

# **JUDICIARY AND COURTS (SCOTLAND) ACT 2008**

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## **EXPLANATORY NOTES**

### **THE ACT**

#### **Part 2 – the Judiciary**

#### **Chapter 3 - Judicial Appointments**

#### **Section 17 - Confidentiality of information**

50. This section recognises that the Board will be dealing with sensitive and personal information. Subsection (1) prohibits unauthorised disclosures by the Board, its staff or indeed anyone who has been privy to confidential information relating to the appointment to judicial office process. For example, a candidate's referee, who has provided information to the Board, is prohibited from disclosing that information unless the disclosure is authorised, that is, unless subsection (3) applies.
51. Subsection (2) clarifies that in this context, confidential information is information that relates to an identified or identifiable individual. Subsection (4) makes it clear that information given by one person about another person (for example, a reference) is confidential information about both persons.
52. Subsection (3) sets out the limited circumstances in which disclosure of information is authorised, which includes when the subject of the information is content for the information to be disclosed. In the case of a reference, the effect of subsection (4) is that both the candidate and the referee would have to agree to the disclosure. Disclosure is also authorised where either the Board or the Scottish Ministers need to disclose certain information in order to carry out their functions in connection with a judicial appointment (for example, when inviting references or arranging criminal records checks).
53. Under subsection (5), disclosure of confidential information that has already been in the public domain would not breach the subsection (1) duty against unauthorised disclosure.
54. Subsection (6) provides that a disclosure of confidential information which is not authorised under subsection (3), or which discloses information not already in the public domain in terms of subsection (5), is actionable in the civil courts by the subject of the information where he or she can establish that loss or damage has resulted from the disclosure. For example, the situation might arise that Queens Counsel X was a candidate for judicial office and this was disclosed to solicitor Y who would otherwise have appointed X to a complex and lengthy case but decides not to on the basis that X, if successful, would be unable to commit to the case. If X was not successful in obtaining a judicial appointment and later discovered that he or she had been Y's initial choice and had effectively lost out on a significant case, X would be likely to be able to establish loss and would therefore have a right of action.

*These notes relate to the Judiciary and Courts (Scotland) Act  
2008 (asp 6) which received Royal Assent on 29 October 2008*

55. To the extent that information is prohibited from disclosure by this section it is exempt from disclosure under a freedom of information request, by virtue of section 26(a) of the [Freedom of Information \(Scotland\) Act 2002 \(asp 13\)](#). That Act applies to the Board by virtue of paragraph 21 of schedule 1 to the Act.