SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY AT LANARK

[2025] SC LAN 32

LAN-B158-23

JUDGMENT OF SHERIFF ANTHONY MCGLENNAN

in the cause

KENNETH JOHN BAILLIE PRENTICE

Pursuer

against

CHIEF CONSTABLE OF POLICE SCOTLAND

Defender

Pursuer: Party
Defender: Cartney

Airdrie, 30 April 2025

The sheriff, having resumed consideration of the summary application;

Preface

[1] This summary application seeks three orders. By its first crave, declarator that the defender has failed to comply with its statutory obligations "under section 45(1) and (2)" to fully and properly respond to the subject access requests made by the pursuer or his agent on 17 November 2021, 22 February 2022, 31 July 2023 and 11 September 2023. The legislation is not specified by the crave, but reading the balance of the application there is more than reasonable inference that the sections referred to are of those of the Data Protection Act 2018.

[2] The second crave seeks an order in terms of section 167(2) of the Data Protection Act 2018. That order to require the defender to comply in full with its obligations under sections 45(1) and (2) of the Act, in relation to the aforementioned subject access requests.

[3] In his the third crave, made in terms of section 169 of the 2018 Act, the pursuer seeks an award of compensation of £5,000.00 from the defender for "damage and distress" suffered as a result of the defender's failure to respond to the said subject access requests.

[4] My judgment addresses the debate that took place upon preliminary pleas insisted upon by the defender relative to the application. These are her first and second pleas-in-law. They relate to the relevancy and specification of the pleadings in respect of all three craves. It also addresses the issue of the competency of the crave for declarator.

The application

[5] The record of pleadings encompasses 38 pages. An addendum to the defender's fourth answer and what is designed as a response by the pursuer, account for 28 pages of that total.

The overarching positions

The pursuer's case

[6] The background to the raising of the application is the involvement of Police Scotland with the pursuer, his firearms license, and his firearms. More specifically the actions of Police Scotland in 2021 related to their concerns as to the suitability of the pursuer to hold a firearms license, culminating in the revocation of his license and the seizure of his firearms. The pursuer later successfully appealed against that revocation at the sheriff court at Lanark. Subsequently data subject access requests were made by

the pursuer (or made on his behalf by his then solicitors) of the defender. These sought the personal data of the pursuer processed by the defender in relation to various actions taken by Police Scotland with regard to the pursuer's firearms and firearms license. The pursuer maintains these requests were either not responded to at all, or were inadequately responded to. Exemptions were claimed by the defender which were not properly available to her. These failings amounted to breaches of the defender's obligations to the pursuer in terms of section 45 of the Data Protection Act 2018. The court should make a declarator in that regard. The court should also order compliance with the requests as per its power at section 167 of the Act. The effect of the breaches was that the pursuer was placed at a disadvantage in his appeal against revocation of his firearms license, the natural course of justice was thus interfered with. He was also caused financial detriment, frustration, anxiety and stress. Compensation should be awarded in terms of section 169 of the Act.

The defender's case

[7] The defender refutes the assertion that she failed to comply with her obligations in terms of the 2018 Act. In terms of the subject access requests averred upon, these either, in one instance, did not constitute a data subject request, or were responded to in compliance with the Act. When responding the defender relied appropriately upon available exemptions provided for by the Act.

Condescendence and answers

Condescendence two and its answer

[8] Condescendence two avers that a subject access request was made of the defender on 17 November 2021. The averments address the nature of the request as follows:

"…it contained requests for the Defender to provide personal data held by and processed by it relating to the Pursuer". The request was not responded to. A "follow up email" was sent on 6 December 2021. This attracted an email response from the defender stating that the request had been sent to her legal services department, but "no substantive reply was ever received…".

[9] In answer the defender challenges that a subject access request was made on 17 November 2021. Rather, it is averred, all that was forwarded on that date was an email seeking information and documentation. A subject access request was forwarded on 21 February 20222 and responded to on 21 March 2022. The averments in this second answer call upon the pursuer to specify the dates and recipients of the subject access requests identified in his second condescendence.

