



Scottish Information  
Commissioner

**Decision 025/2008 Mr George Gebbie and the  
Scottish Legal Aid Board**

*Bonus payments made to staff and the decision making process in  
relation to a freedom of information request*

**Applicant: Mr George Gebbie  
Authority: Scottish Legal Aid Board  
Case No: 200601931 and 200700056  
Decision Date: 18 February 2008**

**Kevin Dunion  
Scottish Information Commissioner**

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## **Decision 025/2008 Mr George Gebbie and the Scottish Legal Aid Board**

***Request for details of payments of bonuses made to Scottish Legal Aid Board (SLAB) staff – request for details of the decision making process in relation to Mr Gebbie’s request for information – certain information withheld by SLAB under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 on the grounds that the information constituted the personal data of third parties and that to disclose this information would contravene the data protection principles – the Commissioner upheld SLAB’s decision to withhold the information***

### **Relevant Statutory Provisions and Other Sources**

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Freedom of Information (Scotland) Act 2002 (FOISA): section 1(1) (General entitlement) and 38(1)(b), (2)(a)(i) and (b) (Personal information)

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

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

### **Facts**

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Mr Gebbie wrote to the Scottish Legal Aid Board (SLAB) and requested details of payments of bonuses to SLAB employees over the past two years. SLAB provided Mr Gebbie with some information but withheld details concerning individual employees under section 38(1)(b) of FOISA. SLAB argued that the information consisted of third party personal information and that to disclose such information would breach the first data protection principle which requires that personal data are processed fairly and lawfully.

Mr Gebbie requested a review of SLAB’s decision. On review, SLAB upheld its original decision. Mr Gebbie remained dissatisfied and applied to the Commissioner for a decision.



Mr Gebbie then submitted a request to SLAB for details of the decision making process in relation to his request for information concerning bonus payments. SLAB provided Mr Gebbie with copies of all of the recorded information it held in relation to his original request, including its documented procedures for handling such requests.

SLAB withheld personal information which related to individuals who had been recipients of bonus payments under section 38(1)(b) of FOISA on the grounds that to disclose such information would breach the first data protection principle.

Mr Gebbie requested a review of SLAB's decision. On review, SLAB upheld its original decision. Mr Gebbie remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that SLAB had dealt with Mr Gebbie's requests for information in accordance with Part 1 of FOISA.

## **Background**

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### *Mr Gebbie's first request*

1. On 9 October 2006, Mr Gebbie wrote to SLAB requesting details of bonus payments that had been made to SLAB staff under its bonus payment scheme in the two years prior to the date of his request. Mr Gebbie asked SLAB to detail the amounts paid, the representative proportion of the recipients' annual salaries, identities of the recipients and details of the bases and performance indicators that were met by the individual recipients that justified the payments.
2. SLAB responded to Mr Gebbie on 3 November 2006. In its letter SLAB informed Mr Gebbie that it could not provide information which would reveal the identities of the recipients or amounts paid relating to the bonus payments to staff in general. SLAB added that it was unable to reveal the specific details of individual employees' performance indicators and objectives that were met by the individual recipients under its performance management system which justified any payments made.
3. However, in order to assist with Mr Gebbie's enquiry, SLAB provided him with information concerning the total amounts paid to eligible staff in August 2005 and August 2006. General details of the basis upon which these payments were made were also provided by SLAB. This information was provided in such a way as to avoid revealing the identity of any individual member of staff.



4. SLAB informed Mr Gebbie that since part of his request related to information about named individuals, such information had been withheld under section 38(1)(b) of FOISA on the grounds that to disclose such information would breach the data protection principles set out in the DPA.
5. Mr Gebbie was dissatisfied with the response to his request and he wrote to SLAB on 4 November 2006, requesting a review of its decision to withhold information he had requested. In his letter Mr Gebbie maintained that he should be provided with the information he had requested on the grounds that it was no different in character to that routinely published by SLAB. He also argued that it did not seem tenable that there was a public interest in information relating to certain payments made by SLAB on the public's behalf but none in relation to how it disburses other payments from its funds amongst its own staff.
6. SLAB carried out a review of its decision to withhold information and communicated its findings to Mr Gebbie on 1 December 2006. In its letter SLAB informed Mr Gebbie that it was satisfied that the original decision to withhold information was correct and it confirmed that decision.
7. Mr Gebbie was dissatisfied with the outcome of the review and, on 7 December 2006, applied to me for a decision.

