

# Decision Notice

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## **Decision 022/2015: Company A Limited and the Scottish Legal Complaints Commission**

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### **Information concerning the SLCC's investigation procedures**

Reference No: 201402700

Decision Date: 13 February 2015



Scottish Information  
Commissioner

## Summary

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On 6 August 2014, Company A Limited (Company A) asked the Scottish Legal Complaints Commission (the SLCC) for information concerning the SLCC's investigation procedures. The SLCC notified Company A that it did not hold the information it had requested.

The Commissioner investigated and found that the SLCC had partially failed to respond to Company A's request for information in accordance with Part 1 of FOISA.

The Commissioner was satisfied that the SLCC correctly notified Company A that it did not hold any information falling within the scope of parts (ii) and (iii) of the request.

In relation to part (i) of the request, the Commissioner found that the SLCC had incorrectly given notice that it did not hold any relevant information.

The Commissioner required the SLCC to issue a new review response to Company A in relation to part (i) of its request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

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.

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

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1. On 6 August 2014, Company A made a request for information to the SLCC. The information requested was as follows:
  - (i) What investigations have been undertaken or proposed into the SLCC's practice of permitting the disclosure of information between its staff and the solicitors complained of (and others) without the knowledge of the complainant and without them being afforded the opportunity to see or respond to those disclosures? Please provide copies of all documentation and communications.
  - (ii) Has the SLCC identified any other similar bodies that, when making binding determinations, allow representations in secret by the party complained of without the knowledge of the complainant. If so, please provide copies of any documentation.

- (iii) Has the SLCC considered whether allowing representations in secret in such circumstances could constitute perverting the course of justice/attempting to defeat the ends of justice or contravene the Human Rights Act 1998? If so, please provide copies of any documentation.

(Within this request, Company A also asked for other information which is not the subject of this decision notice).

2. The SLCC responded on 12 August 2014. The SLCC gave notice in terms of section 17(1) of FOISA that it did not hold the requested information.
3. On 23 October 2014, Company A wrote to the SLCC requesting a review of its decision. Company A noted that there had been a number of appeals to the Court of Session and to the Scottish Information Commissioner on, or partly on, the question of disclosure (part (i) of the request). In Company A's view, there must have been some investigations, communications and advice by and to the SLCC on the subject.
4. The SLCC notified Company A of the outcome of its review on 12 November 2014. The SLCC confirmed that it did not hold the requested information. The SLCC provided Company A with a copy of the judgment of the Court of Session in the case of *William Murnin v the SLCC and the Law Society of Scotland* (2012 SLT 685)<sup>1</sup>. The SLCC indicated that this judgment had considered the procedures used by the SLCC when processing complaints.
5. On 19 November 2014, Company A wrote to the Commissioner. Company A applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Company A stated it was dissatisfied with the outcome of the SLCC's review because it considered the SLCC must hold some relevant information. Company A also considered the SLCC's review response of 12 November 2014 had not addressed parts (ii) and (iii) of its request.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Company A 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. The case was allocated to an investigating officer and, on 16 December 2014, the SLCC was notified in writing that Company A had made a valid application.
8. 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 answer specific questions. The SLCC was asked to provide details of the searches it had undertaken to identify and locate any information falling within the scope of the request.
9. The SLCC provided the Commissioner with details of the searches it had carried out. At this stage, the SLCC stated that it had identified a document comprising an opinion from Counsel which related to the information sought in Company A's request. The SLCC provided the Commissioner with a copy of this document. It indicated that this information was exempt from disclosure under section 36(1) of FOISA on the basis that it comprised information in respect of which a claim to confidentiality could be maintained in legal proceedings.

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<sup>1</sup> <http://www.scotcourts.gov.uk/search-judgments/judgment?id=28a08aa6-8980-69d2-b500-ff0000d74aa7>

## Commissioner's analysis and findings

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10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Company A and the SLCC. She is satisfied that no matter of relevance has been overlooked.