Condescendence three and its answer

[10] The pursuer's third article avers that a further subject access request was made of the defender on 22 February 2022. It requested personal data held by the defender in; the pursuer's firearms licence file; the Police Scotland's database and record system; the Police National Computer; and the Police National Database. It also requested; personal data held in relation to Police Scotland's attendance at the pursuer's property on 1 October 2021; the personal data held which led to Police Scotland seeking to remove the pursuer's shotguns on that date; and the personal data contained in any documentation which named or identified the pursuer in relation to the said attendance at the pursuer's home. In addition it requested the personal data contained in any documentation which named or identified the pursuer in a warrant application placed before a sheriff on 4 October 2021. Lastly it sought; any personal data held containing information "in regard to public safety

concern(s) relating to the Pursuer as a lawful licenses gun holder"; and that contained "in relation to Carty's solicitors 1st December 2022 to 10th April 2023". The averments continue that the request was responded to by the defender, by letter, but that in doing so the defender failed to provide all of the data requested. Indeed in large part the data was not supplied. The defender relied upon exemptions set out at sections 45(4)(e), section 45(6), and schedule 2 part 2 section 7 of the 2018 Act, absent of any explanation of the basis of their application to the request made. The pursuer avers his belief that the exemptions were not properly available to the defender.

[11] The defender's answer accounts that upon 21 March 2022 a response was provided to the subject access request of 22 February 2022. Therein the pursuer was provided with the information to which he was entitled in terms of the data protection legislation. Section 45(4)(a), and schedule 2, part 2, section 7 of the Data Protection Act 2018 restricted the pursuer's access to some data. The response issued by the defender had communicated that this data was exempt from subject access rights and that the restriction of access was necessary and proportionate. The pursuer was called upon to specify the basis and extent of the alleged infringement of his rights as a data subject.

Condescendence four and its answer

[12] The pursuer's fourth article of condescendence addresses a subject access request made "(on) or about 31st July 2023", that communication being incorporated into pleadings brevitatis causa. The defender's response to the same is averred to have failed to provide all data sought in terms of the request. It is asserted that: "The Pursuer does not accept that the Defender had a legitimate basis for withholding the information". The defender is called upon to "specifically" set out and exemptions which applied to the date sought.

[13] Thereafter the averments turn to a further request made upon 11 September 2023, also incorporated into pleadings brevitatis causa. Personal data sought therein regarding events of 1 October 2021 and 4 October 2021 was not provided by the defender's response of 25 October 2023. Here too the statutory exemptions relied upon by the defender for so doing were not available to her.

[14] The answer of the defender admits that the requests were made and responded to. It avers that in both of her responses the pursuer was provided with the information to which he was entitled in terms of the data protection legislation, there was accordingly no breach of the pursuer's rights in terms of the Act. The pursuer is called upon to specify the basis and extent of the alleged infringement of his rights as data subject in terms of the Act. The answer incorporates an addendum containing the defender's position in respect of the information and documents that were provided in relation to the pursuer's requests.

[15] There are 19 "items" (as they were referred to) addressed by the defender in the addendum. They are as follows:

i. Reports on all police systems for incident 20/12/2019.

ii. Reports on all police systems for incident 03/01/2020.

iii. Reports on all police systems for incident 02/06/2021.

iv. Reports on all police systems for incident 01/10/2021.

v. Reports on all police systems for incident 01/10/2021.

vi. Firearms initial incident notification form 090-032 for incident 20/12/2019.

vii. Firearms initial incident notification form 090-032 for incident 01/10/2021.

viii. Firearms initial incident notification form 090-032 for incident 01/10/2021.

ix. Firearms initial incident notification form 090-032 of 04/10/2021 for incident 2398 of the 01/10/2021.

x. Firearms initial incident notification form 090-032 of 04/10/2021 for incident 0289 of the 01/10/2021.

xi. Supporting documents presented by Police Scotland to procurator fiscal/sheriff in support of application for sheriff warrant.

xii. Supporting documents presented by Police Scotland to procurator fiscal/sheriff in support of application for sheriff warrant.

xiii. All communications relating to pursuer between the defender's Professional Standards Department and National Firearms and Explosives Licensing Department.

xiv. All communications between Police Scotland and Glasgow City Council.

xv. Dates the defender accessed Police National Computer / Police National Database / Criminal History System (PNC/PND/CHS) between 11/02/2019 to 21/12/2019.

xvi. Security of firearms form showing incident number pursuer's shotguns were stored under when under the supervision of the area commander.

xvii. Application to procurator fiscal for sheriff warrant made by Police Scotland seeking a warrant.

xviii. All production schedules/documents formulated relating to warrant.

xix. Communications between Cartys solicitors and Police Scotland 1/1/2023 to 30/3/2023.

