

Decision Notice



Decision 246/2011 Mr G and the Scottish Legal Complaints Commission

Identity and relationship of decision-makers

Reference No: 201100922

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Summary

Mr G requested from the Scottish Legal Complaints Commission (the SLCC) information as to whether a named person was personally acquainted with certain decision-makers and/or members of the SLCC board, and also the identities of those involved in making a particular decision. The SLCC did not respond and Mr G wrote to the SLCC requiring it to carry out a review. Following a review, as a result of which the SLCC responded to the effect that it did not hold any information falling within the scope of the first request and considered the second request to be vexatious, Mr G remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner was satisfied that the SLCC did not hold any information falling within the scope of Mr G's first request. He also accepted that the second request was vexatious and that, by virtue of section 14(1) of FOISA, the SLCC was not obliged to comply with it.

However, the Commissioner also found that in failing to provide a response to Mr G's request within 20 working days, the SLCC breached section 10(1) of FOISA. He did not require the SLCC to take any action in relation to this failure.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 10(1) (Timescale for compliance); 14(1) (Vexatious or repeated requests) and 17(1) (Notice that information is not held)

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

1. On 27 February 2011, Mr G wrote to the SLCC requesting the following information:
 - a. whether any person involved in making the decision in a specific case, or any board member of the SLCC, is personally acquainted with a named person?
 - b. the identities of any SLCC board members and/or lawyers involved in making the decision in that case.



2. On 16 April 2011, not having received a response to his information request of 27 February 2011, Mr G wrote to the SLCC requesting a review in respect of its failure to respond.
3. The SLCC notified Mr G of the outcome of its review on 16 May 2011. It apologised for its failure to comply with Mr G's request for information within the timescales set down by section 10 of FOISA and acknowledged its breach of Part 1 of FOISA.
4. For request a., the SLCC gave notice under section 17 of FOISA that it did not hold the information requested, advising that it was not aware of any other public authority that could respond to this request. For request b., the SLCC stated (with reasons) that it regarded this request as vexatious in terms of section 14(1) of FOISA.
5. On 18 May 2011, Mr G 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 G had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests. The case was then allocated to an investigating officer.

Investigation

7. 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) and asking it to respond to specific questions. In relation to request a., it was asked to explain the steps it had taken to establish what relevant information it held, while in relation to request b. it was asked to justify the application of section 14(1) of FOISA.
8. The submissions received from both Mr G and the SLCC, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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



Section 17 - Notice that information is not held

10. In terms of section 1(4) of FOISA, the information to be provided in response to a request made under section 1(1) is the recorded information held at the time the request is received. Where a Scottish public authority receives a request for information which it does not hold, it must, in line with section 17(1) of FOISA, notify the applicant in writing that it does not hold the information.
11. The SLCC stated, in respect of whether any decision maker or board member of the SLCC was personally acquainted with the named person (request a.), that it held no information.
12. Mr G commented about what he considered to be the importance of holding such information for the lawfulness of the SLCC's decision-making process. This is not something the Commissioner can or will comment upon, except insofar as he considers it relevant in determining whether there might have been a reasonable expectation that the information would be held. The Commissioner will determine whether the SLCC dealt with Mr G's request correctly, and in doing so he must be satisfied as to whether, at the time it received Mr G's request, the SLCC held any information which would fall within the scope of that request.
13. The SLCC was therefore asked to explain the searches and other enquiries it had conducted to determine whether any relevant information was held. The SLCC explained that it had searched the relevant case file and, as no information was held in that file, it was not considered necessary to make a more extensive search as the matter was specific to that particular case.
14. The SLCC was asked if there was an expectation that it would hold the information requested. It responded that there was not. It explained that it was the personal responsibility of individual members to declare a conflict of interest and, if there were such a conflict, to decline to make a decision about whether a complaint was frivolous, vexatious or totally without merit. This, the SLCC commented, was in line with its Code of Conduct¹. The SLCC explained that it made a verbal check prior to allocating cases to individual members, but this was not recorded as a matter of course because the important information was whether there was a conflict, not whether there was not.
15. It was also put to the SLCC that Mr G had noted the duty to ensure impartiality, from which it might seem likely that there would be guidance and a procedure (for example, general "conflict of interest" provisions). Whilst this might be different from being "personally acquainted", as phrased by Mr G, the SLCC was asked if there was internal or external guidance which created any expectation that such information would be held.

