

Decision Notice



Decision 211/2012 Mr David Rule and the Scottish Ministers

Special adviser's engagements

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www.itspublicknowledge.info

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Summary

On 25 July 2011, Mr Rule requested from the Scottish Ministers (the Ministers) the engagements of Kevin Pringle, a special adviser, from a specified date. The Ministers refused to supply the information as they estimated the cost of complying would exceed the upper cost limit of £600. Following an investigation, the Commissioner decided that she could not accept that the cost of complying would exceed £600. She required the Ministers to provide the information.

Relevant statutory provisions

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

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.

Background

1. On 25 July 2011, Mr Rule wrote to the Ministers, asking to be provided with “the engagements of Kevin Pringle [a special adviser] from 1 January 2009 to the present day.”
2. On 2 September 2011, having received no response to his request, Mr Rule wrote to the Ministers requesting a review in respect of their failure to respond.
3. Mr Rule did not receive a response to his request for a review and, on 6 October 2011, wrote to the Commissioner stating that he was dissatisfied with the Ministers' failure to respond and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
4. Following this application, which led to *Decision 224/2011 Mr David Rule and the Scottish Ministers*¹, the Ministers carried out a review and notified Mr Rule of the outcome on

¹ http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201101898_201101899.asp



10 November 2011. They apologised for the delay in replying and for their failure to respond. The Ministers advised that they had now completed a search of their paper and electronic records and that they did not hold the information Mr Rule had requested. The Ministers explained that Mr Pringle did not carry out public engagements, but did, occasionally, support Ministers at external events.

5. Mr Rule was informed by the Ministers that information about Ministers' engagements, including those of the First Minister, was proactively published in arrears by the Scottish Government. The Ministers explained that information about Ministers' engagements from 31 May 2011 to the date of Mr Rule's request was being collated as part of a wider proactive publication exercise, and would be available on the Scottish Government website shortly. A link was provided to published information.
6. On 14 November 2011, 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.
7. Following this application, which led to *Decision 066/2012 Mr David Rule and the Scottish Ministers*² (in which the Commissioner did not accept the Ministers' position that Mr Pringle did not have any "engagements" in the ordinary sense of the word for the period in question), the Ministers carried out a further review and notified Mr Rule of the outcome on 22 May 2012.
8. The Ministers' review of 22 May 2012 noted that, under section 12 of FOISA, public authorities are not required to comply with a request for information if the authority estimates that the cost of complying would exceed the upper cost limit (currently set at £600 by the Fees Regulations). The Ministers advised Mr Rule that the costs of locating, retrieving and providing the information he had requested would exceed the upper cost limit of £600. As the request sought information across a 31 month period, they submitted that they would be required to explore a variety of sources in order to locate and retrieve the information requested. In addition, they estimated that additional time would be required to redact exempt information, such as personal data, from the information requested.
9. On 29 June 2012, 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.
10. 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.

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201102128.asp>



Investigation

11. The investigating officer subsequently contacted the Ministers, 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. These focused on the requirements of section 12(1) of FOISA.
12. The relevant submissions received from both the Ministers and Mr Rule will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered a sample of the withheld information and the submissions made to her 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

14. In responding to the investigating officer's letter seeking comments on the application, the Ministers confirmed that they wished to rely on section 12(1) of FOISA in respect of Mr Rule's request. Were the Commissioner to accept that section 12(1) applied (i.e. that on a reasonable estimate, the cost of complying with the request would exceed the figure of £600 specified for that purpose by regulation 5 of the Fees Regulations), she could not require the Ministers to comply with the request.
15. The projected costs a Scottish 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 authority reasonably estimates it will incur in:
 - a. locating
 - b. retrieving and
 - c. providingthe information requested in accordance with Part 1 of FOISA. The maximum hourly rate the authority can charge for staff time is £15 an hour.
16. The authority may not charge for the cost of determining
 - (i) whether it actually holds the information or
 - (ii) whether or not it should provide the information.
17. The Ministers explained that no list of Mr Pringle's engagements/appointments existed. To respond to the request, all information considered to be within the scope of the request would have to be extracted from Mr Pringle's electronic ("Outlook") calendar and a list created.