[16] The pursuer provided a response to the addendum. Therein, item-by-item, he accounts his position on what is averred by the defender.

Condescendence five and its answer

[17] The fifth condescendence addresses damages sought. In a brief article of condescendence the pursuer avers that the failure to respond to his subject access requests caused him "distress over a protracted and unnecessary period of time". Particular reference is made to the "disadvantage" he was placed at during the (successful) appeal taken against the revocation of his firearms license. This is averred to have been by way of preventing evidence being presented. The averments continue that the withholding of data has brought financial detriment to the pursuer in his attempts to recover the data sought, reference being made to his instruction of three firms of solicitors. The withholding of data is also averred to have "..interfered with the natural course of justice and caused the Pursuer frustration, anxiety and stress over this protracted period of lime (*sic*)".

[18] The defender's answer includes a call upon the pursuer to state the loss he alleges he has sustained and the basis upon which he attributes that loss to her responses to the subject access requests made.

Parties' pleas-in-law

The pursuer

[19] The pursuer first pleads that having made lawful subject access requests in terms of sections 45(1) and (2) of the 2018 Act, declarator should be pronounced as first craved. His second plea being that the defender's failure to comply with her obligation to disclose his personal data, an order should be pronounced in the terms second craved. As per the third plea-in-law, the defender having failed to meet her statutory obligation to the pursuer, an award of compensation should be made.

The defender

[20] The defender's first and second pleas seek dismissal on the basis of a lack of relevancy and specification. This is stated quoad the action itself at the first plea, and in relation to the averments upon loss (which apply only to the third crave) in the second plea.

[21] The defender's third, fourth and fifth pleas-in-law seek absolvitor on the basis that, respectively; the averments where material are unfounded in fact; no contravention of the pursuer's subject access rights has occurred; and no loss or damage has been suffered by the pursuer.

Background and procedural history

[22] It is relevant to account some of the somewhat lengthy procedural history:

(a) The application was lodged by the pursuer on 26 September 2023 and was warranted the following day. A hearing was fixed for 31 October 2023. The pursuer had attended to the lodging without legal representation and continued to represent himself throughout.

(b) The defender opposed the application at the hearing. The pursuer was permitted to amend the heading of the application and also the name of the chief constable. A further hearing was fixed for 28 November 2023. Technical difficulties with the pursuer's ability to connect to the virtual hearing required that hearing to be continued until 8 January 2024. At that hearing the application was further continued to allow the defender's solicitor time to take instructions upon preliminary pleas. A further hearing was fixed for 6 February 2024.

(c) On 1 February 2024 a note containing preliminary pleas was lodged by the defender. Principally this attacked the application on the basis that both its first and

second pleas-in-law referred to the Data Protection Act 2018 without identifying the relevant provisions which the defender was alleged to have infringed. On 6 February 2024 a further hearing was fixed for 16 April 2024, to allow the pursuer time to consider those pleas. The pursuer duly lodged a minute of amendment. The defender opposed the amendments at the April hearing. The court reserved consideration of allowing the same until answers (and subsequent adjustments) had been lodged. On 25 June 2024 the minute and answers as adjusted were allowed and a further hearing fixed for 23 July 2024. Meantime, on 6 June 2024, a revised note of preliminary pleas had been lodged by the defender. Procedure then became bound up in the issue of a minute for contempt of court lodged by the pursuer. This was dismissed in early September 2024 and diet of debate upon the defender's revised preliminary pleas fixed for 5 December 2024.

(d) The application called before me for the first time at that diet of debate. Written submissions had been lodged, and I heard the defender's solicitor on her oral submissions. A short way into the pursuer's oral submission it was clear to me that he was failing to address the defender's preliminary pleas. He was, both in these oral submissions and what he had provided in writing, concentrating exclusively upon providing an account of the substantive merits of his application, and not attending to dealing with the pleas to relevancy and specification. I suggested that he may wish further time prepare his oral submission before completing the same. The pursuer agreed this was an opportunity he would like to take up, and the diet of debate was continued further for that to take place.

(e) When the diet of debate recalled on 30 January this year the hearing commenced by way of presentation of an unopposed motion by the pursuer to

further amend his pleadings. It was granted. The effect was that the third crave now refers to section 169 of the Data Protection Act 2018 and had reference to Article 82 of the General Data Protection Regulation deleted. Article of condescendence four also had the following deleted:

> "The Pursuer understands that the Defender sought to rely on the non-existent suitability review as justifying their reliance on the exemption provided by section 45(1) (e)and section 45(6) of the Data Protection Act 2018. As that suitability review was not carried out, the Pursuer asserts the Defender had no basis to do so and sought to rely on those exemptions without proper basis".