*Mr Gebbie's second request*

8. On 4 November 2006, Mr Gebbie wrote to SLAB requesting details of the decision making process that had resulted in SLAB's decision to withhold information in relation to his first information request, detailed above. Mr Gebbie asked to be provided with the identity of all persons involved in making that decision, all persons consulted in relation to it and copies of all file notes, memoranda, notes of meetings, notes of telephone calls and e-mails relating to the decision. In particular, he asked to be provided with the identity of those persons involved in the making of the decision or consulted in relation to it, who had been the recipients of bonus payments under the bonus payment scheme during the period referred to in his first information request.
9. SLAB responded to Mr Gebbie on 1 December 2006. In its letter SLAB informed Mr Gebbie that it was obliged under FOISA to provide recorded information only. Mr Gebbie was advised that no file notes, memoranda, notes of meetings or notes of telephone calls were made relating to the making of the decision and that the only recorded information that was held by SLAB in this regard was its documented procedures for handling freedom of information requests.



10. SLAB provided Mr Gebbie with a copy of its procedures along with copies of relevant e-mails that had been sent to the Director of Corporate Services asking for his approval of SLAB's draft decision letter to Mr Gebbie. SLAB also created a record for Mr Gebbie of the process which had been followed when dealing with his request. This detailed all persons involved in making the decision and all persons consulted in relation to it.
11. As regards the persons involved in making the decision and all persons consulted in relation to it, SLAB informed Mr Gebbie that it was not required to meet his request to reveal the identities of those who had been the recipients of bonus payments. Such information was considered by SLAB to be exempt from disclosure under section 38(1)(b) of FOISA on the grounds that it constituted information relating to individual employees and disclosure of such information would breach data protection principles.
12. Mr Gebbie was dissatisfied with the response to his request and he wrote to SLAB on 4 December 2006, requesting a review of its decision to withhold information he had requested. In his letter Mr Gebbie questioned whether he had been provided with all of the information that was held by SLAB relating to this matter, such as file notes and diary entries.
13. Mr Gebbie also requested further details concerning SLAB's response which included the identity of one of the individuals involved in the decision making process and which data protection principles would be breached in this instance, and he questioned the accuracy of the list provided by SLAB which set out the steps involved in processing his request.
14. SLAB carried out a review and communicated the outcome to Mr Gebbie on 22 December 2006. In its letter SLAB advised Mr Gebbie that a review had been conducted and it confirmed its original decision to withhold the information in question.
15. In relation to Mr Gebbie's request for file notes, memoranda, copies of meetings, notes of telephone calls and e-mails, Mr Gebbie was advised that the only recorded information which was held by SLAB in relation to his original request for information consisted of Mr Gebbie's letters, the replies he received from SLAB, two e-mails which had already been provided to him and two service request entries on SLAB's computerised system. Copies of the computer entries from the computerised system were provided to Mr Gebbie.
16. SLAB also informed Mr Gebbie that it was content that the record of events that had been provided to him was accurate and gave him a list of the names and job titles of those persons who had been mentioned in the record of events. SLAB added that these members of staff were all potentially eligible for a bonus payment but it would breach data protection legislation to provide information as to any payments made.



17. Further details were also provided to Mr Gebbie by SLAB concerning the data protection principles that it contended would be breached if such information were to be released. SLAB informed Mr Gebbie that disclosure of the information he had requested would breach the first and second data protection principles. It added that the information requested constituted personal data and to disclose it would in particular be a breach of the first data protection principle insofar as none of the conditions of schedule 2 of the DPA would be met.
18. Mr Gebbie was dissatisfied with the outcome of the review and, on 11 January 2007, applied to me for a decision.
19. Both cases were then allocated to an investigating officer and Mr Gebbie's applications were validated by establishing that on each occasion he had made a valid request for information to a Scottish public authority and had applied to me only after asking the authority to review its response to his initial request.

## **The Investigation**

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20. SLAB was notified on 17 January and 22 January 2007 that two applications had been received from Mr Gebbie and that an investigation into the matter had begun. SLAB was also asked to provide comments in terms of section 49(3)(a) of FOISA, along with supporting documentation for the purposes of the investigation.
21. SLAB was also contacted during the course of the investigation in order to clarify certain matters, including whether the senior managers of SLAB would consent to the release of information concerning the individual amounts they may have received in bonuses for the periods 2004-5 and 2005-6.

