

Decision Notice 116/2021

Complaint information

Applicant: The Applicant

Public authority: Scottish Legal Complaints Commission

Case Ref: 202100230



Scottish Information
Commissioner

Summary

The SLCC was asked for information it held in relation to a specific complaint. The SLCC refused to disclose the information on the basis that it was either not held or it was prohibited from doing so by the Legal Profession and Legal Aid (Scotland) Act 2007.

The Commissioner found that the SLCC had complied with FOISA in responding to the request.

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)

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

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 28 December 2020, the Applicant made a request for information to the Scottish Legal Complaints Commission (the SLCC). The Applicant requested copies of recorded information held by the SLCC in respect of a specific case reference. He stated that this should include (for example) information held in written notes, files, minutes/notes of meetings, exchanges of information, emails/any information held on electronic format, also any “zoom” type video or telephone conversations or transcripts thereof. He stated that the request was for information held in respect of both internal SLCC communications and SLCC communications with independent / external parties / information submitted to SLCC.
2. The SLCC responded on 20 January 2021. It advised that it did not record any video or telephone conversations and so this information was not held. It told the applicant that the information that it did hold was exempt from disclosure under section 26(a) of FOISA, explaining that disclosure was prohibited under section 43 of the Legal Profession and Legal Aid (Scotland) Act 2007 (the LPLA).
3. On 29 January 2021, the Applicant wrote to the SLCC, requesting a review of its decision as he did not believe the law had been properly applied.
4. The SLCC notified the Applicant of the outcome of its review on 10 February 2021. The SLCC accepted that, in part, it did not correctly interpret FOISA, for which it apologised. It confirmed it did not audibly or visually record any telephone calls and issued a notice in terms of section 17(1)(b) of FOISA, stating that this information was not held. In terms of the remaining information, it advised the Applicant that, as it constituted his own personal data, it was exempt from disclosure in terms of section 38(1)(a) of FOISA. It advised that it would respond to his request as a subject access request under the Data Protection Act.
5. On 23 February 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the SLCC’s review because he was not seeking only his own personal data. He provided

reasoning as to why he believed that the SLCC should hold information that would not constitute his own personal data.

6. On 24 February 2021, the SLCC provided the Applicant with a response to his subject access request under the DPA, in which it provided a schedule of information that had been withheld, not being his personal data.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant 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 22 March 2021, the SLCC was notified in writing that the Applicant had made a valid application. The SLCC was asked to send the Commissioner the information withheld from the Applicant. The SLCC provided the information and the case was 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 to answer specific questions, focusing on the identification of any information held and the application of any relevant exemptions.
10. The SLCC provided submissions: these will be considered below.
11. On 1 April 2021, the Applicant provided the Commissioner with a copy of the subject access response he had received on 24 February 2021 and, in relation to the SLCC advising him (presumably as policy) that it did not record telephone or video recordings, stated he had in fact asked for "information held" held by the SLCC, commenting that the SLCC might import such information, or details of such conversation might be held in note form.
12. The Applicant also provided details of his complaint to the SLCC and how that complaint was dealt with by the SLCC. The Commissioner cannot comment on the SLCC's handling and investigation of the Applicant's complaint. The Commissioner can only consider whether or not the SLCC complied with FOISA in responding to the Applicant's request. The Applicant's submissions will be considered below.

Commissioner's analysis and findings

13. 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 him by both the Applicant and the SLCC. He is satisfied that no matter of relevance has been overlooked.

Information held by the SLCC

14. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
15. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant

believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.

