

# Decision Notice

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## **Decision 173/2015: Mr N and the Scottish Legal Complaints Commission**

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### **Complaints correspondence**

Reference No: 201501455

Decision Date: 10 November 2015



Scottish Information  
Commissioner

## Summary

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On 5 June 2015, Mr N asked the Scottish Legal Complaints Commission (the SLCC) for correspondence regarding complaints he had raised. The SLCC refused to disclose the correspondence on the basis that it was prohibited from doing so by the Legal Profession and Legal Aid (Scotland) Act 2007. Following an investigation, the Commissioner accepted that the SLCC was prohibited from disclosing the correspondence and that the correspondence was therefore exempt from disclosure under FOISA.

## Relevant statutory provisions

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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); 26(a) (Prohibitions on disclosure)

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

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 5 June 2015, Mr N made a request for information to the SLCC. He asked for information relating to particular investigations carried out by the SLCC, specifically copies of correspondence received from named legal practitioners during the period between the issue of the draft and final determination reports regarding his complaints.
2. The SLCC responded on 16 June 2015. It stated that the information was exempt from disclosure in terms of sections 26(a) and 30(c) of FOISA. In relation to the application of section 26(a), the SLCC informed Mr N that disclosure of the information was prohibited under section 43(1) of the LPLA.
3. On 22 July 2015, Mr N wrote to the SLCC requiring a review of its decision. He believed that section 43(3) of the LPLA allowed disclosure under FOISA.
4. The SLCC notified Mr N of the outcome of its review on 31 July 2015. The SLCC upheld its original decision with further explanation.
5. On 7 August 2015, Mr N wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. In relation to section 26(a), Mr N explained why (in terms of section 43(3)(b) of the LPLA) he believed FOISA overrode the prohibition in section 43(1) of the LPLA.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr N made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.

7. On 2 September 2015, the SLCC was notified in writing that Mr N had made a valid application. The SLCC was asked to send the Commissioner the information withheld from him. The SLCC provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 28 September 2015, the SLCC was invited to comment on this application and asked (with particular reference to sections 26(a) and 30(c)) to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. The SLCC responded on 7 October 2015, providing submissions on its application of these exemptions.
10. Mr N provided additional submissions during the investigation.

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

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11. 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 Mr N and the SLCC. She is satisfied that no matter of relevance has been overlooked.

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

12. The SLCC argued that disclosure of the withheld information 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.
13. 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
14. The SLCC explained to the Commissioner that the withheld information had been provided to the SLCC for the purposes of the consideration of complaints and so fell within the scope of section 43(2) of the LPLA. 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.
15. Mr N identified section 43(3) of the LPLA as, in his opinion, overriding the prohibition in this case. Section 43(3) 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.

16. The SLCC submitted that disclosure of information under FOISA was not necessary for the purposes of enabling or assisting it to exercise any of its functions. In this regard, it referred to the case of *Dumfries and Galloway Council v Scottish Information Commissioner [2008] CSIH 12*<sup>1</sup>, where the Court rejected the notion that “function” in this context could be interpreted to include the disclosure of information.
17. The SLCC also disagreed with Mr N’s view that FOISA permitted disclosure, in terms of section 43(3)(b) of the LPLA. It argued that disclosure under FOISA would be inconsistent with the LPLA, referring again to the Court of Session decision cited in the previous paragraph. In that case, it noted, the Court held that the exercise of a duty to disclose information under FOISA must not be inconsistent with the prohibitions or restrictions contained in the other enactment: it considered this to be equally applicable to the LPLA, as to Part 9 of the Enterprise Act (considered in that earlier decision).
18. While noting Mr N’s submissions on the application of section 43(3), this has been considered previously in a number of decisions, including *Decision 236/2011 Robert McKee and the Scottish Legal Complaints Commission*<sup>2</sup>. There, the then Commissioner accepted that information covered by section 43(2) of the LPLA had been correctly withheld in terms of section 26(a) of FOISA. For reasons very similar to those argued by the SLCC in this case, the Commissioner accepted that section 43(3) did not apply: the present Commissioner can identify no reason why she should (or can) take a different approach in this case.
19. 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) of FOISA.
20. 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 section 30(c) of FOISA in relation to this information.

## 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 Mr N.

## Appeal

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<sup>1</sup> <http://www.scotcourts.gov.uk/search-judgments/judgment?id=f7ac86a6-8980-69d2-b500-ff0000d74aa7>

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

Should either Mr N 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**

**10 November 2015**

### 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.

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