## **The Commissioner's Analysis and Findings**

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22. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by Mr Gebbie and SLAB and I am satisfied that no matter of relevance has been overlooked.



23. I will begin by considering the first of Mr Gebbie's requests for information which concerned his request for details of payments of bonuses to SLAB employees over the past two years.

### **Mr Gebbie's first information request**

#### *SLAB's response to Mr Gebbie's first request*

24. In its response to Mr Gebbie's request, SLAB provided him with details of the basis for payments made. It outlined SLAB's current pay and grading system and set out the parameters of its performance management system which provides bonuses to be paid each year to members of staff who have demonstrated excellent or very good performance in the previous reporting year.
25. SLAB provided Mr Gebbie with aggregated information concerning bonus payments made to its staff which did not reveal any specific information about individual staff members. Total payments of bonuses were provided for each year along with the total number of staff who had been awarded a bonus payment and the average amount of bonuses paid. SLAB provided Mr Gebbie with details of its remuneration system for its Chief Executive and Directors and details of how assessments of performance were measured against corporate and operational objectives.
26. In its response to Mr Gebbie's request for review, SLAB reaffirmed its original decision that to disclose information about bonus payments made to individual members of staff would be in breach of SLAB's obligations under the DPA.
27. Mr Gebbie had argued that the information he had requested was no different in character from information published in connection with payments from the Scottish Legal Aid Fund to members of the legal profession. However, SLAB disagreed with this view. It argued that payments out of the Scottish Legal Aid Fund do not disclose the entirety of an individual's annual income, nor do they provide any reflection on the recipient's standard of performance at work. SLAB cited my decision in the case of Balfour & Manson Solicitors and the Scottish Executive 052/2005 (<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2005/200502019.asp>) as being supportive of its position. SLAB argued that in the decision I had found that publication by SLAB of payments to counsel was quite distinct from the publication of information about an individual's income which would reveal personal information about that individual.



### *Mr Gebbie's submission*

28. Mr Gebbie complained that his request had been refused on the basis that SLAB had informed him that the information he had requested was exempt from disclosure under section 38 of FOISA. It was argued that the information related to the payment of public money to public servants in respect of their performance of their public duties. Mr Gebbie stated that he was unable to see why such information should not be made public.
29. In his submission, Mr Gebbie outlined the information he had requested in relation to bonus payments: details of the amounts paid, the representative proportion of the recipients' annual salaries, the identities of the recipients and the details of the bases and performance indicators that were met by the individual recipients that justified the payments.
30. Mr Gebbie was of the view that without such information it would be impossible for taxpaying members of the public to see whether their money was being badly or well spent. It was also argued that this prevented any possibility of identifying any conflicts of interest between the recipients' obligation to be impartial in the performance of their public duties and the promotion of their self interest created by a bonus scheme.
31. Mr Gebbie added that he had pointed out to SLAB that payments to the legal profession from the Scottish Legal Aid Fund had identified both the amount of the payments and the recipients involved. He argued that this information was not only routinely supplied by SLAB, but was actively published on the basis of transparency in the expenditure of public money. Mr Gebbie stated that he was unable to understand why SLAB had relied upon one of my earlier decisions, which he argued supported the publication of information relating to payments made by SLAB to persons who are private individuals, to support its decision to withhold the information he had requested in this instance. Mr Gebbie was of the view that this was contrary to the aim of transparency in public expenditure and meant that the payments made in-house were secret.

### *Analysis of SLAB's arguments*

32. SLAB stated in its submission that, in line with the Bichard recommendations on performance management in the public sector, the pay system agreed with the Scottish Government introduced lump sum non-consolidated and non-pensionable bonuses to be paid each year.





