

Decision Notice



Decision 107/2013 Mr David Peat and the Scottish Legal Complaints Commission

Complaint information

Reference No: 201301032
Decision Date: 6 June 2013

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Rosemary Agnew
Scottish Information Commissioner

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Summary

On 6 March 2013, Mr Peat asked the Scottish Legal Complaints Commission (the SLCC) whether anyone had raised a complaint against a specific law firm. The SLCC refused to confirm or deny whether it held relevant recorded information. Following an investigation, the Commissioner found that the SLCC was entitled to neither confirm nor deny whether it held information which would address Mr Peat's request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 18(1) (Further provisions as respects responses to request); 30(c) (Prejudice to the effective conduct of public affairs)

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 6 March 2013, Mr Peat wrote to the SLCC and, in the context of a previous complaint, asked if anyone else had raised a complaint against a specified law firm.
2. The SLCC responded on 7 March 2013. It informed Mr Peat that it could neither confirm nor deny whether it had received a complaint from anyone else. It explained that this approach was informed by the powers and duties conferred on it by section 43 of the Legal Profession and Legal Aid (Scotland) Act 2007 (LPLA). In doing so, the SLCC informed Mr Peat that any relevant information it held could be withheld under sections 26(a) and 30(c) of FOISA, explaining why it considered these exemptions to be applicable.



3. On 25 March 2013, Mr Peat wrote to the SLCC, requesting a review of its decision on the basis that he required the information requested for a forthcoming court action.
4. The SLCC notified Mr Peat of the outcome of its review on 19 April 2013, upholding its original decision without modification.
5. On 28 April 2013, Mr Peat 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 Peat 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. The case was then allocated to an investigating officer.

Investigation

7. On 21 May 2013, the investigating officer notified the SLCC in writing that an application had been received from Mr Peat, 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 to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with specific reference to the provisions of section 18 of FOISA.
8. The SLCC responded on 4 June 2013, indicating that it was relying upon section 18 of FOISA on the basis that (if held) the information would be exempt in terms of section 30(c) of FOISA. It provided reasons for this position.
9. Mr Peat was invited to provide his comments on this case, and in particular on the public interest in confirming whether or not the information he requested existed or was held by SLCC. He responded with comments.
10. The relevant submissions obtained from Mr Peat and the SLCC 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 submissions made to her by both Mr Peat and the SLCC. She is satisfied that no matter of relevance has been overlooked.



Section 18(1) of FOISA – “neither confirm nor deny”

12. As mentioned above, the SLCC refused to confirm or deny whether it held any information falling within the scope of Mr Peat’s request. It adhered to this position in its submissions to the Commissioner.
13. Section 18(1) allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
 - a request has been made to the authority for information which may or may not be held by it;
 - if the information were held by the authority (and it need not be), it could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 39(1) or 41 of FOISA
 - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
14. Where a public authority has chosen to rely on section 18(1) of FOISA, the Commissioner must establish whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest. She must also establish whether, if the information existed and was held by the public authority, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions provided for by sections 28 to 35, 39(1) or 41 of FOISA.
15. While doing this, the Commissioner must ensure that her decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that she is unable to comment in any depth on the reliance by the public authority on any of the exemptions listed in section 18(1), or on other matters which could have the effect of indicating whether the information existed or was held by the authority.
16. In this case, the SLCC submitted that if it did hold any information falling within the scope of Mr Peat’s request, it would be exempt under section 30(c) of FOISA.
17. It is not sufficient to claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that the authority must be able to give a refusal notice under section 16(1), on the basis that any relevant information it held would be exempt information under one or more of the listed exemptions. The SLCC has advised the Commissioner that, if held, the information would be exempt under section 30(c) of FOISA. This exemption is subject to the public interest test in section 2(1)(b) of FOISA, so the authority must also be satisfied that the public interest in maintaining the exemption outweighs any public interest there would be in releasing any relevant information it held.
18. The Commissioner must first, therefore, consider whether the SLCC could have given a refusal notice under section 16(1) in relation to the information in question, if it existed and was held.



