

Decision Notice



Decision 019/2009 Mr David Rule and the Scottish Ministers

Cost of providing certain correspondence

Reference No: 200801847

Decision Date: 20 February 2009

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Scottish Information Commissioner

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Summary

Mr Rule requested certain correspondence from the Scottish Ministers (the Ministers). The Ministers responded by stating that the cost of complying with this request would exceed the cost limit set for the purposes of section 12(1) of FOISA and that they were therefore not required to comply with the request. Following a review, Mr Rule remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner accepted that the cost of complying with the request would exceed the specified limit and that the Ministers were therefore not obliged to comply with the request. In addition, the Commissioner found that the Ministers had not fully met their obligations under section 15 of FOISA by not explaining what information could be provided within the cost limit. He also found that the Ministers had failed to respond to Mr Rule's request for review within the required timescale. However, since the Ministers had subsequently responded to Mr Rule's request for review and Mr Rule had subsequently narrowed his request, the Commissioner did not require the Ministers to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance) and 21(1) (Review by Scottish public authority)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Section 60 Code)



Background

1. On 2 September 2008, Mr Rule wrote to the Ministers requesting the following information:
“...all correspondence of the First Minister’s Office with governments and government departments outside the United Kingdom and also all correspondence with embassies, as of May 2007”
2. The Ministers responded on 18 September 2008. The Ministers responded by stating that the cost of dealing with Mr Rule’s request would exceed the limit of set out in the Fees Regulations and therefore they were not obliged to comply with the request by virtue of section 12(1) of FOISA.
3. On 31 October 2008, Mr Rule wrote to the Ministers requesting a review of their decision. Mr Rule was particularly dissatisfied that he had not been provided with a calculation of the cost of dealing with his request.
4. The Ministers notified Mr Rule of the outcome of their review on 5 December 2008. The Ministers upheld their original decision without amendment, while also providing some explanation of the work that would have been required to deal with the request.
5. On 12 December 2008, Mr Rule wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers’ review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Rule had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.



Investigation

7. The investigating officer contacted the Ministers on 13 January 2009, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested, with calculations of the costs taken into account for the purposes of section 12(1). A response was received from the Ministers on 9 February 2009.

Commissioner's analysis and findings

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

Section 12(1) – Excessive cost of compliance

9. Section 12(1) provides that a Scottish public authority is not obliged to comply with a request for information where the cost of doing so (on a reasonable estimate) would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently set at £600 in terms of regulation 5 of the Fees Regulations.
10. Consequently, the Commissioner has no power to require the release of information should he find that the cost of responding to a request for information exceeds this amount.
11. The projected costs that the public authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, which the public authority reasonably estimates it is likely to incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA. The public authority may not charge for the cost of determining (i) whether it actually holds the information requested or (ii) whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
12. The Ministers submitted that the information in question was held on relevant subject files/folders in their electronic records management system. They explained that there would be a record of some of the correspondence on their Ministerial Correspondence System (MCS). In addition, they advised that the First Minister's (FM's) Office maintained a correspondence log and held hard copies.



13. According to the Ministers, none of these systems could be searched by reference to the country involved in the correspondence. They advised that the MCS and the FM's Office log could be searched using the names of the individuals to whom correspondence was sent, while searches on the electronic records management system might be possible using key words but might require to be done manually: these latter searches would not be straightforward as document titles might or might not include individuals' names or countries.
14. The Ministers went on to explain that the Scottish Government's International and European Divisions would often be involved in any correspondence with foreign governments, but that it was not possible to rely on them to provide all letters as some would have been dealt with by other teams across the Scottish Government.

Calculation of costs

15. The Ministers submitted that the search for the correspondence falling within the cope of the request would involve four significant tasks.
16. First, the International and European Divisions would be required to identify the contact names in all embassies, consulates and governments. The Ministers estimated that this would take at least one day for a person at B2 level, equating to £112.50 (7.5 hours at £15/hr).
17. Secondly, the FM's Office would be required to search the correspondence log and MCS using the contact names identified to identify the relevant letters stored in hard copy. The Ministers estimated that this would take at least two days work for a person at A3 level, equating to £167.10 (15 hours at £11.14/hr).
18. Thirdly, the Ministers submitted that the FM's Office would be required to physically locate, retrieve and photocopy the relevant hard copy letters from the store. The Ministers explained that the cost of this was difficult to estimate as they did not know how much correspondence was likely to be found. As it would involve searching through many boxes of papers, however, they estimated that it would take 5 days work for an A3 level employee, equating to £412.18 (37 hours at £11.14/hr).
19. The Ministers estimated, therefore, that the cost of completing the first three tasks would equate to £691.78, already in excess of the cost limit set out in the Fees Regulations. However, they also explained that they could not guarantee all correspondence would be picked up by the FM's Office alone, so a Scottish Government wide trawl would be necessary. The Ministers explained that this would require one person at B2 level from every team in the Scottish Government at least half an hour searching the electronic records management system and any locally held records, e.g. personal mailboxes.
20. The Ministers submitted that some teams would very quickly establish whether they held relevant information but others would need to search for considerably longer. They therefore considered half an hour would be a reasonable average, with a cost per team of £7.50. On the basis that there were roughly 250 teams, the Ministers submitted that this would lead to a cost of around £1,875, excluding the cost of photocopying.