18. The Ministers explained that an initial search of Mr Pringle's "Outlook" calendar was undertaken using the dates provided by Mr Rule. They commented that no other criteria were suitable to assist this search, "taking account of the Commissioner's broader interpretation of engagements provided by *Decision 066/2012*."
19. The cost of searching the calendar was estimated to exceed the cost limit, so (the Ministers explained) searches of other information sources – such the minutes of Cabinet and of other meetings held on the Scottish Government central database – were not undertaken. The Ministers' estimated costs (see below), therefore, did not take account of the costs of searching these additional sources, which (the Ministers submitted) would add to the overall cost of compliance. The Ministers provided no estimate of these additional costs to the Commissioner.
20. The Commissioner's view is that, on a reasonable interpretation of his request, Mr Rule was seeking a list of Mr Pringle's business appointments for the relevant period, extracted from his diary or equivalent. Given the nature of the request, the Commissioner is satisfied that all of the information requested on this occasion could be located within Mr Pringle's "Outlook" calendar and consequently there was no requirement for the Ministers to search within the additional sources referred to in the previous paragraph. This point is considered further below.
21. The initial search of Mr Pringle's calendar, the Ministers explained, returned 523 pages of calendar entries organised sequentially by date. They went on to explain:

"This search returned information on engagements which were in scope under the Commissioner's broader interpretation and entries which were not in scope of the request and entries which would need cross referencing with other sources of information to ascertain if they were in scope of the request."
22. The Ministers assessed the costs of printing and working through these 523 pages of entries to identify those which were engagements as defined in the Commissioner's decision (i.e. *Decision 066/2012*), along with the time required to redact any exempt information (such as the names and contact details of private individuals). The Ministers estimated that:
 - on average, it would take five minutes to review a page worth of entries
 - the time required would therefore total 43.5 hours
 - charged at £15 per hour, this would result in a cost of £652.50 to fulfil the request
 - the Ministers would then need to redact "the exempt information such as personal data which would result in the cost further exceeding the upper cost limit".
23. The Ministers stated that, for the period in question, there were 841 calendar entries in Mr Pringle's "Outlook" calendar. In response to a request from the investigating officer, the Ministers supplied copies of what they considered to be a representative sample of pages from the calendar. They believed the random sample of ten days (from which they provided the entries in summary):



“clearly illustrate that there would be a significant cost of reviewing 841 calendar entries, the majority of which, as you will see from the sample, have multiple pages of information attached for Mr Pringle regarding the issue, meeting or engagement being attended”.

24. The Ministers also explained that calendar entries often included attachments which outlined the purpose of the appointment, location, attendees and the like. They suggested that if this kind of information did not fall within the scope of the request:
- “it is not clear what information the Commissioner is recommending should be included in the response. If attachments are not to be included in the response, should information about the subject of the meeting or attendees at the meeting also not be released?”
25. The Commissioner would refer the Ministers to the terms of Mr Rule’s request: he did not ask for details of engagements such as who attended, or what was discussed, or papers circulated, or any similar items which might relate to the event in question – even if they were attached to the calendar entry. The Commissioner would give the ordinary meaning to Mr Rule’s request, as it was worded (see paragraph 1 above): that he sought recorded information (such as would be found in Mr Pringle’s diary or equivalent) providing a basic description of each engagement (in his capacity as special advisor), with the date, time and location (where specified). The Commissioner does not consider the request, on any reasonable interpretation, to extend to information in supporting or background documents, whether attached to the relevant calendar entries or not.
26. The Ministers went on to explain that:
- “Outlook calendar entries provide much information about the appointments that Mr Pringle was invited to rather than what he attended, he regularly accepted electronic calendar entries but did not attend, or did not intend to attend the appointments. Therefore, the most easily accessible information available in his electronic calendar is more often information about invitations, not a list of where he was scheduled to go.”
27. In response to this, the Commissioner would again emphasise that Mr Rule did not specify that he wished the engagements categorised by whether Mr Pringle had actually attended them or participated in them. Generally, an engagement entered in a diary will relate to an event the keeper of the diary intends to attend and it is reasonable conclude that all of the entries in question were placed in Mr Pringle’s calendar for this reason, given that the Ministers have not stated explicitly that they were placed there for any other. It is also reasonable to assume that engagements that Mr Pringle changed his plans about in advance would be removed from the diary at the time. While accepting that Mr Rule’s request should not be interpreted as extending to personal appointments (see below), it does not appear reasonable to attempt (in retrospect) to distinguish between those events Mr Pringle intended to attend and those he did not, never mind those he may have intended to attend but failed to, for whatever reason: in the circumstances, such an attempt could only be speculative (it could hardly be much more definitive even if Mr Pringle remained in post to assist, given the passage of time) – and in any event would appear to be a wholly artificial exercise.