Section 30(c): substantial prejudice to effective conduct of public affairs

19. Under section 30(c) of FOISA, information is exempt information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The use of the word “otherwise” distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from release.
20. For section 30(c) to apply, any harm claimed must be at the level of substantial prejudice. There is no definition in FOISA of what is meant by substantial prejudice, but the Commissioner considers that the harm in question must be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur as a consequence of disclosure, and therefore needs to establish a real risk or likelihood of actual harm occurring at some point in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
21. The SLCC argued that, should it hold the information requested, disclosure of that information would substantially prejudice its ability to carry out independent and impartial investigations, and to analyse and consider the merits of any complaint without interference. This would compromise the investigations and reduce public confidence in the SLCC.
22. The Commissioner accepts this argument. She also considers it particularly relevant that the SLCC is subject to the requirements of the LPLA, which confers an expectation of confidentiality and allows disclosure in limited circumstances only. The Commissioner therefore agrees that disclosure would have the effects claimed by the SLCC, which can reasonably be concluded to amount to substantial prejudice to the effective conduct of public affairs, and that the information, if held, would therefore be exempt from disclosure under section 30(c) of FOISA.
23. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA.

The public interest test – section 2(1)(b)

24. Mr Peat, as indicated above, expressed personal reasons why he believed information should be disclosed to him.
25. The SLCC explained that it aimed to operate in an open and transparent manner, accepting a general public interest in making information accessible to the public.
26. As the gatekeeper for conduct and service complaints against legal practitioners in Scotland, and the public body responsible for regulating and investigating allegations of inadequate professional service by legal practitioners, the SLCC also acknowledged that it was in the public interest for the public to be able to scrutinise its use of its powers under the LPLA.



27. However, the SLCC identified what it considered to be very strong factors favouring non-disclosure of any relevant information. These included the public interest in being able to conduct its investigations independently and impartially, and thus maintain the fairness of the complaints process.
28. On balance, the SLCC submitted that it did not consider the public interest in disclosing any relevant information to be of sufficient significance to outweigh the public interest in withholding the information and maintaining the exemption.
29. The Commissioner has considered all of the above submissions carefully in balancing the public interest both for and against disclosure of any relevant information which might exist and be held by the SLCC.
30. The Commissioner agrees with the SLCC that there is general public interest in disclosure of the requested information, should it exist and be held by the SLCC. This would contribute to ensuring that bodies paid for from public funds are transparent and accountable for their actions. There is also a public interest in transparency and accountability in relation to the conduct of solicitors.
31. On the other hand, the Commissioner recognises the key role played by the SLCC in regulating the conduct of (and service provided by) legal practitioners in Scotland, and the vital importance of allowing it to fulfil these functions in an independent and impartial manner. Not all complaints received by the SLCC will be legitimate or well founded, so it is also of vital importance that information about them is not released into the public domain without adequate safeguards. In this connection, it is also important to bear in mind that conduct complaints may require to be investigated by the Law Society of Scotland in addition to the SLCC. Overall, there is a strong public interest in maintaining the integrity and fairness of the process.
32. On balance, therefore the Commissioner is satisfied that, if the information existed and was held by the SLCC, the public interest in maintaining the exemption in section 30(c) would outweigh any public interest in disclosure of the information.
33. Having accepted that the SLCC could give a refusal notice under section 16(1) of FOISA on the basis that any relevant information would be exempt information by virtue of section 30(c) of FOISA, the Commissioner is required by section 18(1) to go on to consider whether the SLCC was entitled to conclude that it would be contrary to the public interest to reveal whether the information existed or was held.

The public interest – section 18(1)

34. The SLCC submitted that to reveal whether information requested by Mr Peat existed or was held by it would prejudice its ability to carry out independent and impartial investigations, and to analyse and consider the merits of any complaint without interference.



35. The Commissioner is satisfied that, were the SLCC to reveal whether the information requested by Mr Peat existed or was held by it, that would have the prejudicial impact on its investigative and complaints-handling processes claimed by the SLCC. Clearly, given the crucial role played by the SLCC in dealing with complaints against legal practitioners, this would not be in the public interest.
36. As a result, the Commissioner is satisfied that the SLCC was entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether it held information as to any complaints made against the specified law firm (or, indeed, whether such information existed).

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 Peat.

Appeal

Should either Mr Peat 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.

Margaret Keyse
Head of Enforcement
6 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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.

...



30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.