OUTER HOUSE, COURT OF SESSION

[2021] CSOH 110

P312/21

OPINION OF LORD UIST

In the petition of

THE GENERAL TEACHING COUNCIL FOR SCOTLAND

Petitioner

against

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF SCOTLAND

Respondent

Petitioner: Lindsay QC; Anderson Strathern LLP
Respondent: van der Westhuizen QC; Ledingham Chalmers LLP

26 October 2021

Introduction

[1] There are before me seven separate petitions in each of which the petitioner is The General Teaching Council for Scotland ("GTCS") and the respondent is The Chief Constable of the Police Service of Scotland ("Police Scotland"). In each petition the petitioner sought disclosure of certain material from the respondent. Orders for disclosure have been made without opposition from the respondent and the petitioner now seeks an award of expenses against the respondent in each petition. The respondent opposed any award of expenses and at a hearing on expenses I heard full submissions on behalf of both the petitioner and the respondent.

The background

[2] The petitioner is the regulatory body for teaching in Scotland and is a body corporate first established under section 1 of the Teaching Council (Scotland) Act 1965 and continued under Article 4 of the Public Services Reform (General Teaching Council for Scotland) Order 2011 ("the 2011 Order"). The Police Service of Scotland, which is known as and operates under the name "Police Scotland", was established as a constabulary under section 6 of the Police and Fire Reform (Scotland) Act 2012 ("the 2012 Act"). By virtue of section 17(1) and (2)(a) and (b) of that Act the Chief Constable has direction and control of Police Scotland and is responsible for its day to day administration.

The relevant statutory provisions

[3] Articles 4, 5, 6, 7, 8, 9, 15 and 18 of the 2011 Order provide as follows:

> "4.- (1) There is to continue to be a body corporate known as the General Teaching Council for Scotland ('the GTCS').
>
> 5. The GTCS's principal aims are –
> (a) to contribute to improving the quality of teaching and learning; and
> (b) to maintain and improve teachers' professional standards.
>
> 6. The GTCS's general functions are –
> (a) to keep the register;
> (c) to investigate the fitness to teach of individuals who are, or who are seeking to be, registered.
>
> 7. The GTCS must have regard to the interests of the public when performing its functions.
>
> 8. The GTCS must perform its functions in a way which –
> (a) is proportionate, accountable, transparent and consistent;
> (b) is targeted only where action is needed;
> (c) encourages equal opportunities and in particular the observance of the requirements of the law for the time being relating to equal opportunities; and
> (d) is consistent with any other principle which appears to it to represent best regulatory practice.

9.–(1) The GTCS may do anything which appears to it to be appropriate for the purposes of, or in connection with, the performance of its functions.

15. – (1) The GTCS must make and publish rules ('the GTCS rules') –
(a) setting out the procedure for inclusion in the register;
(b) setting out registration criteria; and
(c) otherwise governing the operation of the register.

(3) The GTCS rules may, in particular, make provision about –
(a) the form and keeping of the register;
(b) the making of entries in the register and alterations to those entries;
(g) removing individuals from the register;
(h) restricting and cancelling entries in the register;
(i) circumstances in which registration may lapse; and
(l) such other matters relating to registration as the GTCS thinks fit.

18.-(1) The GTCS –
(b) may investigate any registered teacher's fitness to teach where it becomes aware of circumstances which it considers justify such an investigation.

(2) The GTCS must –
(b) remove from the register any registered teacher whom it subsequently considers to be unfit to teach.

(3) An individual is 'unfit to teach' for the purposes of this Order if the GTCS considers that the individual's conduct or professional competence falls significantly short of the standards expected of a registered teacher (and 'fitness to teach' is to be construed accordingly).

(4) Schedule 4 makes further provision regarding individuals' fitness to teach."

[4] Paragraph 2 of Schedule 4 to the 2011 Order provides as follows:

"2. – (1) The GTCS may hold proceedings in respect of-
(a) An investigation of an individual's fitness to teach;
(b) a review carried out in pursuance of paragraph 1(2)(b).

(2) The GTCS Rules must set out the procedure, the standard of proof and the rules of evidence which are to apply to such proceedings.

(3) The GTCS Rules may specify any exceptional circumstances in which such proceedings are not to be held in public (for example, proceedings relating to individuals whose entry in the register is provisional).

(4) The GTCS may administer oaths or affirmations for the purposes of such proceedings.

(5) The Court of Session may, on an application by any party to such proceedings-

(a) order any person to attend proceedings in order to give oral evidence;

(b) order any person to disclose documents or other evidence to the GTCS;

(c) authorise the taking of evidence from any person or the examination of any documents or other evidence held by any person.

(6) But the Court of Session may not order a person to give any evidence, or to disclose anything, which the person would be entitled to refuse to give or disclose in an action in that court."

