

# Decision Notice



Decision 209/2010 Mr Peter Cherbi and the Scottish Legal Complaints Commission

Audit of FOI procedures

Reference No: 201001655  
Decision Date: 9 December 2010

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**Kevin Dunion**  
Scottish Information Commissioner

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## Summary

Mr Cherbi requested from the Scottish Legal Complaints Commission (SLCC) information relating to an audit of the SLCC's FOI procedures. The SLCC responded by indicating it considered the request to be vexatious in terms of section 14(1) of FOISA. Following a review, Mr Cherbi remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SLCC had failed to deal with Mr Cherbi's request for information in accordance with Part 1 of FOISA, on the basis that Mr Cherbi's request was not vexatious in terms of section 14(1). He required the SLCC to respond to Mr Cherbi's request other than in terms of section 14(1) of FOISA.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement) and 14(1) (Vexatious or repeated requests)

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

## Background

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1. On 14 July 2010, Mr Cherbi wrote to the SLCC requesting the information contained in documents relating to the audit of the SLCC's FOI procedures, carried out by the Scottish Legal Aid Board or others.
2. The SLCC responded on 26 July 2010, advising that it was not obliged to comply with Mr Cherbi's request as it considered the request to be vexatious in terms of section 14(1) of FOISA.
3. On 26 July 2010, Mr Cherbi emailed the SLCC requesting a review of its decision. He noted that the SLCC had given no reason as to why or how it had arrived at its decision that his request was vexatious.



4. The SLCC responded to Mr Cherbi's requirement for review on 18 August 2010, upholding its original decision that the request was vexatious and confirming it would not be releasing the information Mr Cherbi had requested.
5. On 18 August 2010 Mr Cherbi wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SLCC's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Cherbi 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

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7. On 25 August 2010 the investigating officer wrote to the SLCC, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). The SLCC was asked to provide detailed arguments and evidence to support its view that Mr Cherbi's request for information was vexatious in terms of section 14(1) of FOISA.
8. The SLCC responded on 11 September 2010, supplying the Commissioner with an explanation of its reasons for applying section 14(1) of FOISA in this case, along with evidence in support of these arguments.
9. Once submissions were received from the SLCC, Mr Cherbi was provided with an opportunity to comment on the SLCC's submissions and its application of section 14(1) of FOISA to his request.
10. On 21 September 2010, Mr Cherbi wrote to the Commissioner, setting out his reasons for making his information request and commenting on the SLCC's claim that his request was vexatious. The submissions received from both parties, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Cherbi and the SLCC and is satisfied that no matter of relevance has been overlooked.
12. Section 14(1) of FOISA states that the general right of access to information in section 1(1) of FOISA "does not oblige a Scottish public authority to comply with a request for information if the request is vexatious".



13. The Commissioner has published guidance<sup>1</sup> on the application of section 14(1) of FOISA. This states:

*There is no definition of "vexatious" in FOISA. The Scottish Parliament acknowledged that the term "vexatious" was well-established in law and opted to give the Commissioner latitude to interpret that term in accordance with this background, in order that the interpretation might evolve over time in light of experience and precedent.*

*The Commissioner's general approach is that a request (which may be the latest in a series of requests) is vexatious where it would impose a significant burden on the public authority and:*

- a. it does not have a serious purpose or value; and/or*
- b. it is designed to cause disruption or annoyance to the public authority; and/or*
- c. it has the effect of harassing the public authority; and/or*
- d. It would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.*

#### **The SLCC's submissions**

14. The SLCC accepted that, in isolation, the particular request under consideration was "not in itself burdensome". However, it considered the burden to be significant as Mr Cherbi had made 38 requests over 21 months, which had impacted on its delivery of core services given its limited resources. It explained that the nature of the information typically requested was "thematic": in support of this assertion, it referred to six requests in relation to the Master Policy/Guarantee Fund, four requests on hospitality and/or expenses for Board members and three requests about the levy on the legal profession and its collection. It submitted that his requests were regularly framed in broad terms, thus increasing the amount of material requiring to be searched.
15. Further arguments were presented by the SLCC to support its view that Mr Cherbi's request lacked serious purpose or value, being simply part of a campaign of requesting information to harass it and cause disruption. In support of this, it noted that, in the broad range of Mr Cherbi's previous requests, he had never once questioned the SLCC about its procedures or processes or any external scrutiny of them.
16. The SLCC also provided arguments in support of its view that Mr Cherbi's request was designed to cause disruption by commenting on his blog and website, giving examples of items posted online, which, it submitted, had been followed soon afterwards by related information requests from Mr Cherbi. It argued that the tone and nature of his postings and those of anonymous individuals indicated that FOISA would be used "to keep the SLCC busy". It suggested that these were indicative of a campaign to that end.

