

# Decision Notice



Decision 134/2008 Mr Bill Kidd MSP and the Scottish Criminal Cases Review Commission

Cases of defective representation against a named solicitor

Reference No: 200800662  
Decision Date: 13 October 2008

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**Kevin Dunion**  
Scottish Information Commissioner

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## Summary

Mr Bill Kidd MSP requested from the Scottish Criminal Cases Review Commission (the SCCRC) information relating to cases of defective representation received against a named solicitor. The SCCRC responded by advising Mr Kidd that it considered the information to be exempt from disclosure in terms of section 26(a) of FOISA due to a prohibition on disclosure contained in section 194J of the Criminal Procedure (Scotland) Act 1995 (the CPSA). Following a review, Mr Kidd remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SCCRC had dealt with Mr Kidd's request for information in accordance with Part 1 of FOISA, by correctly applying the exemption in section 26(a) and by withholding the requested information.

## Relevant statutory provisions and other sources

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

Criminal Procedure (Scotland) Act 1995 (the CPSA) sections 194J (Offence of disclosure) and 194K (Exceptions from obligations of non-disclosure)

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.

## Background

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1. On 24 January 2008, Mr Kidd emailed the SCCRC requesting the following information:
  - 1) How many “defective representation” grounds of appeal have been received since 1999?
  - 2) How many cases have been referred to appeal on “defective representation” grounds since 1999?
  - 3) How many cases on the grounds of “defective representation” has the SCCRC received against [named solicitor] of [named firm]?



2. The SCCRC responded on 12 February 2008. The SCCRC provided information which fulfilled requests 1) and 2). In relation to request 3), the SCCRC stated that it considered the information to be exempt from disclosure under section 38(1)(b) of FOISA on the basis that the information constituted personal data the disclosure of which to a member of the public would contravene any of the data protection principles set out in the Data Protection Act 1998. The SCCRC also considered that section 194J of the CPSA would make it a criminal offence for an employee of the SCCRC to disclose information obtained by it in the exercise of any of its functions.
3. On 6 March 2008, Mr Kidd emailed the SCCRC requesting a review of its decision.
4. The SCCRC notified Mr Kidd of the outcome of its review on 2 April 2008. The SCCRC confirmed that it considered its initial decision was correct and that the provisions of section 194J of the CPSA prohibited it from disclosing the requested information.
5. On 30 April 2008, Mr Kidd wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SCCRC's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Kidd confirmed that his application to the Commissioner was in respect of request 3) only.
6. The application was validated by establishing that Mr Kidd had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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7. On 6 June 2008, the SCCRC was notified in writing that an application had been received from Mr Kidd and asked to provide the Commissioner with any information withheld from the applicant.
8. The SCCRC subsequently contacted the Commissioner advising him that it does not collate information on the names of individual solicitors against whom allegations of defective representation have been made in applications to it. The SCCRC also advised the Commissioner that, due to the amount and nature of work involved to identify and provide the requested information, the estimated cost of complying with the request would exceed £600. Consequently, the SCCRC considered it would be under no obligation to comply with the request in terms of section 12(1) of FOISA (Excessive cost of compliance).
9. The SCCRC also stated that, notwithstanding the estimated cost of compliance, it considered section 194J of the CPSA prohibited it from disclosing the requested information. The case was then allocated to an investigating officer.



10. The investigating officer subsequently contacted the SCCRC, 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 SCCRC was asked to justify its reliance on any specific provisions of FOISA it considered applicable to the information requested.
11. The SCCRC responded on 8 August 2008. The SCCRC stated that it considered the requested information to be exempt from disclosure in terms of section 26(a) of FOISA on the basis that section 194J of the CPSA creates a prohibition on disclosure.

## **Commissioner's analysis and findings**

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12. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Kidd and the SCCRC and is satisfied that no matter of relevance has been overlooked.

### **Consideration of section 26(a)**

13. Section 26(a) of FOISA exempts information under FOISA where disclosure of the information is prohibited by or under any 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.
14. The SCCRC has argued that the disclosure of the information requested by Mr Kidd is prohibited by another piece of legislation, in this case section 194J of the CPSA.
15. The SCCRC has argued that section 194J of the CPSA prohibits the disclosure of any information obtained by the SCCRC in the exercise of any of its functions unless the disclosure of the information is excepted by section 194K (of the CPSA).
16. Section 194J of the CPSA states that:
  - (1) A person who is or has been a member or employee of the Commission shall not disclose any information obtained by the Commission in the exercise of any of their functions unless the disclosure of the information is excepted from this section by section 194K of this Act.
  - (2) A member of the Commission shall not authorise the disclosure by an employee of the Commission of any information obtained by the Commission in the exercise of any of their functions unless the authorisation of the disclosure of the information is excepted from this section by section 194K of this Act.
  - (3) A person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.