33. SLAB also provided details of its performance management system as background information. All SLAB members of staff are subject to an appraisal system which reviews their job performance against objectives and required grade competencies. Performance, assessed by the outcome of their end of year appraisal, is rated under a number of headings which range from substantially exceeding requirements to regularly falling below requirements.
34. SLAB considered that the information requested by Mr Gebbie was wholly personal data within the meaning of section 1(1) of the DPA as it was data which related to living individuals, namely the members of staff involved. Additionally, SLAB stated that it was of the view that to release the requested information would breach the first data protection principle which requires that data are processed fairly and lawfully.
35. In relation to the issue of fairness, SLAB was mindful that it was a requirement of the Financial Reporting Manual (FRM) applicable to non-departmental public bodies and the guidance for the appointment and remuneration of Chief Executives to disclose, if relevant, information about the Chief Executive Officer and Executive Directors, including pensions, salary and allowances. It was noted that the requirement for disclosure of the latter was to disclose in bandings – there was no requirement in the FRM to disclose specific salary details or specific bonus details.
36. I note from the 2007-08 FRM (<http://www.financial-reporting.gov.uk/manual.htm>) that paragraph 7.2.26 states that entities under the control of the Scottish Government must seek the prior consent of named individuals to disclose the remuneration information required by the FRM. This includes salary and allowances (in bands of £5,000 for officials). Salary and allowances covers both pensionable and non-pensionable amounts and includes gross salaries and performance pay or bonuses payable.
37. SLAB was mindful that individual senior managers, such as the Chief Executive Officer and Executive Directors, as defined in the FRM, have the legal right to withhold consent to the disclosure of this information. If consent is withheld, this fact must be noted in SLAB's annual accounts.
38. SLAB pointed out that in its correspondence with Mr Gebbie it had confirmed that it does publish details of the Chief Executive Officer's and Directors' remuneration and pension rights in bandings in its annual accounts, with the prior consent of the individuals concerned. Such disclosure was not held to be a breach of the DPA.
39. I note that SLAB's Annual Report 2005-6 ([http://www.slab.org.uk/annual\\_report\\_2005\\_2006/index.htm](http://www.slab.org.uk/annual_report_2005_2006/index.htm)) states the following:



“Performance is also rewarded for the Chief Executive and Directors, as agreed by the Remuneration and Appointments Committee, with a non-consolidated lump sum bonus of up to 10% of salary, and is linked to achievement of targets and outcomes derived from the corporate and operational plans. The Chief Executive’s performance is appraised by the Chairman in consultation with the Remuneration and Appointments Committee. Directors’ performance appraisals are carried out by the Chief Executive under the Board Performance Management system which applies to all staff. The performance management system is about continuous improvement, supporting the achievement of business targets and encouraging personal growth.”

40. However, although bandings are provided in the Annual Report which detail the total remuneration and pension benefits of senior managers (the Chief Executive and Directors), there is no indication of the specific amounts they actually receive in bonus payments.
41. In its submission to me, SLAB argued that to go beyond the current expectations of senior staff about the processing and possible disclosure of their personal data, by disclosing information concerning detailed salaries (outwith banding), detailed bonuses paid and performance appraisal documentation, without first discussing this with them and obtaining their consent to the release of such information, would result in unfair and unlawful processing of their personal data.

### **Section 38(1)(b) – personal information**

42. Section 38(1)(b) of FOISA exempts from release third party personal data, the disclosure of which to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. The DPA defines personal data in section 1(1) as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (see the full definition in the Appendix).
43. It should be noted that the exemption in section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (b) of FOISA, is an absolute exemption in that it is not subject to the public interest test required by section 2(1)(b) of FOISA.
44. In order for a public authority to rely on this exemption it must show that the information which has been requested is personal data for the purposes of the DPA, and that disclosure of the information to a member of the public would contravene any of the data protection principles laid down in the DPA.



45. I am satisfied that the information under consideration (i.e. the amounts paid under the bonus scheme, the representative proportion of the recipients' annual salaries, identities of the recipients and details of the bases and performance indicators that were met by the individual recipients that justified the payments) is personal data within the meaning of section 1(1) of the DPA. It is clear that individuals can be identified from the data. I am also satisfied that the data relates to the individuals in question, given that it is biographical and has the individuals as its focus.

***The first data protection principle - fair and lawful processing***

46. As noted above, SLAB has argued that the release of the information would breach the first data protection principle. This requires that personal data must be processed fairly and lawfully and, in particular, that personal data must not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
47. I have considered the definition of "sensitive personal data" in section 2 of the DPA and am satisfied that none of the personal data here is sensitive. As such, I am not required to consider whether any of the conditions in Schedule 3 can be met.
48. In considering whether disclosure of such information would be fair and lawful, I have taken into consideration the following factors:
- The terms of the FRM and the individuals' reasonable expectations about what would happen to their personal data;
  - The seniority (or lack of seniority) of the individuals concerned (e.g. in the case of senior managers, I consider that the individuals concerned should expect a greater degree of public scrutiny where public money is being spent);
  - The fact that the personal data requested relates to the individuals' professional lives (as opposed to personal data concerning individuals' private lives); and
  - Whether Mr Gebbie and the public at large have legitimate interests in knowing the amount of public money awarded in bonus payments to individual members of senior SLAB staff.