In accordance with Article 15 of the 2011 Order the GTCS made on 14 June 2017 the General Teaching Council for Scotland Fitness to Teach Rules 2017 approved and signed by the Lord President ("the Rules").

[5] Section 32 of the 2012 Act provides as follows:

"32. Policing principles
The policing principles are –
(a) that the main purpose of policing is to improve the safety and well-being of persons, localities and communities in Scotland, and
(b) that the Police Service, working in collaboration with others where appropriate, should seek to achieve that main purpose by policing in a way which –
(i) is accessible to, and engaged with, local communities, and
(ii) promotes measures to prevent crime, harm and disorder."

[6] The Law Enforcement Privacy Notice of Police Scotland provides:

"In certain circumstances we will share information which was initially for a law enforcement purpose with selected third parties for non law enforcement purposes:

- Insurance companies (for example, where information was initially gathered at the scene of a road traffic collision and is subsequently shared to allow the company to identify other drivers for the purposes of an insurance claim).
- Criminal Injuries Compensation Authority.
- Schools and other educational establishments.
- Other regulatory bodies, such as the General Medical Council (GMC)."

[7] Section 31 of the Data Protection Act 2018 ("the 2018 Act") defines "the law enforcement purposes" as being "the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against the prevention of threats to public security".

[8] Section 36 of the 2018 Act provides:

> "(1) The second data protection principle is that – (a) the law enforcement purpose for which personal data is collected on any occasion must be specified, explicit and legitimate, and (b) personal data so collected must not be processed in a manner that is incompatible with the purpose for which it was collected.
>
> (2) Paragraph (b) of the second data protection principle is subject to subsections (3) and (4).
>
> (3) Personal data collected for a law enforcement purpose may be processed for any other law enforcement purpose (whether by the controller that collected the data or by another controller) provided that –
>
> (a) the controller is authorised by law to process that data for the other purpose, and
>
> (b) the processing is necessary and proportionate to that other purpose.
>
> (4) Personal data collected for any of the law enforcement purposes may not be processed for a purpose that is not a law enforcement purpose unless the processing is authorised by law."

The dispute

[9] The respondent's position on what is required in order to comply with the statutory requirement of being "authorised by law" under section 36(4) of the 2018 Act is set out in answer 1 to each petition as follows:

> "The respondent is not permitted or obliged to disclose the information sought by the petitioner without an order of the court. The respondent accordingly does not oppose the granting of the substantive orders being sought by the petitioner, and will comply with those orders if the court grants them, but opposes the granting of expenses against him …"

[10] In an email dated 20 December 2019 the Information Commissioner's Office (ICO) provided the following advice to Police Scotland:

> "Personal data collected for any of the law enforcement purposes may not be processed for a purpose that is not a law enforcement purpose unless the processing is authorised by law. In operational terms this means that personal information obtained and processed in the course of a criminal investigation will be for at least one of the law enforcement purposes –i.e. the apprehension and prosecution of offenders. That information cannot be used for anything other than a law enforcement purpose which means that Police Scotland is subject to a statutory bar from using (including sharing) such information for any other purpose unless specifically authorised to do so by law. This would require either an order of the court or a specific statutory obligation to provide the information. The fact that another body has a statutory power to request such information would not constitute an obligation on the part of Police Scotland to provide the same. If, as you intimate, a Regulator is requesting such information in order to pursue a fitness to practice *(sic)* or misconduct investigation, Police Scotland would be breaching the requirements of the 2018 Act if it acceded to such a request as per section 36(4)."

On the other hand, in its statutory code of practice issued under section 121 of the 2018 Act the ICO stated that "authorised by law" might be "for example, statute, common law, royal prerogative or statutory code".

[11] In response to one of the requests from the petitioner Police Scotland sent the following reply on 30 November 2020:

> "I refer to your recent request for information which has been considered in terms of the Data Protection Act 2018. The information you seek is gathered for the purposes of law enforcement in terms of the Law Enforcement EU Directive 2016, transposed into UK legislation via Part 3 of the Data Protection Act 2018. Section 36(4) of the 2018 Act states that in relation to complying with the second data protection principle *personal data collected for any of the law enforcement purposes may not be processed for a purpose that is not a law enforcement purpose unless the processing is authorised by law*. This means that personal information obtained for law enforcement purposes cannot be used for anything other than a law enforcement purpose which precludes Police Scotland from using (including sharing) such information for any other purpose unless specifically authorised to do so by law. This would require either an order of the court or a specific statutory obligation to provide the information. I therefore refuse to provide you with the information sought as a restriction exists to the processing of same."