¹ <http://www.scottishlegalcomplaints.org/media/2900/slcc-member-code-of-conduct.pdf>



16. The SLCC explained that its procedures set out that it was the responsibility of the clerk to carry out a conflict of interest check, which was a verbal check. The SLCC acknowledged that this was not a specific check to establish whether any party is known to the decision-maker, which was what Mr G was seeking. Instead, the SLCC stated that its experience from other cases was that if either party were known the member would declare this as a conflict of interest.
17. As the Commissioner has stated previously, the standard of proof to apply in determining whether a public authority holds the requested information is the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality and results of the searches carried out by the public authority. He will also consider, where appropriate, any other reason offered by the public authority to explain why it has concluded that the information is not held.
18. The Commissioner has taken into account Mr G's view about what information he would have expected to be held, and also the SLCC's explanations as to why this information was not held. In this instance, the Commissioner is of the view that the searches undertaken, and described above, by the SLCC were reasonable and adequate in the circumstances. He notes that the relevant case file has been searched by the SLCC, and he accepts the SLCC's explanation as to why a more extensive search was not undertaken. He also notes the comments by the SLCC about why the information was not held, and considers them reasonable in the circumstances.
19. For these reasons the Commissioner finds that the SLCC was correct to give Mr G a notice under section 17(1) of FOISA, to the effect that it held no information which fell within the scope of request a.

Section 14(1)

20. The SLCC submitted that Mr G's second request was vexatious in terms of section 14(1) of FOISA and, in its submission to the Commissioner, referred to its original response to Mr G for its reasons, whilst providing some additional information.
21. Section 14(1) of FOISA provides that section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious. The test to be applied, therefore, is whether the request is vexatious, not the person making it. FOISA does not define "vexatious". The Oxford English Dictionary provides useful guidance as to the meanings of the word which may be summarised as "tending to cause trouble or harassment by unjustified interference".
22. The Commissioner's general approach is that a request (which may be a single request, the latest in a series of requests, or one among a large number of individual requests) may be vexatious where it would impose a significant burden on the public authority and one or more of the following conditions can be met:
 - (a) it has the effect of harassing the public authority; and/or
 - (b) it does not have a serious purpose or value; and/or



- (c) it is designed to cause disruption or annoyance to the public authority; and/or
- (d) it would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.

23. While “vexatious” must be applied to the request and not the requestor, the Commissioner's briefing on section 14² acknowledges that the applicant's identity, and the history of their dealings with a public authority, may be relevant in considering the nature and effect of the request and relevant surrounding circumstances. It might be reasonable, for example, for the authority to conclude that a particular request represents a continuation of a pattern of behaviour it has deemed vexatious in another context.
24. In this case, the underlying issue appears to be Mr G's dissatisfaction with a decision by the SLCC involving himself. Mr G's opening sentence of his request indicates his intention to appeal that decision, and the remainder of his letter, which contains his information requests, sets out his concern about the decision and how it was arrived at by the SLCC. Mr G also expresses his reason for requesting the information: he wishes to complain about the decision and to complain, in the way he intends, he requires the information sought.
25. The SLCC acknowledged in its submission that the fact that Mr G wished to complain about certain conduct was not reason in itself to regard the request as vexatious. The Commissioner agrees with this.
26. Similarly, for this request, the SLCC acknowledged that the request itself would not create a significant burden, but argued that it would in the wider context of Mr G's previous dealings with it. The SLCC submitted that the significant burden was evidenced from its experience, specifically Mr G's past requests for information about the same types of decision and issue.
27. The SLCC submitted that if Mr G obtained the name/s of the member/s he would complain to the Standards Commission. The SLCC stated that it knew such a complaint would not be upheld, but that the complaint itself would require it to divert resources to deal with it by way of comment. Similarly, the SLCC contended that this would also result in complaints from Mr G about lawyer members' conduct, which it would also have to deal with in terms of the relevant legislation. The SLCC commented that such a complaint would be unlikely to be accepted for investigation unless Mr G could provide sufficient evidence that there was a breach or potential breach of the Solicitors or Advocates' Codes of Conduct. Rejection of a complaint would then result, its experience suggested, and the process would become circular with a further request by Mr G for the member's name to instigate a further complaint.
28. The result would be the diversion of SLCC resources from its core business and, whilst acknowledging that the assessment of significant burden was to a degree speculative, the SLCC emphasised that this view was borne out of its experience dealing with Mr G over several years.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.asp>