(f) Notwithstanding the amendments the defender's preliminary pleas remained insisted upon. Ahead of the continued debate the pursuer had lodged written submissions. When the case called he asked that I consider these rather than hear him in further oral submission. I was content to do so. However, at this juncture I raised with parties whether the declarator sought at crave 1 could be competently granted. It was pars judicis to do so (see most recently, *Afandi* v *City of Edinburgh Council* 2022 SAC Civ 10). I continued the hearing to provide parties with an opportunity to lodge written submissions and thereafter present any brief additional oral submission which they had upon the matter. The defender had also sought at the hearing to rely on the case of *Barry Scott* v *Kate Frame, Police Investigations and Review Commissioner* [2024] SAC (Civ 3). The pursuer had not been given notice of that. I considered that fairness required that he be allowed to consider what was said there and include any views he held upon the authority's application to the issues at debate in those in his submissions.

(g) Written submissions were duly lodged. The debate recalled on 20 March 2025. Neither party wished to augment what was written with oral submissions. I made avizandum.

The Data Protection Act 2018

Section 45 of the Data Protection Act 2018

[23] Section 45 of the Data Protection Act 2018 sets out obligations upon a data controller:

"(1) A data subject is entitled to obtain from the controller—
(a) confirmation as to whether or not personal data concerning him or her is being processed, and
(b) where that is the case, access to the personal data and the information set out in subsection (2).

(2) That information is—
(a) the purposes of and legal basis for the processing;
(b) the categories of personal data concerned;
(c) the recipients or categories of recipients to whom the personal data has been disclosed (including recipients or categories of recipients in third countries or international organisations);
(d) the period for which it is envisaged that the personal data will be stored or, where that is not possible, the criteria used to determine that period;
(e) the existence of the data subject's rights to request from the controller—
(i) rectification of personal data (see section 46), and
(ii) erasure of personal data or the restriction of its processing (see section 47);
(f) the existence of the data subject's right to lodge a complaint with the Commissioner and the contact details of the Commissioner;
(g) communication of the personal data undergoing processing and of any available information as to its origin.

(3) Where a data subject makes a request under subsection (1), the information to which the data subject is entitled must be provided in writing —
(a) without undue delay, and
(b) in any event, before the end of the applicable time period (as to which see section 54).

(4) The controller may restrict, wholly or partly, the rights conferred by subsection (1) to the extent that and for so long as the restriction is, having

regard to the fundamental rights and legitimate interests of the data subject, a necessary and proportionate measure to—
(a) avoid obstructing an official or legal inquiry, investigation or procedure;
(b) avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties;
(c) protect public security;
(d) protect national security;
(e) protect the rights and freedoms of others.

(5) Where the rights of a data subject under subsection (1) are restricted, wholly or partly, the controller must inform the data subject in writing without undue delay—
(a) that the rights of the data subject have been restricted,
(b) of the reasons for the restriction,
(c) of the data subject's right to make a request to the Commissioner under section 51,
(d) of the data subject's right to lodge a complaint with the Commissioner, and
(e) of the data subject's right to apply to a court under section 167.

(6) Subsection (5)(a) and (b) do not apply to the extent that the provision of the information would undermine the purpose of the restriction.

(7) The controller must—
(a) record the reasons for a decision to restrict (whether wholly or partly) the rights of a data subject under subsection (1), and
(b) if requested to do so by the Commissioner, make the record available to the Commissioner."

Section 167 of the Data Protection Act 2018

[24] Section 167 of the Act, details the court's powers of enforcement:

"(1) This section applies if, on an application by a data subject, a court is satisfied that there has been an infringement of the data subject's rights under the data protection legislation in contravention of that legislation.

(2) A court may make an order for the purposes of securing compliance with the data protection legislation which requires the controller in respect of the processing, or a processor acting on behalf of that controller—
(a) to take steps specified in the order, or
(b) to refrain from taking steps specified in the order.

(3) The order may, in relation to each step, specify the time at which, or the period within which, it must be taken.

(4) In subsection (1)—
(a) the reference to an application by a data subject includes an application made in exercise of the right under Article 79(1) of the UK GDPR (right to an effective remedy against a controller or processor);
(b) the reference to the data protection legislation does not include Part 4 of this Act or regulations made under that Part.