17. The SCCRC noted that the information in question had been obtained by it in the exercise of its functions. It went on to explain that its function under the CPSA is to review and investigate cases where it is alleged that a miscarriage of justice may have occurred and to decide whether to refer an applicant's case (whether in respect of his conviction or sentence (or both)) to the High Court for determination.
18. The SCCRC stated that the reason Parliament included the prohibition on disclosure is that the work of the SCCRC invariably involves it having access to highly confidential and sensitive material. In addition, it is required to interview many parties involved in criminal proceedings, including victims and vulnerable witnesses, and their cooperation with the SCCRC may be lessened if the information provided was automatically entitled to be placed in the public domain under FOISA.
19. In this case, the Commissioner is satisfied that the information in question has indeed been obtained by the SCCRC in the exercise of its functions under the CPSA. It is therefore necessary for the Commissioner to go on to consider whether any of the exceptions contained in section 194K of the CPSA are applicable in the circumstances of this case.
20. Section 194K of the CPSA provides that:
  - (1) The disclosure of information, or the authorisation of the disclosure of information, is excepted from section 194J of this Act by this section if the information is disclosed, or is authorised to be disclosed –
    - (a) for the purposes of any criminal, disciplinary or civil proceedings;
    - (b) in order to assist in dealing with an application made to the secretary of State for compensation for a miscarriage of justice;
    - (c) by a person who is a member or an employee of the Commission to another person who is a member or an employee of the Commission;
    - (d) in any statement or report required by this Act;
    - (e) in or in connection with the exercise of any function under this Act; or
    - (f) in any circumstances in which the disclosure of information is permitted by an order made by the Secretary of State.
  - (2) The disclosure of information is also excepted from section 194J of this Act by this section if the information is disclosed by an employee of the Commission who is authorised to disclose the information by a member of the Commission.
  - (3) The disclosure of information, or the authorisation of the disclosure of information, is also excepted from section 194J of this Act by this section if the information is disclosed, or is authorised to be disclosed for the purposes of –
    - (a) the investigation of an offence; or



(b) deciding whether to prosecute a person for an offence,  
unless the disclosure is or would be prevented by an obligation or other limitation on disclosure (including any such obligation or limitation imposed by, under or by virtue of any enactment) arising otherwise than under that section.

21. The SCCRC submitted that none of the exceptions contained in section 194K of the CPSA would permit the disclosure of the information in this case.
22. The SCCRC argued that neither of the exceptions in subsections (1)(a) or (1)(b) were applicable as the information had not been requested for the purposes of any criminal, disciplinary or civil proceedings nor in order to assist with an application for compensation for a miscarriage of justice.
23. The SCCRC pointed out that the exception in subsection (1)(c) is not applicable in this case as the information is not being disclosed by a member or employee of the SCCRC to another. Neither are the exceptions in subsections (1)(d) or (1)(e) engaged as the disclosure would not be done in any statement or report required by the CPSA nor in or in connection with the exercise of any function under the CPSA.
24. The SCCRC also stated it was unaware of any circumstances in which the disclosure of the information would be permitted by an order made by the Secretary of State (subsection (1)(f)).
25. The SCCRC further submitted that the exceptions in subsection (3)(a) and (3)(b) were not engaged as the disclosure would not be for the purposes of the investigation of an offence or deciding whether to prosecute a person for an offence.
26. In his submissions to the Commissioner, Mr Kidd contended that the SCCRC's arguments regarding the prohibition on disclosure had been used in a very broad sense and did not take into account the exceptions such as those contained in section 194K(1)(b) and 194K(2) of the CPSA.
27. Although the SCCRC did not specifically mention the content of section 194K(2) in its submissions, the Commissioner notes that section 194J(2) also prohibits the *authorisation* of disclosure unless the authorisation of the disclosure is excepted by section 194K. Section 194K(1) reiterates this position by stating that the *authorisation* of the disclosure of information is excepted from section 194J only if any of the exceptions in section 194K are applicable.
28. Accordingly, the Commissioner is satisfied that the SCCRC's submissions in relation to the exceptions in section 194K(1) and 194K(3) are also applicable to section 194K(2).
29. Having considered the submissions made by both Mr Kidd and the SCCRC and the terms of the CPSA, the Commissioner is satisfied that none of the exceptions contained in section 194K of the CPSA are engaged and consequently the disclosure of the information requested in this case is prohibited under the CPSA.



30. The Commissioner therefore agrees with the SCCRC that the disclosure of the information under FOISA would constitute a breach of section 194J of the CPSA and that the disclosure of the information is therefore exempt in terms of section 26(a) of FOISA.

## DECISION

The Commissioner finds that the Scottish Criminal Cases Review Commission (the SCCRC) acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Kidd.

## Appeal

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Should either Mr Kidd or the Scottish Criminal Cases Review 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 Investigations**  
**13 October 2008**



## Appendix

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### 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.

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- (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;

...

#### Criminal Procedure (Scotland) Act 1995





#### **194J Offence of disclosure**

- (1) A person who is or has been a member or employee of the Commission shall not disclose any information obtained by the Commission in the exercise of any of their functions unless the disclosure of the information is excepted from this section by section 194K of this Act.
- (2) A member of the Commission shall not authorise the disclosure by an employee of the Commission of any information obtained by the Commission in the exercise of any of their functions unless the authorisation of the disclosure of the information is excepted from this section by section 194K of this Act.
- (3) A person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

#### **194K Exceptions from obligations of non-disclosure**

- (1) The disclosure of information, or the authorisation of the disclosure of information, is excepted from section 194J of this Act by this section if the information is disclosed, or is authorised to be disclosed –
  - (a) for the purposes of any criminal, disciplinary or civil proceedings;
  - (b) in order to assist in dealing with an application made to the secretary of State for compensation for a miscarriage of justice;
  - (c) by a person who is a member or an employee of the Commission to another person who is a member or an employee of the Commission;
  - (d) in any statement or report required by this Act;
  - (e) in or in connection with the exercise of any function under this Act; or
  - (f) in any circumstances in which the disclosure of information is permitted by an order made by the Secretary of State.
- (2) The disclosure of information is also excepted from section 194J of this Act by this section if the information is disclosed by an employee of the Commission who is authorised to disclose the information by a member of the Commission.
- (3) The disclosure of information, or the authorisation of the disclosure of information, is also excepted from section 194J of this Act by this section if the information is disclosed, or is authorised to be disclosed for the purposes of –



- (a) the investigation of an offence; or
- (b) deciding whether to prosecute a person for an offence,

unless the disclosure is or would be prevented by an obligation or other limitation on disclosure (including any such obligation or limitation imposed by, under or by virtue of any enactment) arising otherwise than under that section.

...