*Non-senior members of SLAB staff*

49. As regards the information requested by Mr Gebbie in respect of non-senior members of staff, SLAB argued that non-senior members of staff are not subject to the terms of the FRM and no information, such as banded salary and allowance information, was currently in the public domain. SLAB added that such members of staff had no expectation that their salaries and/or bonuses or any performance appraisal documentation about individuals would be made public. Further, SLAB considered that the disclosure of such information would impinge upon the private lives of those individuals to such an extent that could not easily be justified.
50. In considering the question of whether the release of this information would be fair to the data subjects, I have taken into account guidance issued by the Information Commissioner, who is responsible for regulating and overseeing the DPA and, in particular, his guidance note "Freedom of Information Act Awareness Guidance No 1" ([http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_1\\_-\\_personal\\_information.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_1_-_personal_information.pdf)).
51. This guidance suggests that, in thinking about fairness, it is likely to be helpful to ask whether the information relates to the private or public lives of the individual. It also suggests that information which is about the home or family life or an individual, his or her personal finances, or consists of personal references is likely to deserve protection. By contrast, information which is about someone acting in their official or work capacity could be provided on request.
52. I am of the opinion that the more senior a position an individual holds in an organisation, the more likely they are to expect that information relating to their position should be made available to the public. It will normally be the case that the higher the position and the greater the authority of an individual, the greater is the argument for openness, transparency and accountability. This is particularly so in the case of performance-related bonuses issued to senior members of staff in publicly funded bodies.
53. In my view, as a person's position becomes more high profile, their expectations of privacy, in relation to information concerning their professional lives, are likely to diminish. Similarly, the less senior a person's position in an organisation, the less likely they are to expect information relating to their professional lives (such as individual salary details) to be made available to the general public.



54. Taking into account all of the above, I am of the view that to disclose the details of bonus payments (including the representative proportion of the recipients' annual salaries) and performance appraisal information of *non*-senior members of staff would constitute unfair processing and would therefore contravene the first data protection principle. (Given that I have found that the processing would be unfair, I do not intend to go on to consider whether the processing would be unlawful or would be permitted by any of the conditions in schedule 2, nor do I intend to consider whether disclosure would breach the second data protection principle.)
55. I am therefore of the opinion that SLAB was correct to withhold, under section 38(1)(b) of FOISA, the information which it had not provided to Mr Gebbie and which related to non-senior members of SLAB's staff.

*Senior members of SLAB staff*

56. SLAB stated in its submission to me that it was prepared to raise the issue of consent with the senior managers concerned in order to assist with the investigation. My investigating officer wrote to SLAB to ask if its senior managers could be contacted in order to determine whether they would consent to the disclosure of details about any bonus payments they might have received. SLAB subsequently advised my Office that its senior managers had chosen not to give their consent to the disclosure of bonus payments they received for the periods 2004-5 and 2005-6.
57. It should be noted that the issue of obtaining consent is not a definitive factor in deciding whether third party personal data could be disclosed. The Information Commissioner has pointed this out in his Freedom of Information Act Awareness Guidance No.1 ([http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance%201%20personal\\_information\\_v2.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance%201%20personal_information_v2.pdf)):
- “It is a commonly held misconception that the [DPA] prevents the disclosure of any personal data without the consent of the person concerned. This is not true. The purpose of the [DPA] is to protect the private lives of individuals. Where information requested is about the people acting in a work or official capacity then there is less likelihood that the data protection principles would be breached.”
58. SLAB stated that the total remuneration reported in its audited accounts included any bonus payments made to senior staff and this was consistent with the requirements of the FRM.



