

Decision Notice



Decision 027/2014 BWWC Limited and the Scottish Legal Complaints Commission

Handling of complaint

Reference No: 201302419
Decision Date: 14 February 2014

www.itspublicknowledge.info

Rosemary Agnew
Scottish Information Commissioner

Kinburn Castle
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Summary

On 31 May 2013, BWWC Limited (BWWC) asked the Scottish Legal Complaints Commission (the SLCC) for correspondence and other information relating to a complaint made to the SLCC.

The SLCC refused to disclose the information, under exemptions including that in section 26(a) of FOISA. This exempts information from disclosure if disclosure is prohibited by other legislation. Following an investigation, the Commissioner found that the SLCC had been entitled to withhold the information.

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); 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 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. Following a complaint made by BWWC to the SLCC about named solicitors and about a firm of solicitors, BWWC wrote to the SLCC on 31 May 2013, requesting specified information relating to the complaint.
2. The SLCC responded on 25 June 2013, withholding the information under the exemptions in section 26(a) and 38(1)(b) of FOISA. In relation to section 26(a), the SLCC explained that it was prohibited from disclosing the information by section 43(1) of the LPLA.



3. On 18 July 2013, BWWC wrote to the SLCC requesting a review of its decision.
4. The SLCC notified BWWC of the outcome of its review on 16 August 2013, upholding its previous decision and, additionally, applying the exemption in section 30(c) of FOISA to the information.
5. On 14 October 2013, BWWC wrote to the Commissioner, stating that it 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 BWWC 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 21 October 2013, the SLCC was notified in writing that an application had been received from BWWC and was asked to provide the Commissioner with any information withheld in this case. The SLCC responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the SLCC, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). The SLCC was asked to justify its reliance on section 26(a) of FOISA.
9. During the investigation, the SLCC provided some information to BWWC. It continued to withhold the remaining information under sections 26(a) and 30(c) of FOISA, additionally applying section 25 (Information otherwise accessible) to some information. The SLCC confirmed that it was no longer withholding information under section 38(1)(b) of FOISA.

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 BWWC and the SLCC. She is satisfied that no matter of relevance has been overlooked.



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

11. 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.
12. 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:
 - 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.
13. 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.
14. 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.
15. The SLCC submitted (with reasons) that the withheld information all fell within the scope of section 43(2). 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, the solicitors concerned did not consent to disclosure.
16. 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.

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



17. 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 created a prohibition on disclosure for the purposes of section 26(a) of FOISA.
18. BWWC submitted that section 43(3)(b) of the LPLA was not the only qualification to section 43(1). BWWC noted that section 43(3)(a) permitted disclosure for the purpose of enabling or assisting the Commission to exercise *any of its functions*. It believed the copying of documentation such as this to the various other parties involved (including the complainant), to allow them the opportunity to respond or comment, was clearly assisting the SLCC to exercise its functions.
19. BWWC also commented that section 43(3)(b), as well as covering other enactments, also permits disclosure under any *other rule of law*. This would appear, BWWC submitted, to include the rules of natural justice. BWWC asserted that for the SLCC to consider representations from the very people complained of, and also apparently others, without disclosing that information to BWWC or offering it any opportunity to respond, must be not only a fundamental breach of natural justice but also an abuse of process.
20. The SLCC was asked to comment on these points and again made reference to the Court of Session judgment in the Dumfries case. There, the SLCC pointed out, the Court refused to accept that disclosure of information under FOISA was a “function” of the authority for the purposes of the prohibition under consideration in that case (which was qualified in a similar way to the prohibition in section 43 of the LPLA). The SLCC asserted that applying the same logic as in the Dumfries case, whereby a “function” of the SLCC would connote any act or activity susceptible of being facilitated by the disclosure of information, would have the same meaning in this case. In other words, the SLCC argued, it would be meaningless (and contrary to the intention of the legislation) to say that information might be disclosed for the purpose of disclosing information.
21. In relation to BWWC’s views on disclosure required by a rule of law and the rules of natural justice, the SLCC commented that such a position would be inconsistent with the prohibition in section 43(1) and the criminal offence in section 43(4). It noted that it was empowered to regulate its own procedures and cited judicial authority supporting its position on giving parties the opportunity to comment on information provided. It considered itself to have acted fairly in relation to the current complaint, in accordance with the guidance of the Court in the case cited.

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



22. Having given full consideration to all relevant 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 considers the conclusions in the Dumfries case to apply with the same force here as they did in the McKee case. Following these conclusions, she does not consider there to be any basis for concluding that disclosure would be for the purpose of enabling or assisting the SLCC to exercise any of its functions, or could be said to be required by any enactment.
23. While she has considered BWWC's submissions fully, neither is the Commissioner persuaded that disclosure is required under any rule of law, for the purposes of section 43(3)(b) of the LPLA. In line with the Dumfries case, disclosure must be consistent with the prohibition under consideration. Given the nature of the section 43 prohibition, read as a whole, the Commissioner does not believe it is the intention of section 43(3)(b) to permit the disclosure of information by the SLCC to address the situation where one of the parties to a complaint perceives there to have been a breach of natural justice in the SLCC's handling of the case. In the face of the section 43 prohibition, that would appear to the Commissioner to usurp the functions of the courts.
24. In reaching her conclusions, the Commissioner must bear in mind that disclosure under FOISA is to the general public and not just the requestor. In all the circumstances, the Commissioner is satisfied that the SLCC was entitled to withhold the information under the exemption in section 26(a) of FOISA.
25. 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 sections 25 and 30(c) of FOISA in this case.

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 Bird Watching and Wildlife Club.



Appeal

Should either BWWC Ltd 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
14 February 2014



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.