The decided cases

[12] Three leading cases dealt with the confidentiality of information held by the police. The first was *Woolgar* v *Chief Constable of Sussex Police and UKCC* [2000] 1 WLR 25, where the Court of Appeal held that the public interest in ensuring the free flow of information to the police for the purposes of criminal proceedings which required that information given in confidence would not be used for some collateral purpose had to be balanced against a countervailing public interest in protecting public health and safety which entitled the police to disclose to a regulatory body operating in that field confidential information which the police reasonably believed was relevant to an inquiry being conducted by that body on the basis that confidentiality would otherwise be maintained. Kennedy LJ set out the plaintiff's submission at p36 as follows:

> "Essentially Mr Wadswoth's submission was and is that when the plaintiff answered questions when interviewed by the police she did so in the reasonable belief that what she said would go no further unless it was used by the police for the purposes of criminal proceedings. The caution administered to her so indicated, and in order to safeguard the free flow of information to the police it is essential that those who give information should be able to have confidence that what they say will not be used for some collateral purpose."

His lordship rejected that submission in the following terms:

> "However, in my judgment, where a regulatory body, such as the UKCC, operating in the field of public health and safety, seeks access to confidential material in the possession of the police, being material which the police are reasonably persuaded is of some relevance to the subject matter of an inquiry being conducted by the regulatory body, then a countervailing public interest is shown to exist which, as in this case, entitles the police to release the material to the regulatory body on the basis that, save in so far as it may be used by the regulatory body for the purposes of its own inquiry, the confidentiality which already attaches to the material is maintained. As Mr Horan said in his skeleton argument:
>
> > 'A properly and efficiently regulated nursing profession is necessary in the interest of the medical welfare of the country, to keep the public safe, and to protect the rights and freedoms of those vulnerable individuals in need of nursing care. A necessary part of such regulation is the ensuring of the free

> flow of the best available information to those charged by statute with the responsibility to regulate.'
>
> Putting the matter in Convention terms Lord Lester submitted, and I would accept, that disclosure is 'necessary in a democratic society in the interests of … public safety or … for the protection of health or morals, or for the protection of the rights and freedoms of others.'
>
> Even if there is no request from the regulatory body, it seems to me that if the police come into possession of confidential information which, in their reasonable view, in the interests of public health or safety, should be considered by a professional or regulatory body, then the police are free to pass that information to the regulatory body for its consideration."

[13] In *General Dental Council* v *Savery and Others* [2011] EWHC 3011 (Admin) Sales J, as he then was, made clear that it was not necessary to obtain a court order in order to share personal data with a regulatory body for the purposes of professional misconduct or improper practice proceedings. He stated as follows at para 62:

> "I do not think it is possible to read the lead judgment of Thorpe LJ in the Court of Appeal as indicating that a ruling of a court is required before there can be disclosure of patient records (without the consent of the patients concerned) for the purposes of investigation by official regulatory bodies of allegations of professional misconduct or improper practice, such as what is in issue in the present case. If that had been the intention of Thorpe LJ it would have been necessary for him to embark upon detailed consideration of *MS* v *Sweden* and *Woolgar* to explain why they were wrong or should be distinguished, but there is nothing dealing with these matters in his judgment. On the contrary, he affirmed the condition imposed by Munby J – which made it clear that the intervention of the court was *not* required in a case where it was proposed to disclose or make use of patient records for the purposes of professional misconduct or improper practice proceedings by appropriate regulatory bodies. As I read the judgment, Thorpe LJ's observations at [25] – [26] were directed to meeting the contention of the health authority that it could disclose or make use of the patient records for any *other* purposes which it might choose. It was only if the health authority wished to make such wider disclosure or use of patient records (i.e. *beyond* disclosure and use for the purposes of professional misconduct or improper practice proceedings), where there was not already in place a clear regime which provided suitable protection for the patients' interests in confidentiality, that the decision of a court would be required as a safeguard."

[14] In *C* v *The Chief Constable of the Police Service of Scotland* [2020] CSIH 61 a group of police officers, against whom misconduct proceedings had been brought, petitioned for judicial review seeking declarator that the use of messages sent among them via the WhatsApp messaging system for the purpose of bringing the disciplinary proceedings in respect of non-criminal behaviour on their part was unlawful and amounted to a contravention of Article 8 of the European Convention on Human Rights (ECHR). The messages had been discovered by a detective constable during an investigation into sexual offences in which the petitioners were not persons of interest. The Inner House held that there was a clear and accessible legal basis for the disclosure by Police Scotland as there was a very clear, specific public interest in the maintenance of a properly regulated police force and its importance to the retention of public confidence and the proper discharge of police duties.

[15] The Lord Justice Clerk stated as follows at paras [107] and [108]:

> "[107] The Lord Ordinary drew from these observations the conclusion that there was a clear and accessible basis upon which the police could disclose to regulatory bodies information which they recovered in the course of criminal investigations. He added … 'It seems to me that this must be the position in a case such as the present one where the police are referring the information recovered to their own internal disciplinary body. There is a public interest in having a a properly regulated police force in order to protect the public and thus it is lawful that information recovered in criminal proceedings by the police can be passed to its own disciplinary body for that strictly limited purpose (and there is no suggestion in the present case that it will be used for any other purpose).'
>
> [108] In my view the Lord ordinary was correct in reaching this conclusion. The discretion to use the material is limited by the nature of the public interest which the disclosure is to meet. I should not be taken as suggesting that any amorphous or vague public interest may be sufficient to provide the clear and accessible basis necessary. On the contrary, in the present case it seems to me that there is a very clear, specific public interest in the maintenance of a properly regulated police force and its importance to the retention of public confidence and the proper discharge of police duties."

