

# Decision Notice 150/2021

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## Complaint information

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**Applicant: The Applicant**

**Public authority: Scottish Legal Complaints Commission**

**Case Ref: 202100600**



Scottish Information  
Commissioner

## Summary

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The SLCC was asked for general data on its handling of complaints and also complaints data regarding a specified law firm. In relation to the specified 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 the request regarding the specified law firm.

## Relevant statutory provisions

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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 Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 13 May 2021, the Applicant wrote to the Scottish Legal Complaints Commission (the SLCC). The Applicant asked the SLCC for the following information, “over the last year and separately over the last three years:
  - (i) What was the average number of complaints per law firm submitted to the SLCC & how many complaints were submitted involving [named firm of solicitors].
  - (ii) What percentage of all complaints submitted to the SLCC were upheld (found in the complainant’s favour) by the SLCC & what percentage of complaints against [named firm of solicitors] were upheld by the SLCC.
  - (iii) What percentage of complaints which were rejected by the SLCC and then appealed at the Court of Session were successful & what percentage of complaints against [named firm of solicitors] which were rejected by the SLCC were overturned at the Court of Session.
  - (iv) What percentage of all ‘third party’ complaints submitted to the SLCC were upheld (found in the complainant’s favour) by the SLCC (so did not need to be appealed by the complainant after either the eligibility or investigation stages).”
2. The SLCC responded on 9 June 2020. The SLCC provided the Applicant with the requested information regarding complaints in general, providing links to its Annual Report and website in this connection. In relation to the information requested about the named law firm, it told the Applicant it was unable to confirm or deny whether it had received any complaints.
3. The SLCC drew attention to section 43 of the Legal Profession and Legal Aid (Scotland) Act 2007 (the LPLA), stating that the practical effect of section 43 is that the SLCC cannot discuss the details of a particular case unless it is either necessary to its investigation or it has been given a mandate by the parties.
4. The SLCC issued a formal notice under section 18(1) of FOISA, stating that it could neither confirm nor deny if it had received any complaints about the firm in question. It explained

that, if it did hold the information requested, the information would be withheld in terms of sections 26(a) and 30(c) of FOISA. It further advised that section 26(a) is an absolute exemption, so it was not required to consider the public interest test.

5. On 19 July 2020, the Applicant wrote to the SLCC, requesting a review of its decision as he did not agree that sections 26(a) and 30(c) were relevant. He did not believe section 18(1) of FOISA applied, as he considered it firmly in the public interest that he be provided with the information requested.
6. The SLCC notified the Applicant of the outcome of its review on 10 August 2020. The SLCC upheld the original response in terms of section 18(1) of FOISA on the basis that, if held, it would be exempt in terms of section 30(c) and 26(a) of FOISA.
7. On 10 May 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. In summary, the Applicant stated he was dissatisfied with the outcome of the SLCC's review because he disagreed that either section 18(1) of FOISA or the associated exemptions applied, submitting that he did not consider section 43 of the LPLA to be relevant and providing reasons why he considered disclosure of the information sought to be in the public interest..

## Investigation

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8. 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.
9. On 13 May 2021, the SLCC was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
10. 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, with specific reference to section 18 of FOISA as claimed by the SLCC.
11. The Applicant was invited to comment on his application, and in particular to provide any public interest arguments he may have or comments as to why it would not be contrary to the public interest to confirm or deny that the information requested was held by the SLCC. His attention was drawn to the Commissioner's guidance on the application of The Public Interest Test<sup>1</sup>
12. While each case is considered on its own merit, the Applicant's attention was also drawn to *Decision 107/2013*<sup>2</sup>, which found that the SLCC had been entitled to rely on section 18(1) of FOISA in responding to a request as to whether anyone had raised a complaint against a specific law firm.
13. The relevant submissions received from both the SLCC and the Applicant will be considered in the Commissioner's analysis and findings below.

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<sup>1</sup> [The Public Interest Test - FOISA \(itspublicknowledge.info\)](https://itspublicknowledge.info)

<sup>2</sup> [Decision 107/2013 \(itspublicknowledge.info\)](https://itspublicknowledge.info)

## Commissioner's analysis and findings

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14. In coming to a decision on this matter, the Commissioner considered all of 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.

### **Section 18 of FOISA – “neither confirm nor deny”**

15. As mentioned above, the SLCC refused to confirm or deny whether it held any information falling within the scope of the Applicant's request relative to the named law firm. The SLCC adhered to this position in its submissions to the Commissioner.
16. Section 18 allows Scottish public authorities to refuse to reveal whether they hold information (or whether it exists) 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, 38, 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.
17. Where an authority has chosen to rely on section 18, 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. He must also establish whether, if the information existed and were held by the authority, the authority would be justified in refusing to disclose that information by virtue of any of the exemptions listed in section 18(1).
18. The Commissioner must ensure that his decision does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that he is unable to comment in any depth on the authority's reliance 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. The same applies to any submissions that are submitted by an Applicant.
19. In this case, the SLCC submitted that, if it did hold any information falling within the scope of the request regarding the named firm of solicitors, it would be exempt from disclosure under section 30(c) of FOISA. The SLCC accepted that section 26(a) of FOISA was not one of the exemptions listed in section 18 and that it had incorrectly applied FOISA in this respect.
20. 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 (if it existed and were held) would be exempt information under one or more of the listed exemptions. Where the exemption(s) is/are subject to the public interest test in section 2(1)(b) of FOISA, the authority must also be able to satisfy the Commissioner that the public interest in maintaining the exemption(s) outweighs any public interest there would be in disclosing any relevant information it held.
21. 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 were held.