59. As a non-departmental public body (NDPB), SLAB was of the view that it was not unusual in reporting total remuneration this way (it was pointed out that the FRM does not provide for separate disclosure of amounts received in bonus payments by senior managers). SLAB argued that, on reviewing the remuneration disclosures of other Scottish NDPBs, the disclosure of total remuneration in bands (which included any bonus payments) would appear to be the norm. SLAB added that it was its practice to obtain explicit consent for such disclosure from each individual concerned on an annual basis.
60. In its submission, SLAB argued that the expectations of the individuals concerned would be that the information about bonus payments they received would not be disclosed without their consent; and further, that although SLAB had sought consent to disclosure, this had not been provided. Therefore, given the expectations of the individuals and the nature of the information concerned, SLAB was of the view that the release of the information in response to Mr Gebbie's request would amount to unfair processing. SLAB also argued that information relating to bonus payments would form part of the information held by an organisation's human resources department and staff would expect such information to be kept private.
61. Although, as noted above, I am generally of the view that an employee or agent of a public authority who makes decisions which involve significant expenditure of public funds should expect greater scrutiny about their role for which they are paid out of public funds commensurate with their level of responsibility, I also recognise the strength of SLAB's argument that there is a strong expectation of privacy attached to the bonus payment information, especially in this case where the percentages of bonus payments awarded to senior managers of SLAB staff are directly linked to each individual's performance in the workplace.
62. Taking into account the detailed bonus payment information which SLAB has already supplied to Mr Gebbie in response to his request (which includes the number of senior members of staff awarded a bonus payment, the total bonus payments made to senior members of staff and the average bonus paid to such persons in 2004-05 and 2005-06) and the fact that the bonus payments are inextricably linked to staff performance, I am of the view that to disclose further information about the bonus payments of senior members of SLAB staff would reveal personal human resource information about their levels of performance.



63. I am therefore of the opinion that to disclose such information without the consent of the individuals involved would be unfair and would therefore breach the first data protection principle. (Given that I have found that the processing would be unfair, I do not intend to go on to consider whether the processing would be unlawful or would be permitted by any of the conditions in schedule 2, nor do I intend to consider whether disclosure would breach the second data protection principle.)
64. I am therefore of the opinion that SLAB was correct to withhold, under section 38(1)(b) of FOISA, the information which it had not provided to Mr Gebbie and which related to senior members of SLAB's staff.

### *Summary*

65. In my view a balance has to be struck between a public authority's duty to be transparent and accountable and a public authority's duty to respect its employees' reasonable expectations of privacy. In all the circumstances of this case, I am of the view that disclosure of the detailed salaries (other than general salary bands), individual bonus payments and performance appraisal documents of senior managers and the disclosure of salaries and/or bonuses or any performance appraisal documentation of non-senior members of staff would be unfair and would breach the first data protection principle.
66. Additionally, in relation to both senior and non-senior members of staff, I am of the view that SLAB was correct to withhold details, under section 38(1)(b) of FOISA, of the bases and performance indicators that were met by the individual recipients which justified any bonus payments, on the grounds that the information constituted personal human resource information and disclosure of such information would constitute unfair processing and would breach the first data protection principle.
67. I also find that SLAB was correct to withhold, under section 38(1)(b) of FOISA, the representative proportion of each member of staff's annual salary which constituted any bonus payment, on the grounds that the information constituted third party personal data and to disclose such information would constitute unfair processing and would breach the first data protection principle.

### **Mr Gebbie's second information request**

#### *Mr Gebbie's submission*

68. Mr Gebbie's second request to SLAB was for information relating to the decision making process that had resulted in SLAB withholding the information requested in Mr Gebbie's first request, as detailed above.



69. Even though SLAB had provided Mr Gebbie with information in response to his request, Mr Gebbie complained that his request had been “refused in the entirety of its substance” on the basis that “there were no records kept” and the information requested constituted third party personal data.
70. In his request for review Mr Gebbie had advised SLAB where he thought the information he had requested would have been stored. He stated in his submission to me that he was unable to see how information relating to the exercise of a public duty by public officials could be personal data. Mr Gebbie added that there seemed to be no good reason for secrecy regarding whether or not there might have been an apparent conflict of interest in respect of the officials’ involvement in the decision making process.
71. Mr Gebbie argued that the official who had carried out the review had informed him that he had not been involved in the original decision, but had not indicated whether he had been the recipient of any bonus payments. Mr Gebbie therefore questioned the independence of the reviewer and argued that the decision to refuse information did not enable the public to verify that the decision was completely free from any appearance of conflicting interests.