(5) In relation to a joint controller in respect of the processing of personal data to which Part 3 applies whose responsibilities are determined in an arrangement under section 58, a court may only make an order under this section if the controller is responsible for compliance with the provision of the data protection legislation that is contravened."

Section 169 of the Data Protection Act 2018

[25] Section 169 of the Act enables compensatory awards by the courts. It does so thus:

"(1) A person who suffers damage by reason of a contravention of a requirement of the data protection legislation, other than the UK GDPR, is entitled to compensation for that damage from the controller or the processor, subject to subsections (2) and (3).

(2) Under subsection (1)—
(a) a controller involved in processing of personal data is liable for any damage caused by the processing, and
(b) a processor involved in processing of personal data is liable for damage caused by the processing only if the processor—
(i) has not complied with an obligation under the data protection legislation specifically directed at processors, or
(ii) has acted outside, or contrary to, the controller's lawful instructions.

(3) A controller or processor is not liable as described in subsection (2) if the controller or processor proves that the controller or processor is not in any way responsible for the event giving rise to the damage.

(4) A joint controller in respect of the processing of personal data to which Part 3 or 4 applies whose responsibilities are determined in an arrangement under section 58 or 104 is only liable as described in subsection (2) if the controller is responsible for compliance with the provision of the data protection legislation that is contravened.

(5) In this section, 'damage' includes financial loss and damage not involving financial loss, such as distress."

Schedule 7 to the Data Protection Act 2018

[26] Schedule 7 to the Act addresses exemptions to the obligations set out at section 45 of the Act. The relevant passage for the purposes of this action is found at section 7 of part 2 of the schedule:

> "The listed GDPR provisions do not apply to personal data processed for the purposes of discharging a function that—
> (a) is designed as described in column 1 of the Table, and
> (b) meets the condition relating to the function specified in column 2 of the Table,
> to the extent that the application of those provisions would be likely to prejudice the proper discharge of the function."

The germane part of the table is as follows:

The function is designed to protect members of the public against	**The function is—**
(a) dishonesty, malpractice or other seriously improper conduct, or	(a) conferred on a person by an enactment
(b) unfitness or incompetence.	(b) a function of the Crown, a Minister of the Crown or a government department, or (c) of a public nature, and is exercised in the public interest.

Parties' submissions

[27] The defender's insisted upon preliminary pleas were opposed. Further, the defender maintained the crave for declarator was incompetent, whilst the pursuer maintained that this was not so.

The defender

The declaratory

[28] Understanding of the defender's submissions upon the crave for declarator requires exposition of its terms.

[29] As it stood before the court at debate the crave was as follows:

> "To make a Declarator that the Defender has failed to comply with its statutory obligations under section 45(1) and (2) to fully and properly respond to the subject access requests made by the Pursuer (or his agent) on 17th November 2021, 22nd February 2022 and 31st July 2023 and 11th September 2023."

[30] In his final written submissions the pursuer sought that in the event that I was not persuaded that his crave was competent and relevant (although his position remained that it was both) he be allowed to amend. As amended, if I deemed that necessary, the crave would read thus:

> "To make a Declarator that the Pursuer has a right under section 45(1) and (2) of the Data Protection Act 1998 for the Defender to fully and properly respond to the subject access requests made by the Pursuer (or his agent) on 17th November 2021, 22nd February 2022 and 31st July 2023 and 11th September 2023."

[31] Citing paragraphs 20.01 and 20.05 of *MacPhail's Sheriff Court Practice*, and pages 105, 106 and 115 of *Walker on Civil Remedies* the defender submitted that the crave for declarator was incompetent and irrelevant. This was so both when considered in the terms in which it presently stood and also in the terms in which it would stand if amendment was allowed. The submission was that an action of declarator is one to declare the existence of a right the evidence of which is not apparent, or declare non-existent what appears on the face of things to be a right. The currently framed crave for declarator did neither. It sought declarator of the breach of the pursuer's section 45 rights. Seeking declarator of a putative breach of rights was not competent. The pursuer's reliance on *Clarke* v *Fennoscandia Limited No 2* 2001 SLT 1311 (paragraph 33) and *Aberdeen Development Company* v *Mackie, Ramsay and Taylor* 1977 SLT 177 misunderstood their import. Those authorities were not supportive of his position that the declarator as currently sought could be competently granted.