16. In its submissions to the Commissioner, the SLCC explained that the Applicant had requested all recorded information relative to his complaint, under a specific reference number. It advised that any and all information falling within the scope of the Applicant's request was held within its case management system, in which it recorded all external correspondence sent and received regarding the complaint, together with file notes of telephone calls, and internal correspondence and documentation.
17. It further advised that it did not audibly or visually record meetings or telephone calls and so had been correct in providing the Applicant with notice, in terms of section 17(1) of FOISA, that no such recordings were held.
18. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner must first of all consider the interpretation and scope of the request and thereafter the quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, however, the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
19. Having considered all relevant submissions, and the terms of the request under consideration, the Commissioner accepts that the SLCC interpreted the Applicant's request reasonably and took adequate, proportionate steps in the circumstances to establish what information it held. In relation to that part of the Applicant's request for: "... any 'zoom' type video or telephone conversations...", he is satisfied that the SLCC does not (and did not, on receipt of the request) hold any audible or visually recorded information of the description set out in its responses to the Applicant and so was correct to give the Applicant notice, in terms of section 17(1) of FOISA, that it held no such information. Any other information held relating to video or telephone conversations would not fall within the scope of that section 17 notice.
20. The SLCC went on to submit that all of the information it did hold was held for the purpose of conducting an investigation into a complaint made by the Applicant and that it was exempt from disclosure under section 26(a) of FOISA.

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

21. The SLCC argued that disclosure of the information held, including that which was provided to the Applicant under the DPA, was prohibited by section 43(1) of the LPLA and 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 and so is not subject to the public interest test in section 2(1)(b) of FOISA. Section 43 of the LPLA is reproduced in full in Appendix 1.
22. Section 43(1) of the LPLA (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 –

- (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.
23. As outlined above, the SLCC advised the Commissioner that any information falling within the scope of the Applicant's request was held within its case management system, in which it recorded all external correspondence sent and received regarding the complaint, together with file notes of telephone calls, and internal correspondence and documentation.
24. The SLCC submitted that it is governed by the LPLA and stated that section 43 of the LPLA, as indicated to the Applicant in its initial response, prohibits it from disclosing information received in relation to complaints, other than for the purpose of enabling or assisting it to exercise any of its functions, or where the disclosure is required by or by virtue of any provision made by or under that Act or by any other enactment or other rule of law.
25. It advised that it will sometimes disclose information to the parties to a complaint, where the SLCC considers it will assist with resolving the complaint. It advised that the Applicant submitted his request for information on his complaint file after his complaint had been closed, in other words after the SLCC's function had been completed. The SLCC confirmed its position that it was prohibited from disclosing the information requested, under section 43 of the LPLA.
26. Having considered this explanation and the withheld information, the Commissioner is satisfied that it is information to which section 43(2) of the LPLA applies.
27. The Commissioner notes that section 43(3) of the LPLA provides that information covered by section 43(2) 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.
28. The SLCC submitted that disclosure of information to the Applicant under FOISA would not help it in the exercise of any of its functions. It noted that it had no ongoing function in relation to the Applicant's complaint.
29. In relation to the relevance of section 43, the Applicant drew attention to information the SLCC had published on its "decision database" in connection with other complaints it had handled. In those cases, he submitted that it had published "unrestricted" what the complainers said, what the practitioners said, any legal conventions adopted, how the committee probed evidence to take their decisions and what the committee thought in the circumstances.
30. The Applicant provided background details of the complaint he had raised with the SLCC, advising that in his case the details were not published on the SLCC database, as had been done in other cases. He commented that it was not therefore unreasonable to expect that if information was available on the internet regarding the approach adopted by the SLCC, then similar / further information would be available in respect of other cases.
31. The Applicant submitted that the tenor of the SLCC's argument, as set out in its initial response of 20 January 2021, was that it had conducted an investigation into his complaint, made a determination and there was nothing further for it to do.

32. Given that the SLCC had not published details relative to his complaint, as it had done with other complaints and investigations, the Applicant commented that the SLCC had not discharged all of its functions. He commented that, in general, the SLCC's position as not consistent with the rule of law or natural justice.
33. The Commissioner notes that section 43 of the LPLA prohibits the disclosure of information, as defined by section 43(2). As above, he is satisfied that the information held is information to which section 43(2) of the LPLA applies. In relation to section 43(3), the Commissioner notes that the information may be disclosed for the purposes of enabling or assisting the SLCC to exercise any of its functions. The disclosure or publication of such information, in enabling or assisting the SLCC to exercise any of its functions, is purely a matter for the SLCC. Whether or not those functions have been completed or not has no bearing on whether the information falls to be considered under section 43 of the LPLA.
34. In the circumstances of the present case, therefore, the Commissioner is satisfied that the provisions contained in section 43 of the LPLA do 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).

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 the Applicant.

Appeal

Should either the Applicant 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

4 August 2021

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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