[16] At para [109] the Lord Justice Clerk added:

> "In addition, it is in my view an interest which falls within general policing purposes, such that the fact that the police would be entitled to forward the information would be accessible to the reclaimers and the consequences of doing so foreseeable. Senior counsel for the reclaimers submitted that the encapsulation of policing purposes could be found in p1081, para 9 of *R (on the application of Catt)* per Lord Sumption: 'police purposes' … are defined … as protecting life and property, preserving order, preventing crime, bringing offenders to justice and performing any legal duty or responsibility of the police. He accepted that if disclosure were for such a purpose then such a measure would be capable of being in accordance with law. In my view senior counsel for the reclaimers, in suggesting that the use for which the material was intended in this case fell outwith the definition of 'police purposes' viewed the matter through too narrow a prism. The definition which he himself submitted includes references to any legal duty or responsibility of the police. That in my view is wide enough to include the responsibility of maintaining police discipline in order that all wider policing purposes may properly be carried out."

[17] Two cases in the sheriff court also dealt with the matter. The first was *Scottish Social Services Council* v *Livingstone* (Unreported, Dunfermline Sheriff Court, 4 April 2019), which was decided by Sheriff McSherry. That was a summary application under section 1(1) of the Administration of Justice (Scotland) Act 1972 for recovery of certain documents and information held by Police Scotland. The orders for production sought were granted unopposed and the sheriff then had to decide the question of expenses. He made no finding of expenses in favour of the pursuer and found the pursuer liable to the defender in the expenses of the hearing on expenses. He took the view that the pursuer was not vindicating its rights as, unlike the General Medical Council (GMC) under section 35A of the Medical Act 1983, it had no statutory power of requiring disclosure from anyone. He considered that the police were not under a duty to make disclosure to the pursuer: if they were, the summary application would not have been necessary. He also took the view (which I do not understand) that both parties were public bodies and the defender should not be liable for expenses in every application as this would be a considerable burden on the public purse

which was saved by the costs of only one public body being incurred in making the summary application, undefended by the other.

[18] The second case was *The General Medical Council* v *Iain Livingston, Chief Constable of the Police Service of Scotland* (Unreported, Hamilton Sheriff Court, 30 August 2019) in which the pursuer in a summary application under section 35A(6A) of the Medical Act 1983 sought production of information in the hands of the defender. The pursuer has power under section 35A in connection with its investigative function to require "any other person who in his opinion is able to supply information or produce any document which appears relevant to the discharge of any such function, to supply such information or produce such a document …" In connection with its investigations into a registrant the pursuer applied to the defender under section 35A for information held by the defender in connection with an earlier criminal investigation carried out by Police Scotland into alleged criminal conduct by the registrant. The defender refused to produce the required information, as a result of which the pursuer required to bring the summary application in the sheriff court. That application was opposed by the defender only in relation to the question of expenses. Sheriff H K Small summarised the pursuer's position on expenses as follows:

> "[11] The pursuer's position … can be… summarised in the following manner. Firstly, having regard to the general rule that expenses should follow success, the expenses should be borne by the party or parties who caused the expense. In relation to the defender, the pursuer successfully obtained an order for recovery of documents. The need for court proceedings had been necessitated by the defender's decision, after initial informal approaches, followed by the statutory request in terms of section 35A of the 1983 Act, to withhold the information. Had the defender decided to deliver the documents in response to these requests court proceedings would not have been required.
>
> [13] Secondly, it was the pursuer's position that the proceedings had been necessitated as a result of the defender's wrongful decision to withhold the information requested. It was clear from the English cases of *Savery* and *Woolgar* that it was for the defender to consider the request and to balance it against competing duties under Data Protection, GDPR, Article 8 of the European Convention and the

common law. That initial decision, per *Woolgar*, was for the holder of the information to make, not the courts. Although the defender had indicated in correspondence that that the reason for deciding not to produce was that the information was 'provided for a policing purpose and in the full expectation of complete confidence. If witnesses were aware that their statement may be given to other agencies then they may not be so willing to provide a full and frank statement to the police' (per letter from Police Scotland to the pursuer dated 5 November 2018), no clear and reasoned decision could be ascertained from the defender's submissions to this court. This was not a case where the defender could argue that he was performing a statutory function and, in the absence of malice or bad faith, should not be liable in expenses. English courts have penalised police authorities who have unreasonably refused to produce information … Although not binding on this court, in a recent unreported case at Dunfermline the sheriff expressed a view that any party holding information and refusing to accede to a demand under section 35A would be liable for the expenses of any action subsequently raised, unless contrary to Data Protection, GDPR, Article 8 or the common law."