[32] In any event, both the currently sought declarator, and the amended crave I was asked to allow if necessary, were irrelevant. *MacPhail* and other authorities, most recently

Barry Scott v *Kate Frame* (ibid), made clear that declarators without practical effect should not be made by the courts. Accordingly craves and supporting averments aimed at having the court do so were irrelevant. The existence of the rights bestowed by section 45 of the 2018 Act were clear. There was no identifiable purpose or practical effect in declaring their existence.

Crave 2 and its averments

[33] The crave seeking an order in terms of section 167 of the Act and its averments were fatally lacking in relevancy. There were a number of deficiencies. What is purported in Article 2 of condescendence to be a subject access request made on 17 November 2021 was in fact no such thing. Further the pursuer had not denied the defender's averments in answer and had not averred why it is that the data produced did not satisfy the purported subject access request.

[34] The averments at Articles 3 and 4 plead only the assertion of the pursuer's belief that the defender was not entitled to the statutory exemption to provide data requested. Fair notice is accordingly not provided by those pleadings. They should (but fail to) set out facts which will be proved to establish what the defender should have done, and that which she failed to do. Separately, the averments were also at points confusing.

Crave 3 and its averments

[35] The pleadings in support of the third crave were so lacking in specification as to be irrelevant. They do not set out the basis for financial detriment, nor which actions by the defender caused distress. They do not distinguish the heads of claim. Neither is it possible to discern the pursuer's position upon the fundamental issue of causation and loss from

what is pled. Consequently, fair notice was not provided of what the pursuer was offering to prove, notwithstanding the repeated opportunities that had been afforded to him to amend his pleadings.

The defender's motions

[36] Principally I was moved to dismiss the action. Failing which, I was asked to dismiss the first and third craves. The second should be admitted to probation under deletion of the words "22nd February 2022 and 31st July 2023 and 11th September 2023". Only the averments in Article 2 of condescendence should go forward to probation.

The pursuer

The declaratory

[37] The pursuer maintained that the crave was both competent and relevant. *MacPhail* at Chapter 20 made clear the power of the sheriff court to grant a declarator. The court also had jurisdiction to make orders in terms of section 167 and 169 of the 2018 Act. *Clarke* v *Fennoscandia Limited* (ibid) at paragraph 33 was authority supporting the pursuer's stance that a competent declarator in the terms sought could be made:

> " .. the authorities and particularly Maclaren appear to support the position that declarator can be used in either a positive or negative sense to assert a matter which could competently be a defence to another action".

[38] The pursuer agreed that declarator should only be granted in respect of a live practical issue and referred to the opinion of the court in *Aberdeen Development Co* v *Mackie, Ramsey & Taylor* (ibid) at page 178 in that regard. In his submission the declarator sought by him was not a hypothetical matter. The declarator would support the granting of the orders sought at craves 2 and 3. The facts in *Barry Scott* (and for that matter in *Aberdeen*

Development Co) were distinct from those in the present case. If however I was unsatisfied that all of this was correct, I should allow him to amend so that the crave for declarator was in the terms which I previously accounted.

Crave 2 and its averments

[39] The averments on record supported the crave for an order in terms of section 167 of the Act and clearly set out what the order sought from the defender. This was acknowledged by Sheriff Cottam in his note to his interlocutor of 16 April 2024:

> "The question to be resolved between parties is the alleged failure to provide information/ data. That is still the request, now properly narrowed and set out. The defender has always been clear as to the pursuer's position, albeit not clear exactly what he wanted in the correct form".

[40] The email of 17 November 2021 was a subject access request. The absence of specific and explicit designation of the request as being such a request was not a requirement of the Act.

[41] The pursuer's case was that the subject access requests made had not been fully responded to in terms of the defender's obligations as per section 45 of the Act. The defender had relied upon the provisions which provide exemptions from complying with section 45 but had not explained the bases upon which the exemptions were available. The pursuer's articles of condescendence by way of its narration of facts and circumstances relating to the requests disclosed a case that the statutory exemption had not been applied properly.

Crave 3 and its averments

[42] The averments expressly set out the bases upon which compensation was sought in a way which was easily comprehensible to the defender. Article 5 stated that distress had been suffered consequential to the defender's failure to fully and properly respond to the subject access requests. The suffering, including frustration, anxiety, and stress, had taken place over a protracted and unnecessary period. The pursuer had been placed at a disadvantage in his appeal against the revocation of his firearms license. He had been "put to the task" of instructing three different firms of solicitors to attempt to obtain the data he continues to seek. The defender's withholding of the data had resulted in financial detriment in legal costs incurred and also the time which the pursuer himself had expended pursuing matters.

