

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 August 2019

Public Authority: Legal Services Board
Address: One Kemble Street
London
WC2B 4AN

Decision (including any steps ordered)

1. The complainant requested information from the Legal Services Board (LSB) relating to a high profile investigation. The LSB denied holding some of the requested information. It provided some information within the scope of the request but refused to provide the remainder, citing section 44(1)(a) (prohibitions on disclosure) of the FOIA.
2. The Commissioner has investigated the LSB's application of section 44(1)(a).
3. The Commissioner's decision is that the LSB was entitled to find that the information was exempt from disclosure under section 44(1)(a) of the FOIA by virtue of section 167(1) of the Legal Services Act 2007.
4. The Commissioner requires no steps to be taken as a result of this decision.

Background

5. The LSB¹:

"... is the oversight regulator of legal services in England and Wales. We are independent from both the legal profession and government".

¹ <https://www.legalservicesboard.org.uk/>

6. The LSB's role and responsibilities are outlined in the Legal Services Act 2007 (LSA)².
7. The explanatory notes for section 167 of the LSA³ state:

"Under this section, "restricted information" is any information obtained by the Board in the exercise of its functions. A restricted person is the Board (including in its capacity as approved regulator or licensing authority) or a person authorised by the Board to carry out its functions. Restricted information must not be disclosed by a restricted person or by any person who has received the information from a restricted person. Section 168 provides an exception to this rule. Restricted information does not include "excluded information", namely information which was obtained more than 70 years before the date of disclosure, or which is already available to the public, or which is in an appropriately "anonymised" form so that information relating to a particular individual cannot be ascertained from it".

Request and response

8. On 19 December 2018, the complainant wrote to the LSB and requested information in the following terms:

"1. Any correspondence (including letters and emails) which has passed between the LSB and the SRA [Solicitors Regulation Authority] in relation to the SRA's investigation and prosecution of Leigh Day (SRA v Day and Others, case no. 11502-2016; [2018] EWHC 2726 (Admin)).

2. The dates of any meetings between the LSB and the SRA at which the investigation/prosecution has been discussed.

3. The dates of any telephone conversations between the LSB and the SRA at which that investigation/prosecution has been discussed.

4. Any notes of the meetings and telephone conversations referred to in 3 and 4 above".

² <http://www.legislation.gov.uk/ukpga/2007/29/contents>

³ <http://www.legislation.gov.uk/ukpga/2007/29/notes/division/7/7/6>

9. The LSB responded on 15 February 2019. It denied holding some of the requested information (information relating to part (3) of the request) but confirmed it held information in scope of the other parts of the request. It provided the complainant with information in respect of part (2) of the request but refused to provide the remainder. It cited the following exemptions, in respect of parts (1) and (4) of the request respectively, as its basis for doing so:
 - section 44 prohibitions on disclosure
 - section 36 prejudice to effective conduct of public affairs.
10. Following an internal review, the LSB wrote to the complainant on 20 March 2019. It maintained its position with respect to parts (1), (2) and (3) of the request. It revised its position with respect to the information requested at part (4) of the request and provided it to him.

Scope of the case

11. The complainant contacted the Commissioner on 2 April 2019 to complain about the way his request for information had been handled. He disputed the LSB's application of section 44(1)(a) of the FOIA, by virtue of section 167 of the LSA, to information within the scope of part (1) of the request.
12. In his correspondence, the complainant raised a number of issues which are outside the scope of the Commissioner's remit.
13. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (FOIA).
14. The scope of her investigation in this case is with respect to the withheld information, ie information within the scope of part (1) of the request.
15. The Commissioner considers that the issues that are within the remit of this decision notice are:
 - is the withheld information '*restricted information*' within section 167 of the LSA?
 - does section 168 of the LSA provide for disclosure?
16. The analysis below considers the LSB's application of section 44(1)(a) of the FOIA to the withheld information.
17. The Commissioner has received and considered a large number of arguments from both parties which she has not reiterated here. She

acknowledges that both parties are fully conversant with each other's comprehensive arguments in favour of disclosing/withholding the disputed information.

18. Taking account of the detailed arguments provided by both parties, the Commissioner has set out below what she considers to be the key points.

Reasons for decision

Section 44 – prohibitions on disclosure

19. Section 44(1)(a) of the FOIA provides that:

"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment".

20. Section 44(1)(a) of the FOIA exempts information if its disclosure is prohibited by other legislation. Such provisions are referred to as statutory prohibitions or statutory bars and they prevent public authorities from disclosing specific types of information.

