

Decision Notice

Decision 060/2015: Mr Robert Dowdles and the Scottish Legal Complaints Commission

Complaint correspondence

Reference No: 201500113
Decision Date: 5 May 2015



Summary

On 15 October 2014, Mr Dowdles asked the Scottish Legal Complaints Commission (SLCC) for information relating to its investigation of his complaint.

The SLCC responded by providing Mr Dowdles with some information. It gave him notice that it did not hold other information he had asked for, and it withheld information in terms of section 26 of FOISA. Following a review, Mr Dowdles remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the SLCC had responded to Mr Dowdles' request for information in accordance with Part 1 of FOISA. It had correctly withheld information under section 26(a) of FOISA and had correctly notified Mr Dowdles that it did not hold other information. She did not require the SLCC to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) 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)

Section 43 of the Legal Profession and Legal Aid (Scotland) Act 2007 (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.

Note: Rosemary Agnew, the Commissioner, was formerly Chief Executive of the SLCC. Ms Agnew has taken no part in the consideration of this application and has, under section 42(10) of FOISA, authorised Margaret Keyse, Head of Enforcement, to make a decision on her behalf. All references to "the Commissioner" in this decision should therefore be read as references to Margaret Keyse, Head of Enforcement.

Background

1. On 15 October 2014, Mr Dowdles made a request for information to the SLCC. He asked for:
 - (a) A copy of section 2(4) of the Legal Profession and Legal Aid (Scotland) Act 2007 (the LPLA);
 - (b) Copies of all file notes and documents submitted by a specified firm of solicitors (Firm A);
 - (c) Copies of all notes and documents submitted by Firm A in which it claimed to have obtained Mr Dowdles' permission to utilise his personal data for its own benefit;
 - (d) Copies of all documentation from Firm A outlining its rebuttal of Mr Dowdles' complaint;

- (e) Copies of any correspondence from Firm A to the SLCC and/or a specified insurance company (Firm B) giving its view of Mr Dowdles' case beyond the failure to sist his writ;
 - (f) Copies of any documentation from Firm B to Firm A and/or the SLCC in which Mr Dowdles is named and expressing an opinion as to the possible outcome of a court case;
 - (g) Copies of any documents to/from Firm A to Firm B and vice versa, in which Mr Dowdles is named and in which levels of compensation are quoted;
 - (h) Copies of any documentation passing between Firm A and Firm B or vice versa in which the subject of financial compensation to Mr Dowdles is discussed;
 - (i) Confirmation from the SLCC that Firm A was legally entitled, under the Data Protection Act (the DPA), to provide the SLCC with Mr Dowdles' personal data in order to defend its own position. Mr Dowdles asked the SLCC to quote the section of the DPA which Firm A claimed would justify this action.
2. The SLCC responded on 11 November 2014. It provided Mr Dowdles with information fulfilling parts a) and i) of his request and it notified him that it did not hold any information regarding parts d) and f). The SLCC advised Mr Dowdles that it considered the information falling under parts b), c), e), g) and h) to be exempt from disclosure under section 26 of FOISA (Prohibitions on disclosure). The SLCC also indicated that, under section 38(1)(b) of FOISA, it had redacted some information from the documents disclosed in response to parts a) and i) of the request, as the information comprised third party personal data.
 3. On 17 November 2014, Mr Dowdles wrote to the SLCC requesting a review of its decision on the basis that he did not accept that the SLCC was correct to withhold information from him. Mr Dowdles clarified the information he had asked for in part d) of his request and he queried the SLCC's reliance on section 17(1) of FOISA with regard to part f). Mr Dowdles also asked additional questions about the response issued to him by the SLCC.
 4. The SLCC notified Mr Dowdles of the outcome of its review on 12 December 2014. In its review, the SLCC maintained that it did not hold any information fulfilling part f) and, based on his clarification of the terms of part d), it confirmed that it held information falling within the scope of that request, but considered it exempt from disclosure in terms of section 26(a) of FOISA. The SLCC addressed the additional questions raised by Mr Dowdles in his request for review, and it upheld its previous decision to withhold information from him under section 26(a) of FOISA.
 5. On 12 January 2015, Mr Dowdles wrote to the Commissioner and applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Dowdles stated he was dissatisfied with the outcome of the SLCC's review because he did not consider that the SLCC was correct to withhold the information he had asked for.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Dowdles made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to her for a decision. The case was then allocated to an investigating officer.