[19] Sheriff Small summarised the submission for the defender as follows:

"[16] It was accepted on behalf of the defender that when dealing with requests for information, including formal requests under section 35A of the 1983 Act, there were a number of matters for the defender to consider. These were summarised in the case of *Woolgar*. It was her submission that *Woolgar*, being an English case, was persuasive only. It was persuasive authority for the proposition that in deciding whether or not to accede to the request the holder of the information had to consider competing duties under Data Protection, GDPR, Article 8 and the common law; he should balance public interest against an individual's right to privacy; he should, if persuaded to release information, give prior indication to those likely to be affected, per the recommendations in *Woolgar;* and that in all such situations the holder of the information was the primary decision make and was not required to produce the information in every case. Accordingly, she submitted that the decision of the defender to withhold the information and await the summary application 'ensured that the defender complied with his obligations under GDPR, Article 8, common law and data protection'.

[17] It was further submitted that, in any event, the court's power to award expenses was discretionary. As this was not a case involving two private litigants, the ordinary rules of expenses following success should not apply. The defender, in the exercise of his public and statutory obligations, had carried out a balancing act and reached a decision which was absent of *(sic)* malice or bad faith. Accordingly, he should not be found liable in expenses."

[20] In reaching his decision the sheriff stated:

"[20] There is no doubt on the information before me that the requirement for these proceedings was brought about entirely as a result of the defender's decision to withhold the information properly requested by the pursuer as part of the pursuer's =legitimate statutory function and in the proper exercise of the pursuer's statutory powers. Had the defender complied with the request there would have been no need for an application to the court …

[21] Having reached that view, the next matter to determine is whether or not, in the exercise of the court's discretion, any liability in expenses arises out of the defender's decision. It was generally agreed in submissions to me that the case of *Woolgar* gives the appropriate guidance to the holders of information in respect of which a valid request for disclosure is made. The defender appears to recognise that the decision in response to the initial request is his to make. Further, the relevant factors which bear upon the defender's decision do not appear to be in dispute. They are Data Protection, GDPR, Article 8, and the common law. While the defender claims to have considered these factors, and based his decision upon such a consideration, I find myself quite unable on examination of all the information placed before the court to determine how the defender's decision was arrived at. The reason for withholding information, as set out in the letter dated 5 November 2018, is not a valid reason. As a statement of the law the content of that letter is incorrect. Ms Fraser for the defender quite rightly did not rely on that letter, but submitted that following receipt of the statutory request in terms of section 35A of the 1983 Act the defender, aware of the need to make a decision, and that the decision was his to make, per *Woolgar*, correctly chose to withhold the requested information. I might have considered that to be a proper approach had I been able to determine how the defender went about making the decision. However, no cogent reason has been advanced in the course of this application. Rather, the defender appears to have abdicated the decision making process to the court.

[22] The defender having been vested with the power to make the appropriate decision, and having failed to make any proper and reasonably based decision, thereby necessitating these proceedings, I can see no reason why the defender should not be found liable in expenses. The defender submits that, in the absence of malice or bad faith in the exercise of the statutory obligations the authorities suggest that he should not be found liable in expenses. This is not one of these cases. The decision to be made was not one falling exclusively within the statutory functions and duties of the police. The defender was simply 'any other person' holding information which the pursuer could require in terms of the statutory powers under section 35A of the 1983 Act. Sheriff McSherry at Dunfermline in the recent unreported case to which I was referred quite clearly opined that, unless valid reasons for refusal of disclosure existed, anyone refusing disclosure required by the pursuer in exercise of his rights under section 35A would be liable in the expenses of an action. Ms Fraser submitted that this was an incorrect statement of the law. I disagree.
Sheriff McSherry also recognised that the police, when they hold such information, have 'an unenviable balancing act to carry out'. Accordingly, it was for the defender to reach a justifiable decision on the request, having regard to the various competing interests and the law. Standing the apparent lack of any reasoned view reached by

> the defender, I agree with Sheriff McSherry that the defender, by refusing disclosure, becomes liable in expenses."

