

Decision Notice



Decision 122/2013 Mr Gordon Beurskens and the Scottish Legal
Complaints Commission

Complaint outcome

Reference No: 201300969
Decision Date: 28 June 2013

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Rosemary Agnew
Scottish Information Commissioner

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Summary

On 18 March 2013, Mr Beurskens asked the Scottish Legal Complaints Commission (the SLCC) for information about the outcome of a specific complaint. The SLCC withheld the information under section 26(a) of FOISA, on the basis that disclosure was prohibited by section 43(1) of the Legal Profession and Legal Aid (Scotland) Act 2007 (the LPLA). Following an investigation, the Commissioner found that the SLCC was entitled to withhold the information under section 26(a).

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(b) (Effect of exemptions); 26(a) (Prohibitions on disclosure)

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

The full text of each of the statutory provisions cited above is reproduced in the Appendix 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 18 March 2013, Mr Beurskens wrote to the SLCC requesting information relative to the outcome of a specified complaint.
2. The SLCC responded on 21 March 2013, withholding the information in terms of section 26(a) of FOISA, on the basis that disclosure of the information was prohibited by section 43(1) of the LPLA. The SLCC provided reasons for applying this exemption and also (with reasons) applied section 38(1)(b) of FOISA.
3. On 25 March 2013, Mr Beurskens wrote to the SLCC requesting a review of its decision. He did not accept that the exemptions cited by the SLCC applied.

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4. The SLCC notified Mr Beurskens of the outcome of its review on 19 April 2013, upholding the application of sections 26(a) and 38(1)(b) of FOISA.
5. On 19 April 2013, Mr Beurskens wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SLCC's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Beurskens made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 13 May 2013, the SLCC was notified in writing that a valid application had been received from Mr Beurskens and was asked to provide the Commissioner with the information withheld from him. The SLCC responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer contacted the SLCC on 22 May 2013, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the SLCC was asked (with particular reference to sections 26(a) and 38(1)(b)) to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. The SLCC responded on 4 June 2013, providing submissions on its application of the exemptions in section 26(a) and 38(1)(b) of FOISA.
10. The relevant submissions made by the SLCC and Mr Beurskens will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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



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

12. 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 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 in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA.
13. Section 43 of the LPLA is reproduced in full in the Appendix to this decision. 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:
 - contained in a conduct complaint, services complaint or handling complaint, or
 - 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.
14. 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.
15. The SLCC confirmed that acting in contravention of this provision holds serious implications for the SLCC, as section 43(4) of the LPLA provides that 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.
16. The SLCC considered the withheld information to fall within the scope of section 43(2). It considered the practical effect of section 43 to be 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. In addition to not considering disclosure necessary for its investigation, the SLCC explained that it did not have consent for release and drew the Commissioner's attention to the explanations it had provided Mr Beurskens in responding to his request and requirement for review.
17. In its initial response to Mr Beurskens, the SLCC explained that, although section 43(3)(b) of the LPLA appeared at first to permit release of the information under "any other enactment" (e.g. FOISA), it considered release of the information under FOISA would be inconsistent with the LPLA. The SLCC referred Mr Beurskens to the Court of Session Opinion in the case of *Dumfries and Galloway Council v Scottish Information Commissioner (2008) CSIH 12*¹, 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.

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

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18. The then Commissioner considered the above judgment of the Court of Session in *Decision 236/2011 Robert McKee and the Scottish Legal Complaints Commission*,² where he accepted that information of a similar description had been correctly withheld in terms of section 26(a) of FOISA.
19. Mr Beurskens submitted that he did not agree that the outcome of a complaint could be said to fall within the definition of information contained in section 43(2) of the LPLA. He stated that he was already in possession of the complaint which had been submitted and sought only the outcome. He stated that the SLCC had misdirected itself as interpreting the request as being for, “information contained in acomplaint”, when in fact he only sought the outcome.
20. He submitted that since the request was for information after the complaint had been made, investigated and decided, it did not fall to be considered as information covered by section 43(2). He submitted that the outcome was not given to or obtained by the SLCC and would not be contained within any report on the investigation.
21. Having given full consideration to Mr Beurskens’ submissions, and having viewed the information withheld, the Commissioner is satisfied that the information requested and withheld by the SLCC is information to which section 43(2) of the LPLA applies. She is satisfied that disclosure of this information under FOISA would be inconsistent with the prohibition in section 43(1), to the same extent as disclosure of the information in the cases referred to in paragraphs 17 and 18 above was inconsistent with the prohibitions under consideration there.
22. In all the circumstances, therefore, the Commissioner is also satisfied that the provisions in section 43 of the LPLA do create a prohibition on disclosure of the information withheld for the purposes of section 26(a) of FOISA, and that the SLCC was entitled to withhold the information under the exemption in section 26(a).
23. As the Commissioner has concluded that all of the information was correctly withheld under section 26(a), it is not necessary for her to consider the application of section 38(1)(b) of FOISA 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 dealing with Mr Beurskens’ request for information.

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

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Appeal

Should either Mr Beurskens or the Scottish Legal Complaints Commission wish to appeal against this decision, there is an 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.

Margaret Keyse
Head of Enforcement
28 June 2013



Appendix

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.

...

- (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;

...

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.