29. As with previous decisions in respect of section 14, viewed dispassionately and in isolation from the past correspondence between Mr G and the SLCC, the Commissioner recognises that the request under consideration might not necessarily appear to impose a significant burden. In considering whether Mr G's request should be regarded as vexatious, however, the Commissioner accepts the SLCC's contention that it is reasonable and relevant in this case to take into consideration the wider context in which the request was made.
30. The Commissioner notes the SLCC's comment that its assessment of significant burden "is to a degree speculative". The SLCC has argued that by responding to the request it will generate more work for itself. The Commissioner is not fully persuaded that this part of the SLCC's argument will always be relevant in all circumstances. However, in this case, the SLCC has developed its argument by explaining that this is not the first request for this type of information by Mr G, and also by referring to earlier decisions of the Commissioner involving similar types of request.
31. Having considered the SLCC's submissions as a whole, the Commissioner is satisfied in the circumstances that it was correct to view Mr G's request within the wider pattern of correspondence it had received from Mr G. He is satisfied that Mr G's request here must be viewed within a pattern of behaviour by Mr G, exemplified in that correspondence. He accepts that the request continued this pattern of behaviour, which (considered collectively) did impose a significant burden on the SLCC.
32. The Commissioner will now go on to consider whether any of the other factors listed in his guidance on section 14 (see paragraph 22 above) could be identified in this case: in other words, whether it could be shown that Mr G's request lacked serious purpose or value; were designed to cause disruption or annoyance to the SLCC; had the effect of harassing the SLCC; and/or would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate
33. The SLCC submitted that the request was vexatious because it had the effect of harassing the SLCC. In its response to Mr G the SLCC explained why, reiterating these arguments in its submissions to the Commissioner.
34. The SLCC highlighted that Mr G had stated in his request and requirement for review that he needed the information to raise complaints with the Standards Commission and the SLCC. The SLCC set out in its review response that the proper way to challenge the SLCC's decision was by appeal to the Court of Session, in accordance with section 21 of the Legal Profession and Legal Aid (Scotland) Act 2007. The SLCC highlighted that section 21(b) of the 2007 Act dealt with the type of complaint that Mr G was proposing: that of procedural impropriety.
35. Mr G had therefore been told, the SLCC explained, that his complaint (to the Standards Commission) would not be upheld even if it related to a named individual. The complaint did not relate to a breach of the relevant code of conduct. The relevant decisions (of the SLCC) were corporate rather than individual, and in any event the appropriate way to challenge the decision was by appeal to the Court of Session. Mr G, it submitted, was aware of all of this from previous communications with the Standards Commission. It also submitted that similar principles applied in relation to any complaint about the individuals concerned to the SLCC.



36. The SLCC stressed, therefore, in its response to Mr G and again in its submission to the Commissioner, that the information would be used to instigate a complaint or complaints which would be unlikely to succeed.
37. In his own guidance on the application of section 14(1) of FOISA, in particular whether a request could be considered to have the effect of harassing a public authority, the Commissioner notes that consideration should be given to the effect that a request has on a public authority, regardless of the requester's intention. Even if the requester may not have intended to cause inconvenience or expense, if the request has the effect of harassing the public authority then it may be vexatious.
38. The Commissioner considers that the language and tone of the request may be relevant in assessing whether there is an intent or effect of harassment. The Commissioner has considered the tone and language used in Mr G's correspondence with the SLCC. Whilst the language used by Mr G clearly indicates frustration, the Commissioner does not consider that the correspondence contains language or is of a tone which would be considered to be abusive or inappropriate within a complaint letter.
39. The SLCC's arguments here are similar to those it has put to the Commissioner in other cases involving similar facts and circumstances. In this instance, as in those previous cases, the SLCC concluded, on the basis that the applicant had made the information request to pursue a complaint, in the knowledge that the complaint had no reasonable prospect of success, that the request had the effect of harassing the SLCC. Previously, the Commissioner has accepted that requests made in similar circumstances have lacked serious purpose or have been, on any reasonable interpretation, manifestly unreasonable.
40. In this present case, however, the Commissioner is prepared to accept that the effect of Mr G's second request of 27 February 2011 was to harass the SLCC. The complaints contemplated by Mr G here would appear to have no greater prospect of success than those under consideration in previous similar cases. Again, there is an appropriate statutory route whereby Mr G may challenge the relevant decision of the SLCC. Given that Mr G continues to make requests of this kind, which appear to remain without serious value or purpose, the Commissioner acknowledges that it is now reasonable to conclude that, whatever Mr G might have intended, the effect of the request was to harass.

Section 10(1) – Time for compliance

41. The Commissioner notes that the SLCC failed to meet the requisite timescale for responding to Mr G's requests for information. The SLCC has acknowledged, and apologised for, this breach, which it attributed to human error, i.e. missing the requests, which had been contained within other correspondence.



42. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case.
43. Given that the SLCC did not respond to Mr G's request of 27 February 2011, the Commissioner finds that it failed to respond to the request within the 20 working days allowed by section 10(1) of FOISA. Given the SLCC's subsequent response to Mr G's request for review, the Commissioner does not require it to take any action in this connection.

DECISION

The Commissioner finds that the Scottish Legal Complaints Commission (the SLCC) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr G.

The Commissioner finds that the SLCC complied with Part 1 of FOISA by providing Mr G with written notice, as required by section 17(1) of FOISA, that it held no information falling within the scope of his first request. The Commissioner also finds that the SLCC dealt with Mr G's second request for information in accordance with Part 1 of FOISA, by refusing to comply with the request on the basis that it was vexatious in terms of section 14(1) of FOISA.

However, the SLCC failed to comply with Part 1 of FOISA by failing to respond to Mr G's requests for information within the timescale required by section 10(1) of FOISA. Given its subsequent response to Mr G's requirement for review, the Commissioner does not require the SLCC to take any action in respect of this failure in response to Mr G's application.



Appeal

Should either Mr G 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 notice.

Margaret Keyse
Head of Enforcement
14 December 2011



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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.
- ...

14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.
- ...



17 Notice that information is not held

(1) Where-

- (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...