Decision

Crave 1

[43] As per *MacPhail,* at Chapter 20 and *Walker* at Chapter 8, a crave for declarator is one which seeks that a right be declared in favour of the pursuer, or that it declares non-existent what appears to be an existent right. The pursuer must have an interest in the declarator sought, and the court will only grant a declarator in respect of a live, practical issue. It is incompetent to bring an action to have a fact declared which has no legal consequences for the pursuer, or to seek a judicial opinion on an abstract question of law. Similarly, to do so where the right is not challenged, or doubted (*Walker* at page 105, *MacPhail* 20.01, *Scott* v *Kate Frame* (ibid) paragraph 88).

[44] Crave 1 of the application does not seek a declarator of the rights provided by section 45 of the 2018 Act. What is sought amounts to a finding in fact and law that on

specified dates the defender failed to comply with her obligations in terms of that section. That is not a competent declarator. The pursuer misunderstands *Clarke* v *Fennoscandia Limited* as authorising a declarator in the form which he sought to be made. The amended terms of the crave tentatively proposed by the pursuer would not improve matters. The element of the court being asked to declare a finding, so to speak, is removed, but what is left is an assertion of a right to provision of data in terms of section 45. As per *Walker, MacPhail* and *Scott* v *Kate Frame* the court should not make declarators of rights which are not doubted. The existence of section 45 rights, their availability to the pursuer, and the concurrent obligations they impose on the defender are not challenged in this case. What is challenged is the pursuer's assertion that the defender failed to comply with her obligations. The defender's position is that the data provided was properly restricted in accordance with the provisions of, including exemptions provided by, the 2018 Act. The pursuer, in turn, contending that the statutory exemptions were not legitimately applied. Neither would any practical issue be affected by the making a declaration of the right. The defender prays in aid the support the declarator would provide for craves 2 and 3. That approach is misconceived. The orders sought in those craves can be pursued and made (if the pleadings and evidence supports them) without any such declarator. The crave is not competent.

Crave 2

[45] The test for relevancy in Scots law is well-established. An action will not be dismissed as irrelevant unless it must necessarily fail, even if all the pursuer's averments are proved (Lord Normand in *Jamieson* v *Jamieson* 1952 SC HL 44).

[46] The defender disputes that the communication sent to her on 17 November 2021 constituted a subject access request. I was not pointed to the authority , statutory, or

otherwise, which would allow the court to determine that to be so at this juncture. In my view it is a matter for proof.

[47] The relevancy critique of the pleadings more generally applied by the defender is that the averments disputing that she properly relied on available exemptions provided for by Act are entirely comprised of assertions of belief. The facts that support the proposition are not pled. Those averments are therefore irrelevant. Without relevant pleadings there is no basis for a finding that the section 45 exemptions were unavailable to the defender. That being so crave two would fall to be dismissed.

[48] *MacPhail a*t paragraph 9.64 has set out the courts' approach to pleadings upon a party's belief:

> "If a material fact, which a party must establish in order to succeed in the claim or defence, is not known to the party, it may be averred that the party believes it to be true if that is a reasonable inference from other facts known to or ascertained by the party which are averred as matter of categorical assertion. That may be appropriate where the material fact is within an opponent's knowledge; but it is inappropriate where it is wholly within the party's own knowledge. An averment of belief which is not supported by other averments from which it may reasonably be inferred is irrelevant".

[49] The pursuer's pleadings include averment that no explanation was provided for the defender's reliance upon the statutory exemptions. In his submissions the points that are, in effect, made are these: The defender holds the information as to why the exemption was employed, but the basis of the application of the exemptions is not explained. The pursuer is disadvantaged by this absence of information when pleading. Nevertheless, his pleadings are sufficiently composed of information and circumstances pertaining to the request made to support a finding in fact that the exemptions were not properly applied.

[50] In examining the pursuer's position I considered what is averred at Articles 2, 3 and 4, and also the responses to the defender's incorporated addendum to the fourth

answer. The defender's agent cast doubt upon whether these could be deemed to be part of the pleadings - the pursuer did not aver that they were incorporated. However, on consideration I am of the view that they should are part of the pleadings, notwithstanding that omission. They are responses to 19 "items" the defender incorporated into her pleadings. They were clearly presented as part of his case. Neither do I consider, looking at the pursuer's pleadings as a whole, that it can be properly said that he has failed to answer calls, or left defender's statements unanswered, so as to make admissions of the defender's case on the material contentious issue of the proper application of the statutory exemptions.