<sup>1</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2513&SID=2591>



17. The SLCC also commented that it considered that the request had the effect of harassing it, given that the demands posed by his requests deflected staff time away from core business. It referred (with examples) to the language and tone of material published on Mr Cherbi's website, which remained unchecked on his blog, arguing that he had editorial responsibility for these and that the language used was inappropriate and threatening in tone. This material, it suggested, resulted from Mr Cherbi posting information deriving from previous correspondence (including information requests) with the SLCC, in a way which incited others to react as they did: the effect, it submitted, was that its staff were harassed by his requests. In this connection, it also cited the use of a blood-spattered SLCC logo on the website as threatening and harassing. It considered the harassing effect of Mr Cherbi's requests to be cumulative, but cited the content of the current request in particular, noting that it was specific to the day to day processes followed by its staff and the judgements they applied.
18. Finally, in arguing that a reasonable person would consider Mr Cherbi's request to be manifestly unreasonable or disproportionate, the SLCC submitted that his actions went beyond mere publication and were indicative of a "vexatious intention" in relation to future requests and the way in which he managed responses. The cumulative effect of the "serial nature" of his requests, it contended (noting that this request was the result of the Commissioner's decision on another request), created a context demonstrating such an intention.

### **Mr Cherbi's submissions**

19. Mr Cherbi submitted that his interest in requesting the information was purely professional as a journalist reporting on regulation in the legal profession. He asserted that many issues of significant public interest and concern regarding the SLCC's functions and ability to perform its duties had been revealed through Freedom of Information requests, issues which he believed would not have been made known to the public if these requests had not been made. He went on to provide examples.
20. In respect of the number of requests made, Mr Cherbi was of the view that these covered a wide variety of issues relating to information the SLCC did not generally publish. He contended that, if the SLCC chose not to publish this information of its own accord, then he must be able to use FOI legislation to make pertinent enquiries. Whilst he acknowledged that he had submitted 38 requests to the SLCC, he did not consider these to be disproportionate in comparison to the numbers of requests he understood to have been made by others on a single issue.
21. Mr Cherbi further indicated his blog was a public website where comments were welcome. He referred to warnings on the site regarding what could be published, which were typical of all such forums, commenting that not all material was published in the site depending on the severity of what was said. He also highlighted what he perceived to be the public interest in issues surrounding regulation of the legal profession, noting that there were equivalent or worse comments on such matters in newspaper forums and websites relating to the regulation of the legal profession in general.



22. Mr Cherbi indicated there was no campaign against the SLCC, but that he considered he had a duty to report on how the SLCC was handling its remit and how it conducted itself. He suggested there was no evidence of such a campaign, referring to the broad range of matters covered on his website in June 2010, with only one article mentioning the SLCC in the headline and others in what he described as a lesser manner. He provided what he considered to be the context of the blood-spattered SLCC logo.
23. Mr Cherbi indicated he had no intention of harassing the SLCC and its staff, pointing out that allegations of harassment had never been raised in the SLCC's communications with him. On the contrary, he referred to previous offers of meetings by the SLCC's Chair. Given his interest in the regulation of the legal profession, he contended that the SLCC's work was of legitimate concern to him, although he also argued that the SLCC and its activities formed only one aspect of his reporting in this area.

### The Commissioner's conclusions

24. The Commissioner considers that, when viewed separately and in isolation from the volume of correspondence between Mr Cherbi and the SLCC, the request under consideration does not appear to be manifestly unreasonable, unduly burdensome or disproportionate. Indeed the SLCC recognised this in its submissions, contending that it was the effect of such a request within the context of 38 previous requests which made it burdensome.
25. In considering whether Mr Cherbi's request should be regarded as vexatious, however, the Commissioner considers it reasonable and relevant to take into consideration the wider context in which the request was made, which might help in considering whether it was without serious purpose or value, was designed to disrupt or cause annoyance to the SLCC, or otherwise had the effect of harassing the SLCC. He has also taken into account his conclusions in *Decision 187/2010 Peter Cherbi and the Scottish Information Commissioner*, in which he considered similar arguments from the SLCC on a number of aspects of the application of section 14(1), together with all relevant submissions received from the SLCC and Mr Cherbi.

#### *Significant burden*

26. In his briefing on section 14(1), the Commissioner indicated that a request will impose a significant burden on a public authority where dealing with it would require a disproportionate amount of time, and the diversion of an unreasonable proportion of its financial and human resources, away from its core operations. However, if the expense involved in dealing with a request is the only consideration involved, the authority should consider the application of section 12 of FOISA (excessive cost of compliance).