Submission for the petitioner

[21] The broad proposition advanced on behalf of the petitioner was that, as it had enjoyed complete success in having the prayer of the petition granted without the need for an oral hearing, the normal rule of expenses following success should be followed as there were no circumstances that would justify departing from it. The respondent had refused to provide the requested information to the petitioner on a voluntary basis and required the petitioner to proceed with the petition which was not opposed by the respondent, on an erroneous basis that misunderstood the applicable law, despite the correct legal position being explained by the petitioner prior to the commencement of these proceedings. The petitioner therefore incurred the unnecessary expense of having to proceed with the petitions to recover the requested documentation, which could and should have been disclosed by the respondent to the petitioner on a voluntary basis without the need to first obtain an order from the court. As the respondent required the petitioner to incur the expense of proceeding with unnecessary petitions to obtain court orders that were not required he should be liable for the petitioner's expenses in doing so. The respondent's erroneous understanding of the law was that he was not permitted to share personal information obtained and processed in the course of a criminal investigation for anything other than a law enforcement purpose unless specifically authorised to do so by law, which would require either an order of the court or a specific statutory obligation to provide the information, and that he would breach section 36(4) of the 2018 Act if he acceded to a request from a regulatory body, such as the petitioner, for him to provide information for the purpose of pursuing fitness to practise or misconduct investigations. That was an

incorrect understanding of the parties' rights and obligations because the petitioner had a statutory power to require the disclosure of information, the respondent was under a duty to disclose that information to the petitioner without a court order, the processing of the information was authorised by law and the respondent was permitted, and in the circumstances obliged, to disclose the documents sought by the petitioner without an order from the court. None of the three legal regimes engaged (the common law, the 2018 Act and the GDPR and the Human Rights Act 1998) required a court order ordaining disclosure. Rather, all three of these legal regimes authorised and promoted disclosure on public safety grounds. In particular, section 36(4) of the 2018 Act did not require a court order to be pronounced before the requested information could be disclosed to the petitioner: *C* v *The Chief Constable of the Police Service of Scotland* 2020 SLT 1021. Accordingly, the requested information ought to have been voluntarily disclosed by the respondent to the petitioner without the need for a court order. For these reasons the petitions were unnecessary and the respondent should be liable for the petitioner's expenses incurred in connection with them.

Submission for the respondent

[22] On behalf of the respondent it was submitted that his ability to share information obtained during criminal investigations was governed by Part 3 (Law Enforcement Processing) of the 2018 Act, which implemented the Law Enforcement Directive (Directive (EU) 2016/680) and made provision for the processing of personal data by competent authorities for law enforcement purposes, particularly sections 31 and 36(4). Section 116(A1) of the 2018 Act provides that the Information Commissioner is responsible for monitoring the application of Part 3 of the Act in order to protect the fundamental rights and freedoms of individuals in relation to processing by a competent authority, including the respondent,

for any of the law enforcement purposes. Section 157(2)(a) of the 2018 Act provides that in relation to an infringement of a provision of Part 3 of the Act the maximum amount of the penalty that may be imposed by a penalty notice in relation to a failure to comply with section 36 is the higher maximum amount, which in terms of section 157(5) is £17,500,000.

[23] When individuals provided information to the respondent during a criminal investigation they did not necessarily know that the information would be provided to another body for a different purpose. The respondent regularly received requests from regulatory bodies for information obtained during criminal inquiries to enable those bodies to carry out their functions in relation to assessing their members' suitability to practise. The information sought generally comprised sensitive personal data, such as statements of victims of sexual assault, standard prosecution reports and interview transcripts. In light of the two sheriff court decisions referred to above there was increased pressure on the respondent from regulatory bodies for the disclosure of sensitive personal data, primarily focused on cases in which there had been no criminal proceedings or there had been verdicts of acquittal. The respondent therefore contacted the Information Commissioner's Office in December 2019 in relation to his approach and received the reply dated 20 December 2019 set out in para [10] above.

[24] The petitioner had no statutory power to require the disclosure of information from the respondent or from anyone else. However, it could rely on para 2(5)(b) of Schedule 4 to the 2011 Order which provides that the Court of Session may order any person to disclose documents or other evidence to the petitioner on an application by any party to proceedings held by the petitioner in respect of an investigation of an individual's fitness to teach. That was what the petitioner had done in these seven cases. Given the sensitive nature of the information sought and the restrictions imposed by the 2018 Act on the disclosure of the

relevant information the respondent was not permitted or obliged to provide that information to the petitioner without a court order. If he was permitted to disclose the information sought, he was not under a duty to do so without a court order, the formality of which ensured that interested persons who might wish to object to that information being disclosed to the petitioner were given a fair opportunity to do so. Even if the respondent was permitted to disclose the information sought without a court order, given the clear indication from the ICO that he was not permitted to do so, and the potentially significant penalty that could be imposed by the ICO for a breach of Part 3 of the 2018 Act, it was reasonable for the respondent to require a court order first. No oral hearing was required because the respondent did not oppose the granting of the substantive orders sought by the petitioner, undertook to comply with those orders if the court granted them, and entered appearance in the petition proceedings solely for the purpose of opposing any adverse award of expenses. Both parties were publicly funded.