21. The LSB argued that the requested information is prohibited from disclosure by virtue of section 167(1) of the LSA.

22. Section 167 of the LSA states:

"167 Restricted information

(1) Except as provided by section 168, restricted information must not be disclosed—

(a) by a restricted person, or

(b) by any person who receives the information directly or indirectly from a restricted person.

(2) In this section and section 168—

"restricted information" means information (other than excluded information) which is obtained by the Board in the exercise of its functions;

..."

The complainant's view

23. The complainant accepted that section 167 of the LSA is capable of being a prohibiting enactment for the purposes of section 44(1)(a) of the FOIA.
24. However, with respect to the LSB's application of section 44(1)(a) of the FOIA by virtue of section 167 of the LSA in this case, he told the LSB:

"In summary, the attempt to rely upon section 167 is misconceived..."

25. The complainant disputed that the withheld information comprised 'restricted information'. He disputed that, in the circumstances of this case, the LSB was exercising its functions under the LSA. In that respect, he told the LSB:

"One apparently unsolicited email from the SRA, with one document attached to it, does not amount to an "investigation by the LSB exercising its functions under the LSA""

26. Furthermore, he considered that even if the disputed information did comprise restricted information, it may be discloseable through one or more of the gateways provided by the LSA.

27. In correspondence with the LSB, he wrote:

"Explain whether, if the LSB believes the document to be restricted information within section 167, it has considered disclosing the document through one or more of the gateways provided by the LSA (for example, sections 7, 168(2), 168(3)(a) and 171). If so, why has it decided not to disclose the document under one of those gateways?"

28. In subsequent correspondence with the Commissioner the complainant asked:

"Does section 167, read in conjunction with (i) section 168, (ii) the obligations of transparency and accountability imposed upon the LSB by section 3 of the LSA and (iii) the comments made by the High Court in Blacker v Law Society [2016] EWHC 947 (QB), oblige the LSB to ask Leigh Day whether they consent to the disclosure of the document?"

The LSB's view

29. The LSB provided both the complainant and the Commissioner with a comprehensive explanation of its application of section 167, in which it addressed the various points raised by the complainant.

30. The LSB considered that the withheld information is restricted information:

"..., because it was disclosed by the SRA to the Legal Services Board ("LSB") during an investigation by the LSB exercising its functions under the LSA".

31. The LSB also told the complainant:

"While the prohibition on the disclosure of restricted information does not preclude disclosure in certain circumstances (s168(3) LSA), we consider none override the application of s44(1)(a) FOIA in the circumstances here".

32. In its submission to the Commissioner, the LSB confirmed what it had told the complainant, namely that:

- the LSA is a 'restricted person' as defined in section 167(2) LSA,
- the information in question is 'restricted information' because it was provided to the LSB as part of a separate, LSB investigation, unconnected with the subject matter of the request,
- the relevant investigatory activities of the LSB fell within the functions of the LSB, and the information is therefore "information (other than excluded information) which is obtained by the Board in the exercise of its functions", and
- the information is not 'excluded information' as defined in s167(3) LSA.

33. Accordingly, the LSA argued:

"The information therefore meets the definition of 'restricted information' in s167(2) LSA and therefore "must not be disclosed"".

34. During the course of the Commissioners' investigation, the LSB provided further arguments in support of its view that section 44(1)(a) of the FOIA applies in this case. In accordance with the relevant legislation, it also provided the Commissioner, in her role as regulator and in response to an Information Notice, with a copy of the withheld information.

35. With regard to the issue of consent raised by the complainant, the LSB said:

"The LSB's position is that consent gateways are commonplace in enactments prohibiting disclosure of the kind that engage s44(1)(a) FOIA, and public authorities subject to FOIA are not obliged to seek consent under such gateways to facilitate the disclosure of information pursuant to FOIA requests".

36. The LSB also provided detailed reasoning explaining why it did not consider that any of the other gateways provided by section 168 of the LSA were relevant in this case.

The Commissioner's view

37. In reaching her decision in this case, the Commissioner has consulted her guidance⁴ on section 44 of the FOIA '*Prohibitions on Disclosure*'.
38. The first issue the Commissioner considered was with respect to the definition of the withheld information. If the withheld information does not comprise restricted information then section 44 cannot apply.

Is the withheld information restricted information?

