give opinions freely or readily consider compromises.

### **Submissions from Ms McCartney**

33. In her application to the Commissioner, Ms McCartney expressed her view that the disclosure of the withheld information would actually substantially improve the effective conduct of public affairs.
34. She stated that there had been disquiet over the consultations in private between SLAB and LSS which, in her view, SLAB holds to represent the legal profession at large and that there had been some feeling that LSS had not always represented all sections of the profession.
35. Ms McCartney went on to submit that her concern was fundamentally whether individual clients would have the opportunity to make representations, either via their legal representatives or directly to SLAB, about a cut in legal aid which would affect whether they would be able to obtain legal advice. Ms McCartney submitted that such representations could be made only if there was transparency about the proposals.





36. Ms McCartney also stated that it appeared that insofar as SLAB had the role of consulting with the profession and other interested bodies, that it was her view that such consultation should not be exclusive to LSS. She indicated that a representative of a negotiating team within LSS had indicated that they would be happy for the information to be widely known, and saw no difficulty with the proposed change in the travel rate being more widely known before they were formally consulted.
37. She went on to submit that in her view the reasons that SLAB gave for withholding the information in the paper related more to an inconvenience to SLAB in potentially having a wider consultation than it may have wished and that there was no obligation on SLAB to exclusively consult with LSS alone.
38. It was Ms McCartney's view that there would be no inhibition on the provision of advice or exchange of views, at least from the LSS's negotiating team's perspective, and that the exemption at section 30 of FOISA did not apply.

### **The Commissioner's findings**

39. The Commissioner has noted all of the submissions made by both Ms McCartney and SLAB. While he has some sympathy with the concerns expressed by Ms McCartney regarding the extent of consultation taken forward by SLAB, these considerations are not directly relevant to the test set out in section 30(b)(ii) of FOISA. This asks only whether the disclosure of information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
40. In this context, while appreciating the concerns highlighted by Ms McCartney, the Commissioner recognises that the process planned by SLAB was one in which its negotiations would take place with the LSS, the body representing the profession directly affected by the changes. It is within the context of this process that SLAB has argued disclosure would be likely to inhibit the free and frank exchange of views between SLAB and LSS.
41. The test within section 30(b)(ii) does not allow the Commissioner's consideration of that exemption to include evaluation of the appropriateness of SLAB's plans or whether the negotiation process should involve a wider group of stakeholders and interested parties. If the Commissioner is satisfied that disclosure would have been likely (at the time of SLAB's review) to substantially inhibit the free and frank exchange of views between LSS and SLAB, then the exemption was applicable.
42. However, Ms McCartney's concerns about that process are relevant factors when considering the public interest test associated with the exemption in section 30(b)(ii) (on which, see below).



43. Having considered the submissions from both parties, the nature of the withheld information, and the timing of Ms McCartney's request, the Commissioner accepts that disclosure of the withheld information at the relevant time would have inhibited, or would have been likely to inhibit, substantially the free and frank exchange of views for the purposes of deliberation. He considers that public disclosure of SLAB's opening position in its negotiations with LSS in advance of those discussions would have been likely to inhibit those discussions, by limiting the scope for the parties to debate those proposals, or propose and consider alternative options. Having reached this conclusion, he accepts that disclosure would, or would have been likely, at the time of SLAB's review, to inhibit substantially the free and frank exchange of views for the purposes of deliberation between SLAB and LSS.
44. In reaching this conclusion, the Commissioner has noted Ms McCartney's assertion that a representative of LSS had indicated that it would have no difficulty with the proposed rate being known before discussions began. The Commissioner has been given no additional evidence to support this claim. However, he considered whether the exemption would apply, if it were accepted that representatives of LSS would not be inhibited by disclosure of the withheld information. Having done so, the Commissioner still accepts that public disclosure of the withheld information prior to the negotiations would have been likely to inhibit substantially representatives of SLAB with respect to the free and frank exchange of views for the purposes of deliberation.
45. As a result, the Commissioner finds that the exemption in section 30(b)(ii) was correctly applied by SLAB to the information within the board paper that was withheld at the time when SLAB responded to Ms McCartney's request and subsequent request for review.

### **The public interest**

46. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. Where this exemption is found to have been correctly applied, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption in section 30(b)(ii).
47. It was SLAB's view that in this case the public interest would be best served by SLAB securing the best result for the public purse, whilst maintaining the access to justice for the public. SLAB asserted that its negotiating position was most likely to secure such an outcome where it entered negotiations without either party feeling that its ability to exchange views was fettered by prior disclosure of SLAB's opening negotiating position. SLAB submitted that prior disclosure of the withheld information would have been very likely to have impacted adversely on the effective participation of both parties in the negotiations between the SLAB and the LSS negotiating teams.