#### *Analysis of SLAB’s arguments*

72. In its submission, SLAB asserted that Mr Gebbie’s request for information had not been refused, but had been partially satisfied and that his request for review did lead to the release of further information. SLAB maintained that it had provided all of the recorded information it held in relation to Mr Gebbie’s original request – i.e. his letters requesting information and those in reply from SLAB; copies of two e-mails; and two service request entries on SLAB’s computerised system. SLAB stated that any records that it did not consider to constitute personal data had been supplied.
73. SLAB stated that since the decision to withhold certain information had not been a complex one, most of the interaction between staff on the matter was verbal and would not have been recorded but simply acted upon. During the course of the investigation my investigating officer asked SLAB to provide evidence of any searches that had been carried out in order to determine whether any other information was held at the time Mr Gebbie made his request, which related to Mr Gebbie’s request (e.g. searches of any computer systems where such information is likely to have been logged – such as individuals’ e-mail records, searches of paper files, staff notebooks etc).





74. SLAB provided details of searches that had been carried out. It was argued that the decision making process regarding Mr Gebbie's first request was considered relatively straightforward and did not generate a great deal in the way of file notes, memoranda, notes of meetings, notes of telephone calls or e-mails. Other than the documentation already provided to Mr Gebbie, the interaction of SLAB staff in relation to the processing of the request was largely verbal, was not recorded and was simply acted upon. As such, SLAB was of the view that the information attributable to that request was easily identifiable and retrieved.
75. As regards the searches that were carried out by SLAB in order to determine whether any further information was held, SLAB informed my Office that those persons involved with Mr Gebbie's request had been asked to check their e-mails, voice-mails, electronic and paper files, including notes and notebooks, and latterly the case management system which had been used to record the progress of information requests.
76. Taking into account the extent of the searches that were carried out by SLAB in order to determine whether it held any further information which fell within the scope of Mr Gebbie's request, I am satisfied that all reasonable steps were taken by SLAB in this regard. Therefore, in all the circumstances of this case, I am satisfied that no further information was held by SLAB which related to Mr Gebbie's request.
77. In response to Mr Gebbie's request, SLAB provided him with copies of its documented procedures for handling freedom of information requests. In addition, in the spirit of providing advice and assistance, SLAB created records of the decision-making process which detailed, including names and job titles, all those persons involved in making that decision and all persons consulted in relation to it.
78. As regards Mr Gebbie's request for the identification of those persons involved in the decision making process who had been the recipients of bonus payments, SLAB intimated to Mr Gebbie that all of the staff noted on the documentation supplied to him were eligible for bonus payments. However, SLAB refused to disclose the information that Mr Gebbie had requested on the grounds that it constituted personal data within the meaning of section 1(1) of the DPA and that to disclose such information would breach the first data protection principle which requires that personal data are processed fairly and lawfully.
79. In its submission to me, SLAB argued that disclosure would be unfair for the reasons set out in relation to Mr Gebbie's first request as detailed above.



80. I concluded above, in relation to Mr Gebbie's first request, that disclosure of details of bonus payments made to members of SLAB staff would breach the first data protection principle on the grounds that to do so would constitute unfair processing. For the same reasons, I am of the view that it would constitute unfair processing of individuals' personal data for SLAB to provide Mr Gebbie with information relating to the identity of staff who had been involved in the making of the decision concerning his first information request or who had been consulted in relation to it and who had been the recipients of bonus payments under the bonus payment scheme during the period referred to in Mr Gebbie's first information request.
81. I am therefore of the view that such information is exempt from disclosure under section 38(1)(b) of FOISA on the grounds that to disclose such information would constitute unfair processing and would therefore breach the first data protection principle, for the same reasons set out above in relation to Mr Gebbie's first request.

## **Decision**

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I find that the Scottish Legal Aid Board (SLAB) complied fully with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with Mr Gebbie's requests for information relating to bonus payments made to members of SLAB staff and that any information withheld from Mr Gebbie was exempt from disclosure in terms of section 38(1)(b) of FOISA.

## **Appeal**

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Should Mr Gebbie or the Scottish Legal Aid Board wish to appeal against my decision, there is a right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**18 February 2008**



## 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.

##### 38 Personal information

- (1) Information is exempt information if it constitutes-
  - (...)
    - (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;
  - (...)
- (2) The first condition is-
  - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
    - (i) any of the data protection principles; or
    - (...)
  - (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.



## **Data Protection Act 1998**

### **1 Basic interpretative provisions.**

(1) In this Act, unless the context otherwise requires—

[...]

“personal data” means data which relate to a living individual who can be identified—

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual

## **Schedule 1 – The Data Protection Principles**

### **Part 1 The principles**

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
  - (a) at least one of the conditions in Schedule 2 is met, and
  - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

### **Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data**

- 6.(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.