[51] Looked at in the round, taking account also of what is said at paragraph 9.64 of *MacPhail*, I was persuaded that there was sufficient information and circumstances pled pertaining to the subject access requests to allow the court to consider finding in facts that the exemptions were not properly applied. That, to borrow from *Jamieson* v *Jamieson*, crave 2 would not necessarily fail if all of the pursuer's averments pertaining to it were proved. I wish to add that, with unfeigned respect to my brother sheriff, in reaching this decision I was not influenced by Sheriff Cottam's note to his April 2024 interlocutor. That was made at a different point in the action, with different pleadings, and in relation to a different issue for determination. It specifically accepted the prospect that further challenges might be made to the pleadings by way of preliminary plea. It was not determinative of the issues raised by the defender which came before me.

Crave 3

[52] As per *MacPhail* at 9.28:

> "A party's averments in condescendence or answers must specify sufficient facts to allow the party to lead all the evidence desired to be lead at the inquiry, and to give the opponent fair notice of what the party hopes to establish in fact; and they must present, together with the pleas-in-law, a relevant claim or defence".

[53] I agree with the defender that the specification provided in the pursuer's averments supporting the third crave are so lacking as to result in fair notice of the pursuer's case being absent. Section 169(5) of the Act defines damages available under the Act as including financial loss and damage not involving financial loss, such as distress. Those heads of claim are identified in the averments but not in a way that provides fair notice. The existence of distress, stress, anxiety, and frustration, are all averred, but no averments are provided as of how, or when, or where, they manifested themselves. The financial loss (styled as "detriment" by the pursuer) is averred to be the instruction of solicitors, however the legal expenses incurred are not specified at all. Neither do the averments as to the purported "disadvantage" suffered during the successful appeal against the revocation of the pursuer's firearm license explain the loss suffered, if indeed this head of claim is available as per section 169(5) at all.

[54] The averments being fatally lacking in specification the crave should be dismissed.

Equal treatment

[55] I had in the front of my mind during the conduct of the debate and when making my decisions here, that the pursuer is a party litigant. However, as the procedural history narrated above discloses he has had more than adequate time to ensure his craves are competent and his averments contain sufficient specification to go forward to proof.

[56] Our recently revised Equal Treatment Bench Book provides that the judiciary may make allowances for a party litigant, but should take care not to alter the balance of proceedings if those are otherwise in an adversarial setting. This guidance is informed by the United Kingdom Supreme Court judgment in *Barton* v *Wright Hassall LLP* [2018] 1 WLR 1119, at paragraph 18:

> "[t]he rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side…."

Also by our own Sheriff Appeal Court in *Royal Bank of Scotland PLC* v *Aslam* [2023] SAC (Civ) 20, at paragraph 15: "I recognise that more leeway will normally be afforded to a party litigant, but there is a limit to the leeway to be afforded".

[57] In this case leeway and allowance has been appropriately afforded to the pursuer, but the craves dismissed and averments removed from probation remained fatally deficient. To treat them otherwise would have been to treat the pursuer exceptionally and the defender unfairly. It would have offended against the principles in *Barton* v *Wright Hassall LLP* and *Royal Bank of Scotland PLC* v *Aslam*.

Order

[58] Consequent upon this decision I make the following orders:

(a) I dismiss the pursuer's first crave as incompetent.

(b) I repel the defender's first plea-in-law.

(c) I sustain the defender's second plea-in-law and dismiss the pursuer's third crave.

(d) I allow the pursuer a proof upon his averments at his second, third and fourth articles of condescendence for his second crave.

Further procedure

[59] The appropriate course at this juncture is to fix a procedural hearing at which time a diet of proof can be assigned. Other case management issues can be attended to then also and my interlocutor contains directions aimed at that. There is no requirement that I deal with the case going forward save, perhaps, the issue of expenses identified below.

Expenses

[60] There has been mixed success for both parties. I am inclined in those circumstances to reserve the issue of the expenses of the debate procedure until final orders are made in the action. However, parties may wish to submit that this preliminary view is not correct or appropriate. As such I will in the first place continue consideration of the expenses of the debate until the procedural hearing. If parties agree that the issue of expenses should be reserved they should email the sheriff clerk's office no later than seven days from today's date to say so.