

Decision Notice

Decision 015/2018: Mr X and the Scottish Legal Complaints Commission

Complaint about a third party

Reference No: 201702115

Decision Date: 6 February 2018



Scottish Information
Commissioner

Summary

The SLCC was asked for information about a complaint made against a third party.

The SLCC gave notice that it did not hold some of the information, and withheld information.

Following an investigation, the Commissioner accepted that the SLCC did not hold some of the information, and that it was entitled to withhold the information it held.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(a) and (2)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 26(a) (Prohibitions on disclosure)

Legal Profession and Legal Aid (Scotland) Act 2007 (the LPLA) section 43 (Restriction upon disclosure of information: Commission)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 31 July 2017, Mr X made a request for information to the Scottish Legal Complaints Commission (the SLCC). Mr X asked for a range of information about a complaint he had made against a firm of solicitors acting for a client in an action raised against Mr X in the Court of Session.
2. Some background information is required to make this decision clear. Mr X believed that the solicitors had failed to follow an instruction from the judge to make enquiries to their client to ascertain whether there was substance to Mr X's submissions. Mr X had provided the solicitors with a ten-page document outlining his concerns, and was told that the solicitors had sent this to their client.
3. The SLCC responded to Mr X's letter on 10 August 2017. It identified four requests for information within the letter, summarised as follows:

Request 1 - Mr X asked whether the SLCC had queried "this statement from the practitioner" [i.e. a statement to the effect that Mr X had been sent a response to his ten-page document on the same day it was forwarded to the client]; whether the SLCC had "done due diligence" and proof that the solicitors had issued a copy of the ten-page letter to their client; and whether the SLCC had asked to see the reply from the client or had sought evidence of reply from the client.

Requests 2 and 4 – Mr X referred to email correspondence between the solicitors and their client, and asked to see the emails.

Request 3 - Mr X asked for proof that the solicitors had told him that their client had advised that there was no substance to his (Mr X's) claims.

The SLCC provided some contextual explanation, but considered that the requested information was exempt from disclosure under section 26(a) (Prohibitions on disclosure) and section 30(c) (Prejudice to effective conduct of public affairs) of FOISA.

4. On 7 September 2017, Mr X wrote to the SLCC requesting a review of its decision. He did not accept that the exemptions applied and argued that the information should be disclosed.
5. The SLCC notified Mr X of the outcome of its review on 21 September 2017. The SLCC confirmed its previous response, but modified it to make it clear that it did not hold the information covered by request 3.
6. On 23 November 2017, Mr X applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr X did not consider the exemptions had been correctly applied and stated that his case was in the public interest and the information should be disclosed.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr X made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 30 November 2017, the SLCC was notified in writing that Mr X had made a valid application. The case was then allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SLCC was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested and explaining why it was satisfied that it did not hold some of the requested information.
10. The SLCC provided its submissions on 10 January 2018. These are considered in detail below.
11. Mr X was informed that the SLCC's submissions were in line with its review response.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Mr X and the SLCC. He is satisfied that no matter of relevance has been overlooked.

Scope of request and investigation

13. Mr X is dissatisfied with the way his court case was handled and the subsequent investigation of his complaint by the SLCC. As stated in previous decisions, the Commissioner's remit extends only to the consideration of whether a Scottish public authority actually holds the requested information and whether it has otherwise complied with Part 1 of FOISA in responding to a request. The Commissioner cannot comment on whether a public authority should have taken particular action or, if it has, what records it should maintain in relation to that action.
14. The Commissioner has investigated whether the SLCC complied with Part 1 of FOISA in responding to the four information requests it identified in his letter of 31 July 2017.

15. In its submissions, the SLCC confirmed that it did not hold the information sought in request 3 and it was relying on sections 26(a) and 30(c) of FOISA to withhold the other information Mr X had requested.

Section 17(1) of FOISA (Notice that information is not held)

16. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.
17. In request 3, Mr X asked for proof that he had been informed by the solicitors that their client had advised them that there was no substance to his (Mr X's) claims.
18. In its review response of 21 September 2017, the SLCC informed Mr X that it did not hold a copy of the communication that was issued to him by the solicitors at the court hearing in question.
19. In his correspondence during the investigation, Mr X stated that he did not accept that the SLCC did not hold the information, as he believed it would have been required for a proper examination of the facts in the case to make a decision. Mr X considered that the lack of this information showed that the SLCC did not carry out a proper investigation, especially as they found in favour of the other party.
20. The SLCC referred to the Determination it had issued after investigating Mr X's complaint, which states that "following enquiries by the solicitors with their client, the client responded, advising that there was no substance to Mr X's submissions."
21. The SLCC submitted that the response from the client was not required when considering Mr X's complaint, which concerned the allegation that the solicitors had failed to make enquiries with their client having been asked to do so by the Lord Ordinary.
22. Having investigated, the Commissioner is satisfied that the SLCC does not hold the information covered by this part of Mr X's request.
23. The Commissioner finds that the SLCC was correct to give Mr X notice, in terms of section 17(1) of FOISA, that it does not hold the correspondence between the third party's solicitors and himself which he had asked for in request 3.