48. As noted above, Ms McCartney has raised concerns that SLAB planned to enter discussions and negotiations regarding its proposed changes to mileage rates with the LSS, and not undertake a wider consultation on the proposed changes. The Commissioner has considered these submissions in relation to the public interest test. He understands that Ms McCartney considers that the public interest would have been better served at the time of SLAB's review by disclosure of the withheld information, because that disclosure would have allowed a wider range of interested parties to make representations to SLAB about its proposals for amending the mileage rate.
49. Ms McCartney also commented that there is no consistency as to the way SLAB carries out consultations. She noted instances where it has consulted with groups or bodies other than the LSS, and submitted that where SLAB consults with the legal profession and other interested bodies, this is not exclusive to the LSS.
50. The Commissioner acknowledges that there would be a degree of public interest in dissemination of the proposed mileage rates, in that it would give the public an insight into a public body's intentions towards expenditure or savings regarding public funding. He also recognises that disclosure would enable interested parties to make representations to SLAB on those proposals. The Commissioner considers it to be in the public interest that decision making by public authorities, particularly with respect to the expenditure of public funds, is transparent, and takes into consideration a range of views.
51. However, it is not for the Commissioner to determine how widely a public authority should consult on its proposals, particularly in a case where planned consultation would involve the representative body for the profession directly affected by the changes. The Commissioner considers it to be a matter for the legal profession if certain members of LSS do not consider that it appropriately represents their interests.
52. When balancing the public interest in this case, the Commissioner must also acknowledge that disclosure of the withheld information at the time of SLAB's review would have given LSS, FOA and any other interested parties prior knowledge of SLAB's initial negotiating position, which could weaken SLAB's position in any negotiations. This in turn could lead to an undermining of SLAB's ability to strike the best possible deal for the public purse, taking into account both the cost in financial terms and any potential repercussions to the delivery of the legal aid service.
53. On balancing the public interest for and against disclosure in this case, the Commissioner has concluded that, on balance, the public interest in disclosure is outweighed by the public interest in maintaining the exemption. It is the Commissioner's view that the interests of the public would be best served by SLAB's negotiating stance remaining private prior to any negotiations (either with LSS or for that matter with any other body which SLAB may have been considering discussions with) over monies to be paid from the public purse.
54. The Commissioner therefore finds that SLAB correctly relied on the exemption at section 30(b)(ii) of FOISA. Having reached this conclusion the Commissioner will not go on to consider SLAB's reliance on the exemption at section 27(1) of FOISA.



55. The Commissioner therefore finds that SLAB complied with Part 1 of FOISA by withholding those parts of the Board paper that it did at the time of its response to Ms McCartney's review requirement, at which time it held a genuine expectation of negotiations taking place between itself and LSS and FOA on the matter.

### **Additional commentary**

56. Although Ms McCartney did not ask the Commissioner to make a decision on this point, the Commissioner considers it appropriate to comment on the content of SLAB's responses to Ms McCartney's request and subsequent request for review.
57. As noted in paragraphs 5 and 7 above, these responses did not specify clearly which exemption(s) within section 30 were being applied by SLAB when withholding information within the requested document. Section 30 of FOISA includes four distinct exemptions, but responses from SLAB referred only to "the section 30 exemption". The additional explanations suggested that section 30(b)(ii) was considered applicable, possibly alongside and 30(c).
58. During the investigation SLAB clarified that it had intended to apply the exemption in section 30(b)(ii).
59. Sections 16(1) and (2) of FOISA provide that when refusing a request on the basis that information is exempt from disclosure, a public authority must issue a refusal notice which includes certain content. In particular, the refusal notice should specify the exemption in question (section 16(1)(c)) and state (if not otherwise apparent) why the exemption applies (section 16(1)(d)).
60. The Commissioner notes that the refusal notice issued by SLAB did not fully meet these requirements, because it did not clearly specify which exemption was considered to be applicable. Although he has made no formal determination on this point within this decision, he would encourage SLAB to ensure that future refusal notices comply in full with the requirements of section 16 of FOISA, and make clear which exemption is considered to apply and why.

## **DECISION**

In relation to the matters raised in Ms McCartney's application, 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 Ms McCartney.



## Appeal

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Should either Ms McCartney or SLAB 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.

**Margaret Keyse**  
**Head of Enforcement**  
**16 December 2011**

## 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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

##### 16 Refusal of request



- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
  - (a) discloses that it holds the information;
  - (b) states that it so claims;
  - (c) specifies the exemption in question; and
  - (d) states (if not otherwise apparent) why the exemption applies.
- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.

...

### **30 Prejudice to effective conduct of public affairs**

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or

...