[25] Although the general rule was that expenses follow success the court had a broad discretion in relation to expenses. In considering whether or not to award expenses against the respondent it was neither necessary nor appropriate for a determination to be made on whether or not the respondent was in fact authorised to disclose the information requested without a court order. The petitioner had no statutory right to require the petitioner to provide information to it. The petitioner did not seek declarator that a court order was unnecessary in order for the information to be disclosed, nor did it seek judicial review of the respondent's refusal to hand over the information without a court order. The respondent did not oppose the petitions and lodged answers only to protect his position in relation to expenses if necessary. The court therefore did not determine the issue when granting the orders and it was not the reason why it granted them. The petitioner could not

now seek to have the issue determined indirectly in the context of a motion for expenses. It was accepted that an award of expenses was a matter for the discretion of the court and that the general rule was that expenses followed success but it was disputed that the general rule applied in this case where the petitioner was clearly not vindicating a right (*Howitt* v *W Alexander & Sons Ltd* 1948 SC 154, Lord President Cooper at p157). Although the general rule might apply in the context of contested proceedings where there have been opposing arguments made and one party has succeeded and the other has failed the same could not be said in proceedings such as these in which the respondent expressly did not oppose the orders sought and lodged answers only to preserve his position in relation to expenses. The general rule therefore did not apply in the circumstances of these cases. The issue of whether or not the respondent was permitted to provide the petitioner with the information sought without a court order was irrelevant to the determination of expenses, as were his reasons for not providing the information without a court order. Even if the respondent was authorised to disclose personal data without a court order having a court order provided an important safety net that ensured that persons whose rights were to be protected had an opportunity to object to the sharing of their personal data which they would not necessarily have, or have to the same extent, if the data were to be provided without a court order. The respondent had adopted a reasoned and measured approach and should not be penalised in expenses simply for seeking to ensure that the rights of third parties were protected and that he did not fall foul of Part 3 of the 2018 Act in circumstances where there was clearly uncertainty about its correct interpretation and where he had received unequivocal advice from the ICO.

[26] All three leading cases referred to by the petitioner could be distinguished from the present cases and none provided clear authority that the respondent was authorised to

provide personal data for law enforcement purposes to the petitioner without a court order. This was still a grey area, particularly in the context of requests from regulatory bodies such as the petitioner which had no statutory authority to require documents from the respondent or anyone else, but who were otherwise permitted to make an application for an order by the court. *Woolgar* was decided before Part 3 of the 2018 Act came into effect. The information sought related to the person whose conduct was under investigation, not personal data about third party victims or witnesses that had been gathered for law enforcement purposes. Unlike the petitioner, the body seeking the information was the United Kingdom Central Council for Nursing Midwifery and Health Visiting and was a regulatory body operating in the field of public health and safety. *Savery* was also decided before Part 3 of the 2018 Act came into effect. The issue for determination was whether the General Dental Council was entitled to pass patient records onto its investigating committee and practice committee. The information was therefore being shared with a competent authority concerned with law enforcement and was not the type that would be protected under Part 3 of the 2018 Act. *C* was decided after Part 3 of the 2018 Act came into effect and referred to *Woolgar*, but the information being sought was not personal data, which is what is protected by Part 3 of the 2018 Act. This was made clear in para [144]. That case was therefore not clear authority for Police Scotland to provide personal data collected for law enforcement purposes to the petitioner without a court order. The two sheriff court cases were decided before Police Scotland approached the ICO for advice. In the *SCCC* case Sheriff McSherry was of the view that in order to find Police Scotland liable in expenses the court was in effect being asked to review the decision of Police Scotland and make a judgment on it. He considered that the question of whether Police Scotland was correct that it could not hand over the documents voluntarily, and whether it was reasonable in

responding to the requests to do so, were matters for judicial review and for the court to determine in a debate concerning liability for the expenses of raising the action in the first place.

[27] The ICO advice did not contradict its Code of Practice, which was of general application. Furthermore, it was apparent from ongoing discussions among the relevant public bodies and the ICO that the advice contained in the letter of 20 December 2019 continued to apply.

[28] Although awards of expenses could be made against public bodies in contested actions in which the opposing party is seeking to vindicate a right that was not the case here. In any event, the approach of Police Scotland to requiring a court order before providing the information sought was reasonable in all the circumstances. It was not appropriate that Police Scotland, as a public body, be punished in relation to expenses where it was concerned to protect third parties in relation to disclosure of their personal data and where the ICO has advised that they cannot disclose such data without a court order.

[29] A further consideration relevant to the exercise of the court's discretion and which further weighed against the granting of expenses against Police Scotland in this case was the effort and expense incurred by them in effecting service and engaging with interested parties whose personal data were being sought by the petitioner. In this regard the respondent did not oppose any of the orders sought, knowing that they included orders ordaining him to intimate the petitions on persons whose rights under article 8 of the ECHR would be infringed if their personal information were provided to the petitioner without their having an opportunity to be heard. In particular, between 4 December 2020 and 17 June 2021 intimation letters were sent by Police Scotland to 22 interested parties. In addition, there were various telephone and email exchanges between their agents and

interested parties who were seeking more information. This had all been done at the expense of Police Scotland and were expenses that the petitioner would otherwise have had to bear.