39. "*Restricted information*" is defined in section 167(2) of the LSA as follows:

"In this section and section 168 —

"restricted information" means information (other than excluded information) which is obtained by the Board in the exercise of its functions;"

40. It is not in dispute that the information is not '*excluded information*'. The Commissioner has therefore considered whether the information was obtained by the LSB in the exercise of its functions.

41. The Commissioner addresses the matter of statutory bars and public authority functions at paragraph 16 of her guidance:

"Some statutory prohibitions refer to the functions of a public authority. If those functions are defined in the relevant legislation, then that definition must be followed, irrespective of whether they are defined narrowly or widely. In some cases this may prohibit the disclosure of a large amount of information".

42. She recognises, however, that the functions of the authority may not always be specifically defined in legislation. She considers that that is the case here.

43. In such cases, the Commissioner considers that the decision of the House of Lords in *Hazell v Hammersmith and Fulham London Borough*

⁴ <https://ico.org.uk/media/for-organisations/documents/1186/section-44-prohibitions-on-disclosure.pdf>

Council and Others provides guidance on defining what constitutes a public authority's functions.

44. Accordingly, the Commissioner considers:

"If a public authority is applying section 44(1)(a) by virtue of a statutory bar that refers to its functions, then the functions must be those given to that authority specifically, and not general obligations on all authorities, and the authority should be able to:

- explain the nature of the relevant function, and

- point to the applicable legislation or other source from which it derives its authority for this function".

45. In this case, the Commissioner is satisfied that the LSB has explained its powers and duties, and where it derives its authority from. She is satisfied that those activities are its functions and that those functions are specific to the LSB and not general obligations on all authorities. She is also satisfied that the LSB obtained the withheld information in the exercise of its functions.

46. It follows that the Commissioner is satisfied that the withheld information comprises restricted information.

Do any of the statutory gateways apply?

47. The Commissioner recognises that statutory prohibitions may contain 'gateways' allowing disclosure in certain circumstances. The Commissioner acknowledges, however, that while gateways allow disclosure for specific purposes, the FOIA is about general disclosure to the world at large.

48. The gateways are set out in section 168(3) (disclosure of restricted information) of the LSA.

49. The Commissioner accepts that section 168 LSA "*does not preclude*" the disclosure of restricted information in certain circumstances.

50. She accepts that section 168(2) of the LSA states:

"Restricted information may be disclosed for the purposes of enabling or assisting the Board to exercise its functions (whether as an approved regulator, a licensing authority or otherwise)".

51. The Commissioner considers that the FOIA creates general duties for all public authorities. However, mindful of the wording of section 168(2), the Commissioner does not consider that section 168(2) provides a

gateway to disclosure under the FOIA as disclosure under the FOIA is not a function specifically entrusted to the LSB.

52. In considering whether any of the statutory gateways apply, the Commissioner has next considered section 168(3) of the LSA. In that respect, the explanatory notes for section 168(3) state:

"Section 168(3) sets out a list of further specific and limited circumstances in which restricted information may be disclosed..."

53. The Commissioner is mindful that the term used is no stronger than 'may be disclosed'.

54. The Commissioner's guidance 'Prohibitions on disclosure' states:

"Where a public authority has discretion about applying a gateway to disclosure, the Commissioner will not question or examine the reasonableness of the authority's decision. If the authority has decided that information should not be disclosed under a gateway, the Commissioner will only verify that the authority has made that decision, and not consider whether its decision was reasonable"

55. That position was established by the binding decision of the Upper Tribunal in in 2011 (*Ofcom v Gerry Morrissey and the IC, 2011 UKUT 116 AAC*).
56. The Commissioner considers that the LSB has discretion as to whether or not to disclose information under a gateway. She is satisfied that it made the decision in this case not to disclose the disputed information under a gateway.
57. In accordance with the Upper Tribunal decision, the Commissioner has not considered the reasonableness of that decision.

Conclusion

58. From the evidence she has seen, the Commissioner is satisfied that the withheld information is restricted information in accordance with section 167 of the LSA. She is also satisfied that the LSB decided that the information should not be disclosed under a gateway.
59. Accordingly, the LSB was entitled, in the circumstances of this case, to rely on the exemption under section 44(1) of the FOIA - by virtue of section 167 of the LSA - to refuse to disclose the withheld information within the scope of part (1) of the request.
60. Section 44(1) of the FOIA is an absolute exemption, therefore there is no requirement to consider the public interest test.

Right of appeal

61. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

62. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

63. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Carolyn Howes
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