27. In this case, the Commissioner is not satisfied that responding to Mr Cherbi's request would impose a significant burden on the SLCC. On the cumulative effect of Mr Cherbi's requests, he considers his conclusions in *Decision 187/2010* to be apposite: the demands of dealing with Mr Cherbi's requests cannot (so far) be considered an unreasonable burden on the SLCC. On the "thematic" nature of Mr Cherbi's requests, as in *Decision 187/2010*, the Commissioner has sympathy in principle with the argument that very broadly framed requests may impose a particularly significant burden on an authority: as in that previous case, however, he does not accept these arguments as having a bearing on the request under consideration here, which relates to a set of information which is quite capable of being narrowly defined.

*Disruption or annoyance*

28. The Commissioner has considered all the submissions made by the SLCC on this point, including the information drawn to his attention regarding the timing of requests. He is not, however, persuaded that the timing or other circumstances of Mr Cherbi's requests can be taken as evidence of a campaign to keep the SLCC busy. As indicated in *Decision 187/2010*, he does not believe it would be reasonable to assume that the views expressed on Mr Cherbi's website are necessarily shared by him, or that it would be reasonable to conclude that Mr Cherbi's purpose is to cause disruption or annoyance rather than to obtain information: he does not consider it any more reasonable to reach the latter conclusion on the basis of this current request than on the basis of Mr Cherbi's earlier requests or his overall pattern of requests.

*Harassment*

29. As in *Decision 187/2010*, the Commissioner is not satisfied here that Mr Cherbi's use of information on his website could be considered to constitute harassment. In the context of this particular case, he sees no reason why a request relating to the day to day processes followed by staff and the judgements they apply should be considered by their nature to be particularly harassing: on the contrary, he would suggest that transparency on such matters is a key underlying purpose of any freedom of information regime.
30. As indicated above (see paragraph 27), the Commissioner does not yet consider the cumulative effect of Mr Cherbi's requests to be vexatious by virtue of their volume or frequency. Consequently, he does not accept that cumulative effect to constitute harassment in terms of the demands made on staff time.

*No serious purpose or value*

31. The Commissioner's guidance on this issue is clear to the effect that public authorities should not reach this conclusion lightly. Even if a public authority thinks that a request lacks serious purpose or value, the applicant might, from a subjective and reasonable point of view, have a genuine desire and/or need to obtain the information. Furthermore, the applicant is not obliged to share his/her motives for seeking the information with the public authority. The inclusion of this criterion simply recognises that some requests may be so obviously lacking in serious purpose or value that they can only be seen as vexatious.



32. It is evident that Mr Cherbi has a serious interest in matters regarding the regulation of the legal profession, even if his views on these matters may not be shared by the SLCC or perhaps by others. The fact that the subject matter of this request has not been raised by Mr Cherbi before does not appear to the Commissioner to be particularly indicative of the absence of serious purpose or value: the SLCC has provided nothing of substance to support this assertion, while on the other hand Mr Cherbi has provided credible arguments as to why the requested information should be considered relevant to his broader purposes.
33. The Commissioner would also note that he has not upheld the alternative purpose put forward by the SLCC (that the request was part of a campaign to harass the SLCC and cause disruption).
34. Based on the arguments provided by the SLCC, therefore, the Commissioner cannot come to the conclusion that the requests by Mr Cherbi had no serious purpose or value.

*Manifestly unreasonable or disproportionate*

35. For the reasons given in the course of this decision notice, the Commissioner does not accept in this case that Mr Cherbi's information request should be considered manifestly unreasonable or disproportionate. In particular, as in *Decision 187/2010*, he is not persuaded that Mr Cherbi's requests are serial in nature or that, taken together, they demonstrate a vexatious intention.
36. For the reasons given above, therefore, while accepting the potential relevance of certain of the factors identified by the SLCC in determining whether a request is vexatious, the Commissioner finds in this case that the SLCC was not entitled to refuse to comply with Mr Cherbi's request under section 14(1) of FOISA. He requires the SLCC to comply with the request, either by providing the information requested or, if it considers that the information is exempt information, by issuing a refusal notice in terms of section 16 of FOISA (or by dealing with it in some other way which is permitted by Part 1 of FOISA).
37. The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002<sup>2</sup> (commonly known as the "Section 60 Code") makes it clear that authorities should be prepared to provide justification for deciding that a request is vexatious. The Commissioner notes that the SLCC did not do this in responding to Mr Cherbi's request.

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<sup>2</sup> <http://www.scotland.gov.uk/Publications/2004/09/19894/42618>





## DECISION

The Commissioner finds that the Scottish Legal Complaints Commission (SLCC) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing to comply with Mr Cherbi's request for information under section 14(1) of FOISA.

The Commissioner therefore requires the SLCC to respond to Mr Cherbi's request for information in accordance with Part 1 of FOISA, other than in terms of section 14(1), by 26 January 2011.

## Appeal

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

**Margaret Keyse**  
**Head of Enforcement**  
**9 December 2010**



## Appendix

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### 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.

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

##### 14 Vexatious or repeated requests

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

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