[30] In all the circumstances the most appropriate order would be for the court to refuse the petitioner's motion that the respondent be found liable in expenses and to find no expenses due to or by either party.

Discussion

[31] The normal rule is that expenses follow success. In these petitions the petitioner has been successful in that it has obtained the granting of the prayers of the petitions without the need for any hearing. The bringing of the petitions was necessary because the respondent refused to provide the petitioner with the information requested and therefore required the petitioner to bring these petitions in order to obtain court orders against the respondent for the required information to be disclosed. The submission advanced by the respondent is that he had no power to disclose the information voluntarily as he was prevented from doing so by section 36(4) of the 2018 Act and he should therefore not be found liable in expenses. In my opinion it is essential (contrary to the submission advanced on behalf of the respondent), with a view to determining the question of expenses, to decide first whether the respondent was authorised to disclose the information without a court order.

[32] In my opinion the position adopted by the respondent, as well as the advice provided to him by the ICO, was clearly wrong in law. Section 36(4) of the 2018 Act provides that any of the data provided for the law enforcement purposes may not be processed for a purpose that is not a law enforcement purpose unless the processing is authorised by law. Assuming for present purposes (as the contrary was not argued) that the

purpose for which the petitioner sought disclosure was not a law enforcement purpose, the question which arises is whether disclosure was authorised by law. In my opinion it plainly was, and it was therefore not necessary for the respondent to insist upon a court order before disclosing the material requested. The cases of *Woolgar*, *Savery* and *C* are authority for the proposition that the common law and section 32 of the 2012 Act permit the disclosure by the respondent to the petitioner of the requested material without the necessity of a court order on public safety grounds. This was made clear by Kennedy LJ in *Woolgar* and Sales J in *Savery* in the passages quoted above, which seem to have been either ignored or misunderstood by the respondent and the ICO. Indeed, Kennedy LJ stated that the police may even be under a duty to pass confidential information to a professional or regulatory body without being requested to do so if, in their reasonable view, it should be considered in the interests of public health or safety by that body. Sales J affirmed a previous judicial statement that the intervention of the court was not required in a case where it was proposed to make use of patient records for the purposes of professional conduct or improper practice proceedings by appropriate regulatory bodies. The same principle applies to the information held by the police in these cases. I do not accept the submission for the respondent that the three cases can be distinguished as they did not relate to the data of witnesses or victims: all that matters is that the information contains personal data. It follows that the respondent, who did not otherwise oppose the disclosure of the requested information, could (and should) have lawfully disclosed the requested information to the petitioner. There was no lack of clarity in the law: it was perfectly clear. The cases of *Woolgar* and *Savery* stated the common law which applied both before and after the enactment of the 2018 Act. It follows that I disagree with the decision of Sheriff McSherry not to award expenses and I agree with the reasoning and decision of Sheriff Small in

awarding expenses. In the case dealt with by Sheriff Small the position adopted by the respondent was inexplicable and indefensible as the petitioner had a clear statutory right to the information which the respondent refused to provide. The respondent in the cases before me wrongfully forced the petitioner to incur the unnecessary expense of bringing these petitions and must therefore be found liable in expenses.

[33] I do not accept the submission for the respondent that the petitioner was not seeking to vindicate a right in bringing the petitions. In my opinion it clearly was: it was seeking to vindicate its right to receive the information held by the respondent. Nor do I think that the fact that the respondent did not oppose the granting of the petitions is anything to the point. The respondent, by his refusal to provide the information sought, put the petitioner to the needless expense of having to bring the petitions in the first place. The petitioner was a body operating in the field of public safety as it is responsible for ensuring that people who are a danger to children are not permitted to remain on the register and so not permitted to continue to teach. The fact that both parties are public bodies is an irrelevant consideration when determining the question of expenses. So also is the fact that the respondent acted on advice from the ICO as he must take responsibility for his own decisions.

[34] The question of a possible infringement of Article 8 of the ECHR if personal information of certain persons is provided by the respondent to the petitioner without their having the opportunity to be heard arises. This is a procedural issue which has been dealt with by the court on 16 April 2021 ordaining the respondent to intimate the petitions to those persons whose rights under Article 8 of the ECHR would be infringed if their personal information were provided to the petitioner without their having an opportunity to be heard. The expense of intimation was an unavoidable one for the respondent as the holder of the data and does not affect the general question of expenses.

Decision

[35] For the reasons given above I shall find the respondent liable to the petitioner in the expenses of each petition. I trust that this decision will bring an end to the erroneous practice of the respondent automatically refusing to disclose relevant information to professional or regulatory bodies without a court order.