Section 26(a) of FOISA (Prohibitions on disclosure)

24. The SLCC withheld the other information requested by Mr X under section 26(a) of FOISA.
25. The SLCC argued that disclosure of the withheld information was prohibited by section 43(1) of the LPLA and that the information was therefore exempt from disclosure in terms of section 26(a) of FOISA.
26. Section 26(a) exempts information if its disclosure, otherwise than under FOISA, is prohibited by or under an enactment. This is an absolute exemption and therefore is not subject to the public interest test in section 2(1)(b) of FOISA.
27. Section 43 of the LPLA is reproduced in full in Appendix 1. Section 43(1), read with section 43(2), provides that (except as permitted by section 43(3)) no information may be disclosed where it is information:

- (i) contained in a conduct complaint, services complaint or handling complaint, or
 - (ii) given to or obtained by the SLCC, or any person acting on its behalf, in the course of (or for the purposes of) any consideration of such a complaint, or an investigation (including any report of such an investigation) into a services complaint or a handling complaint.
28. The SLCC considered that the withheld information fell within the scope of section 43(2) of the LPLA. The documents that have been withheld, notably the correspondence between the solicitors being complained about and their client, were provided to the SLCC for the purpose of considering the complaint by Mr X. The documents were subject to legal professional privilege and were issued to the SLCC on the understanding that they would not be disclosed. The SLCC did not have consent from the solicitors to disclose the information.
29. Section 43(3) of the LPLA provides that such information may be disclosed (a) for the purposes of enabling or assisting the SLCC to exercise any of its functions, or (b) where the disclosure is required by or by virtue of any provision made by or under the LPLA, or by any other enactment or rule of law.
30. The SLCC noted that the practical effect of section 43 of the LPLA is that the SLCC cannot normally provide details of a particular case unless the disclosure is either necessary for its investigation or the SLCC has been given a mandate by the parties. Neither of these factors was met in this case.
31. The SLCC submitted that it had carried out its functions, by investigating Mr X's complaint and issuing a determination. This was completed by the time Mr X made his information request. There was accordingly no requirement for the SLCC to disclose the information to Mr X "for the purpose of enabling or assisting the Commission to exercise any of its functions" (section 43(3)(a) of the LPLA).
32. The SLCC considered that disclosure of the information other than in the exercise of the functions of the SLCC would be inconsistent with the prohibition in terms of section 43(1) and (2) of the LPLA and would be in contradiction of section 43(4) of the LPLA, which states that it is an offence to knowingly disclose information in contravention of section 43(1) of the LPLA.
33. The Commissioner accepts that the information withheld by the SLCC under section 26(a) of FOISA is information that the SLCC obtained for the purpose of considering the complaint lodged by Mr X. In the circumstances, the Commissioner is satisfied that it is information to which section 43(2) of the LPLA applies.
34. The Commissioner has accepted, in a number of cases, for example, *Decision 027/2014 BWWC Limited and the Scottish Legal Complaints Commission*¹ that section 43 of the LPLA contains a prohibition on disclosure in terms of section 26 of FOISA.
35. In this case, the Commissioner is also satisfied that the provisions contained in section 43 of the LPLA create a prohibition on disclosure of the withheld information for the purposes of section 26(a) of FOISA. Consequently, the SLCC was entitled to withhold the information under the exemption in section 26(a) of FOISA.

¹ <https://www.itspublicknowledge.info/201302419.aspx>

36. As the Commissioner has concluded that the information was correctly withheld under section 26(a), it is not necessary for him to consider the application of section 30(c) of FOISA in relation to this information.

Decision

The Commissioner finds that the Scottish Legal Complaints Commission complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr X.

Appeal

Should either Mr X or the SLCC wish to appeal against this decision, they have the 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.

Margaret Keyse
Head of Enforcement

6 February 2018

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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (b) section 26;

...

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or

- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

(a) is prohibited by or under an enactment;

...

Legal Profession and Legal Aid (Scotland) Act 2007

43 Restriction upon disclosure of information: Commission

- (1) Except as permitted by subsection (3), no information mentioned in subsection (2) may be disclosed.
- (2) The information is information -
 - (a) contained in a conduct complaint, services complaint or handling complaint;
 - (b) which is given to or obtained by the Commission or any person acting on its behalf in the course of, or for the purposes of -
 - (i) any consideration of such a complaint;
 - (ii) an investigation (including any report of such an investigation) into a services complaint or a handling complaint.
- (3) Such information may be disclosed -
 - (a) for the purpose of enabling or assisting the Commission to exercise any of its functions;
 - (b) where the disclosure is required by or by virtue of any provision made by or under this Act or by any other enactment or other rule of law.
- (4) Any person who, in contravention of subsection (1), knowingly discloses any information obtained when employed by, or acting on behalf of, the Commission is guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.

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