## **Section 30(c) – Prejudice to effective conduct of public affairs**

22. Section 30(c) of FOISA exempts 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 section 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 disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
23. The standard to be met in applying the tests contained in the section 30(c) exemption is high. In particular, the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
24. The SLCC submitted that the release of data about specific solicitors would, or would be likely to, prejudice substantially the effective conduct of public affairs on the basis that, should it hold the information requested relative to the named firm of solicitors, disclosure of the information would substantially prejudice its ability to carry out impartial and independent investigations and to analyse and consider the merits of a complaint without interference. It submitted that such disclosure would compromise its investigations and reduce public confidence in the SLCC. It further argued that disclosure could also create a false perception amongst the public and solicitors that the SLCC was not a fair, independent and impartial organisation.
25. The SLCC further submitted that, under section 43 of the LPLA, there is an expectation of confidentiality and disclosure should only be made where it is for the purpose of enabling or assisting the SLCC to exercise its function. It advised that, under section 43, any person who is in contravention of subsection (1), knowingly disclosing information obtained when employed by or acting on behalf of the SLCC, could be found guilty of an offence.
26. The Commissioner has also considered the arguments provided by the Applicant, in which he does not accept that disclosure would substantially prejudice the SLCC’s processes and considers disclosure of the information would increase confidence in the SLCC.
27. Having considered all of the submissions on this point, the Commissioner accepts 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. While not satisfied that the information (if in existence and held) would necessarily be sufficiently directly related to the investigation of individual complaints for section 43 of the LPLA to apply, the Commissioner accepts that an individual legal firm would not reasonably expect these data to be disclosed, certainly not for that firm in isolation. In the circumstances, he agrees that such disclosure would have the prejudicial effects claimed by the SLCC, in relation to the SLCC’s ability to carry out investigations fairly, independently and impartially.

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

28. As stated in previous decisions, and as explained in the Commissioner's guidance on the Public Interest Test, "public interest" is not defined in FOISA but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.
29. The Applicant explained the background to his request and why he considered disclosure should be made in the interest of transparency. He referred to *Decision 107/2013*, where the Commissioner stated:
- "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."
30. He also referred to the Commissioner's guidance on the Public Interest Test, referred to above, which lists a number of factors, which should be considered when applying the public interest test. He submitted that he believed the following factors were relevant, in that disclosure would:
- ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims;
  - enhance scrutiny of decision-making processes and thereby improve accountability and participation;
  - contribute to the administration of justice;
  - contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions;
  - contribute to ensuring effective oversight of expenditure of public funds, and
  - contribute to a debate on a matter of public interest.
31. The SLCC provided submissions to the effect that it recognised that disclosing any information would be *of interest to the public*, in that potential or former clients of the firm might be interested to know complaints data about solicitors. However, the SLCC did not consider disclosure would be in *the interests of the public*, the difference being explained above.
32. The SLCC submitted that publishing the information, if in existence and held, would damage the perception of the SLCC amongst solicitors as an independent and impartial organisation. This, the SLCC claimed, would likely impact on its investigations and prevent it from dealing with complaints without interference. It advised that complaint it receives has to be dealt with on its own merits and data regarding previous complaints would have an impact on future cases.
33. The Commissioner has considered all of the submissions received regarding the public interest test, and while acknowledging why the Applicant made the request and that disclosure may be of wider interest to the public, he has to consider whether disclosure of the information, if in existence and held, would be in the interest of the public. This has to be set

against the public interest in maintaining the exemption and the preventing the substantial prejudice to the effective conduct of public affairs, claimed and accepted above..

34. The Commissioner accepts 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, fairness and accountability in relation to the functions of the SLCC, as expressed by the Applicant.
35. 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 the SLCC to fulfil these functions in a fair, 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, whose decisions can be the subject of an appeal to the Court of Session. Overall, there is a strong public interest in maintaining the integrity and fairness of the process, which (as indicated above) the Commissioner is satisfied would be prejudiced by casting light on one individual practice in this manner.
36. On balance, therefore the Commissioner is satisfied that, if the information existed and were 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.
37. 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)**

38. The SLCC submitted that to reveal whether or not it held the information would be contrary to the public interest, as this would reveal whether or not it had dealt with complaints about a specific law firm. It referred to its submissions regarding the application of section 30(c) of FOISA, in which it had highlighted the risk of its functions being compromised by disclosure, taking account of the expectations of those complained about.
39. The Applicant also provided submissions as to why he disagreed with the application of section 18(1) of FOISA. The Commissioner has considered all of the relevant points made.
40. Taking account of all of the relevant submissions received, the Commissioner is satisfied that, were the SLCC to reveal whether the information requested by the Applicant 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.
41. 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**

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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**

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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**

**30 September 2021**



## Appendix 1: Relevant statutory provisions

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### 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, 38, 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.

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