21. In conclusion, the Ministers submitted that the estimated total cost of responding to Mr Rule's request would equate to £2,566.78
22. The Commissioner has considered the terms of Mr Rule's request, his submissions and the submissions made by the Ministers. Although he is not satisfied that a search of the entire Scottish Government would be required (given the terms of Mr Rule's request, which was specifically limited to correspondence of the First Minister's Office), he is satisfied that a search comprising the first three tasks set out in paragraphs 16, 17 and 18 above would result in costs in excess of the threshold set out in the Fees Regulations. In the circumstances, the Commissioner is satisfied that these estimated costs are reasonable.
23. The Commissioner therefore concludes that the Ministers were correct in their application of section 12(1) of FOISA and consequently were under no obligation to comply with the information request made by Mr Rule.



Section 15 – Duty to provide advice and assistance

24. Having established that the Ministers were correct to rely upon section 12 in FOISA to justify their refusal to comply with both requests, the Commissioner must go on to consider whether the Ministers complied with their duty to advise and assist as required by section 15 of FOISA, read in conjunction with the Section 60 Code.
25. In his application to the Commissioner Mr Rule raised concerns about the level of detail provided to him regarding the costing of dealing with his request.
26. Under section 15 of FOISA a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Where the authority has complied with the Section 60 Code in providing advice and assistance in any particular case, it is taken to have complied with this duty. In paragraph 20 of the Section 60 Code, one example given of appropriate help for this purpose is “an indication of what information could be provided within the cost ceiling, in instances where a request would be refused on cost grounds”.
27. Similarly, Annex 3, paragraph 14 of the Section 60 Code recommends that although a public authority is under no obligation to comply with a request for information which would exceed £600, it should consider what information could be released free of charge or below the prescribed amount.
28. Although Mr Rule was not provided with information of this kind by way of advice and assistance, the Commissioner notes that the Ministers suggested in their initial response to Mr Rule that the cost might be brought under the limit if he were to reduce the scope of his request, for example by identifying which governments/embassies and/or particular issues he was interested in.
29. Mr Rule, within his submissions to the Commissioner, explained that he had indeed submitted a further request to the Ministers, which limited the information he sought to seven specified countries. However, he still remained dissatisfied with the handling of his initial request.
30. Although the Commissioner recognises that the Ministers provided advice to Mr Rule regarding the narrowing of his request, he considers that this advice fell short of what is recommended by the Section 60 Code. In his view, it would have been practicable for the Ministers to provide at least a broad indication of the potential scope of a reduced request that might be answered within the cost limit, rather than simply suggesting that the number of countries, embassies and/or issues might be reduced.
31. The Commissioner therefore concludes that the Ministers did not comply fully with the requirements of section 15 of FOISA read in conjunction with the Section 60 Code. However, the Commissioner is aware that Mr Rule has subsequently submitted a more limited request for information and therefore does not require the Ministers to take any action in respect of this failure.



32. On the question of providing a more detailed calculation of costs, this is neither required by the Fees Regulations nor recommended in the Section 60 Code. The Commissioner would still regard the provision of some explanation of the authority's calculations as helpful to applicants, although in this connection he notes the brief explanation actually given in the Ministers' response to Mr Rule's request for review.

Technical breaches of FOISA

33. Within his application to the Commissioner, Mr Rule raised concerns about the length of time taken to respond to his request for review.
34. Mr Rule requested a review on 31 October 2008, which was acknowledged by the Ministers on 21 November 2008 and responded to, following a reminder submitted by Mr Rule, on 5 December 2008.
35. Section 21(1) of FOISA gives authorities a maximum of 20 working days from receipt of the requirement to comply with a requirement for review, subject to exceptions which are not relevant here.
36. The Commissioner finds that the Ministers failed to respond within the timescale set out in section 21(1) of FOISA. However, as Mr Rule has since received a response to his request for review, the Commissioner does not require any action to be taken in respect of this breach.

DECISION

The Commissioner finds that the Scottish Ministers partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr David Rule.

The Commissioner finds that by applying section 12(1) of FOISA in response to Mr Rule's request, the Ministers complied with Part 1.

However, the Commissioner does not accept that the Ministers fully met their obligations under section 15 of FOISA in dealing with Mr Rule's request. The Commissioner also finds that the Ministers failed to comply with section 21(1) of FOISA in responding to his request for review.

Given that subsequently Mr Rule narrowed his request and the Ministers responded to his request for review, the Commissioner does not require the Ministers to take any action in response to these failures.

Decision 019/2009
Mr David Rule
and the Scottish Ministers



Appeal

Should either Mr Rule or the Scottish Ministers wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Investigations
20 February 2009



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...



Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.