### *Section 17 of FOISA (Notice that information is not held)*

11. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.
12. In its initial response of 12 August 2014, and in its review response of 12 November 2014, the SLCC informed Company A that it did not hold the information requested by Company A.
13. In its application to the Commissioner, Company A stated that the SLCC review response of 12 November 2014 addressed only one part of its information request.
14. Company A also argued that there had been a number of appeals to the Court of Session and the Scottish Information Commissioner regarding the issue of disclosure of information. Company A submitted that there must have been investigations, communications and advice by and to the SLCC, its staff, Board, Chief Executive, legal advisers and other advisers in relation to those appeals.
15. Company A stated that it had raised these issues with the SLCC on a number of occasions and found it difficult to believe that it had been the first to do so. In Company A's view, there must have been some communication arising from such requests and complaints, at the very least in relation to the formulation of the SLCC's responses (to those requests and complaints).
16. The SLCC explained that, following receipt of the request, detailed enquiries were made to ascertain whether the information sought by Company A was held. The SLCC stated that enquiries were made with staff, and records were checked, to see if there was any recorded information concerning investigations undertaken, or proposed at the time of the request, in relation to the practice for disclosure of information between the parties to a complaint.
17. The SLCC stated that searches were carried out in both written and online records for information falling within the scope of the request.
18. The SLCC provided the Commissioner with an internal document which contained a summary of cases where a decision of the SLCC had been appealed to the Court of Session. The SLCC explained that it had considered this document in order to identify whether an investigation had been undertaken in relation to the practice of disclosing information between complainer and practitioner.
19. The SLCC identified two cases within this document where the grounds of appeal referred to procedural impropriety on the part of the SLCC. The SLCC stated that it had checked its records of these cases for information concerning legal advice and opinions obtained by it for the purposes of undertaking an investigation into its existing practice for disclosure of information. No information was found which fell within the scope of Company A's request.

20. The SLCC also stated that it had carried out checks in its online legal advice folder to see whether advice had been sought or received in relation to its existing practice. Additionally, enquiries were made with its Oversight and Clerking teams to ascertain whether they held any records of investigations that had been undertaken or proposed. These enquiries focussed on whether the SLCC had identified any other public bodies which carried out similar practices regarding disclosure of information and whether the SLCC had considered if its practice in relation to disclosure could amount to perverting the course of justice. No recorded information was identified which fell within the scope of the request.
21. Specifically in relation to parts (ii) and (iii) of the request, the SLCC stated that it had given notice to Company A in terms of section 17(1) of FOISA that it did not hold the information. The SLCC reiterated that it had not undertaken any work falling within the scope of these parts of the request.
22. As noted above, during the investigation, the SLCC identified information comprising an opinion from Counsel. The SLCC indicated that it considered this information to be exempt from disclosure in terms of section 36(1) of FOISA.

*Conclusion on section 17*

23. The Commissioner has considered the submissions made by both Company A and the SLCC.
24. In relation to parts (ii) and (iii) of Company A's request, the Commissioner has considered the SLCC's explanation of why it does not hold the specific information sought. Having done so, she is satisfied that the SLCC has conducted reasonable, proportionate searches to establish whether it holds this particular information. The Commissioner also accepts that the SLCC gave notice in terms of section 17(1) of FOISA that it did not hold this information. In doing so, the SLCC complied with Part 1 of FOISA.
25. In relation to part (i) of the request, the Commissioner has examined the document identified by the SLCC (the opinion of Counsel) during the investigation. The Commissioner is satisfied that this information falls within the scope of part (i) of the request. Accordingly, the Commissioner finds that the SLCC failed to carry out adequate searches and incorrectly gave notice in terms of section 17(1) of FOISA that it did not hold any information falling within this part of Company A's request.
26. The Commissioner has also considered the information contained within the internal document supplied by the SLCC concerning decisions which were appealed to the Court of Session. Having done so, the Commissioner's view is that some of the comments in the document suggest that additional information may be held by the SLCC which falls within the scope of part (i) of the request. Along with this decision notice, the Commissioner will provide the SLCC with details of the parts of the internal document that she considers may identify further relevant information.
27. In light of the findings above, the Commissioner requires the SLCC to issue a new review response to Company A in relation to part (i) of its request. The SLCC should either disclose the information described in paragraph 25 or state why it is exempt from disclosure under FOISA. The SLCC should reconsider whether it holds any additional information falling within the scope of part (i) of Company A's request, taking account of the information described in paragraph 26. The SLCC should provide Company A with any information falling within the scope of its request or give notice, in its revised review response, why it is not required to do

so, in accordance with Part 1 of FOISA.

## Decision

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

The Commissioner finds that the SLCC was entitled to give notice, in terms of section 17(1) of FOISA, that it did not hold the information requested in parts (ii) and (iii) of Company A's request.

However, the Commissioner finds that the SLCC was not entitled to give notice in terms of section 17(1) that it did not hold the information requested in part (i) of Company A's request. By doing so, the SLCC failed to comply with Part 1 of FOISA.

The Commissioner requires the SLCC to issue a new review response to Company A in relation to part (i) of its request, as described in paragraph 27 of the decision.

The Commissioner requires the SLCC to take these steps by **30 March 2015**.

## Appeal

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Should either Company A Limited 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.

## Enforcement

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If the Scottish Legal Complaints Commission fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Scottish Legal Complaints Commission has failed to comply. The Court has the right to inquire into the matter and may deal with the Scottish Legal Complaints Commission as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**13 February 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.

...

- (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.

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#### 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.

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