7. On 25 February 2015, the SLCC was notified in writing that an application had been received from Mr Dowdles. It was given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and was asked to respond to specific questions. The SLCC was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
8. The SLCC responded on 18 March 2015. It provided submissions on its application of the exemption contained in section 26(a) of FOISA, and details of the searches it had carried out for information covered by Mr Dowdles' request. It maintained that it was correct to give Mr Dowdles notice, in terms of section 17(1) of FOISA, that it did not hold any information in relation to part f) of his request.
9. The SLCC disclosed information to Mr Dowdles during the investigation. This information was provided under the DPA and will not be considered in this Decision Notice.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Dowdles and the SLCC. She is satisfied that no matter of relevance has been overlooked

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

11. 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.
12. In its initial response of 15 November 2014, and in its review response of 12 December 2014, the SLCC informed Mr Dowdles that it did not hold any information that fell under the scope of part f) of his request (i.e. copies of any documentation from Firm B to Firm A and/or the SLCC in which Mr Dowdles is named and expressing an opinion as to the possible outcome of a court case).
13. In his application to the Commissioner, Mr Dowdles questioned whether the SLCC had undertaken sufficient investigation to be certain that it held no information in relation to part f).
14. The SLCC explained that when it receives a complaint form, a paper file is opened and the information contained in the paper file is recorded on its online system, known as Newpro. The SLCC noted that in response to Mr Dowdles' request for information, it had conducted searches on both the paper file and in Newpro and did not find any information that fell within the scope of part f).
15. The SLCC explained that the paper file was manually checked by searching through every page in the file, and similarly the online records were checked by opening up each document recorded in Newpro and checking them for the information that was sought in part f). The SLCC submitted that searches were carried out on three occasions: following receipt of the initial request; following receipt of the request for review; and following notification from the Commissioner that she had received an application from Mr Dowdles.

16. The SLCC stated that, other than the documents it had already identified in this case, no other information was identified which fell within the terms of the request. The SLCC also submitted that, in addition to the searches described above, a name search was undertaken on Newpro to ascertain if it held any other records belonging to Mr Dowdles. The search identified that it held two files, notably the file for Mr Dowdles' complaint about Firm A (which relates to the FOI request) and the file concerning his freedom of information requests. The SLCC submitted that it holds no other relevant records.
17. The Commissioner has considered the submissions made by both Mr Dowdles and the SLCC and she is satisfied that the SLCC has conducted thorough searches of the information it holds. She is also satisfied that the outcome of those searches indicate that the SLCC does not hold any information that falls under the scope of part f).
18. In light of this, the Commissioner finds that the SLCC was correct to give Mr Dowdles notice, in terms of section 17(1) of FOISA, that it does not hold any information regarding part f).

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

19. Information from four documents was withheld by the SLCC: two emails and two letters. The withheld information comprises correspondence from Firm A to its insurers and to the SLCC.
20. 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. 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.
21. 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:
 - a) contained in a conduct complaint, services complaint or handling complaint, or
 - b) 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.
22. 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.
23. The SLCC emphasised that acting in contravention of this provision had serious implications for the SLCC and its staff, referring to the criminal sanctions in section 43(4) of the LPLA.
24. Mr Dowdles argued that he did not consider that anyone other than himself would be interested in the withheld information. He could see no arguments for withholding it and contended that it should be disclosed.
25. The SLCC submitted that the documents being withheld were provided by Firm A to the SLCC in response to the complaint raised by Mr Dowdles. It argued that the practical effect of section 43 was that it could not normally provide details of a particular case, unless disclosure was either necessary for its investigation or it had been given a mandate by the

parties. It provided confirmation that, with the exception of the information released during the investigation under the DPA, Firm A did not consent to disclosure.

26. The Commissioner has reviewed the withheld information and accepts that all of the correspondence being withheld is information that was obtained by the SLCC when considering the complaint lodged by Mr Dowdles. In the circumstances, the Commissioner is satisfied that it is information to which section 43(2) of the LPLA applies.
27. The SLCC commented that, although section 43(3)(b) of the LPLA appeared to permit release of the information under "any other enactment" (for example, FOISA), its own view was that release of the information under FOISA would be inconsistent with the LPLA. In support of this position, the SLCC made reference to the Court of Session decision in the case of *Dumfries and Galloway Council v Scottish Information Commissioner (2008) CSIH 12*¹ (the Dumfries case), where the Court held that the exercise of a duty to release information under FOISA must not be inconsistent with the prohibitions or restrictions contained in the other enactment. Consequently, the SLCC contended that the information could not be released.
28. The Commissioner considered the judgment in the Dumfries case in *Decision 236/2011 Robert McKee and the Scottish Legal Complaints Commission*² (the McKee case), accepting on that basis that section 43 of the LPLA creates a prohibition on disclosure for the purposes of section 26(a) of FOISA. While the Court of Session judgment related to release under FOISA being inconsistent with Part 9 of the Enterprise Act, she is satisfied that the duty to release the information under FOISA is equally inconsistent with the prohibitions and restrictions contained within section 43 the LPLA.
29. This being so, the Commissioner accepts that the SLCC was entitled to withhold the information covered by Mr Dowdles' request under the exemption in section 26(a) of FOISA.

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 Dowdles.

¹ <http://www.scotcourts.gov.uk/opinions/2008CSIH12.html>

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201100055.asp>

Appeal

Should either Mr Dowdles or the Scottish Legal Complaints Commission 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

5 May 2015

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 –

- (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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