28. In this context, the Commissioner acknowledges that (in the course of the investigation) the investigating officer described a list of engagements/appointments as a list of “where Mr Pringle was scheduled to go”. This was contrasted with a list of where Mr Pringle had been, in an effort to emphasise that it did not appear necessary to search beyond the calendar entries themselves.
29. Such a description of “engagements” is also, in her view, entirely consistent with the ordinary meaning of the word “engagement” set out in paragraph 23 of *Decision 066/2012*: an arrangement to do something or go somewhere at a fixed time. However, it does not appear to the Commissioner to follow from defining “engagements” in this way that certain entries which would appear on the face of the calendar to be in the nature of engagements or appointments should be deprived of that character because of what Mr Pringle did in practice. These events were scheduled in the calendar. As indicated above, the Commissioner must assume this was done with a good business reason. As also indicated above, the Commissioner would consider any retrospective attempt to separate out entries on the basis of Mr Pringle’s actual conduct to be a wholly artificial exercise: indeed, it would appear to be at odds with a reasonable interpretation of the request, and the Commissioner would have to question what purpose (consistent with the requirements of FOISA and associated good practice) such an exercise might reasonably be concluded to have.
30. The Ministers also explained that Mr Pringle’s calendar in “Outlook” included personal engagements occurring during the working week, which would require redaction of his personal data. In addition, the calendar included personal data, such as email addresses, postal and telephone numbers, of private individuals and other third parties which would require redaction.
31. The Ministers explained that in their view there was no simple or quick way to identify which of the entries in Mr Pringle’s electronic calendar were business and which were personal. They explained that, while calendar entries in “Outlook” allowed for entries to be marked in this way, this function was not routinely used. Therefore, each of the 841 calendar entries falling within the timescale of this request would need to be reviewed and personal information exempted. The Ministers were of the view that excluding personal appointments did not reduce the cost of responding to the request.
32. The Ministers did not include the cost of redaction, but simply indicated that this would increase the costs. The Commissioner is of the view that Mr Pringle’s personal data (in the sense of any personal appointments) does not fall within the scope of the request. Similarly, any personal data of a third party, such as an email address or telephone number relating to a business engagement, would also fall outwith the request: it is entirely possible to provide a list of the engagements without this information. While this information may require to be redacted, the cost of doing so is not, therefore, a cost which can be taken into account for the purposes of section 12(1).
33. In applying exemptions to information falling within the scope of the request, the Ministers would be entitled to include in their cost estimate the cost of physical redaction. However, from the sample supplied by the Ministers, the Commissioner cannot see how work of this kind this would add significantly to the costs (see paragraph 36 below).



34. The Ministers provided no explanation of why the maximum hourly rate of £15 per hour should be incurred in responding to the request. While aspects of the response *might* require an employee with an hourly cost at this rate, the Commissioner is not convinced that this could be said of the whole task of responding.
35. The Ministers refer to the sensitivity of certain information, which could be relevant in deciding whether any exemption would apply. That is not, of course, what can be charged for, as it is referring to the decision the Ministers would take about *whether* to provide the information, not simply the physical act of redacting it (which can be charged for). In any event, it is not clear from the Ministers' submissions whether the information considered sensitive is to be found in the calendar entries themselves, or in the attachments or other supporting information which (as indicated above) the Commissioner does not regard as falling within the scope of the request. The point is that the Ministers have provided no justification as to why redaction should be estimated to cost £15 per hour.
36. The Commissioner has studied the sample of information supplied by the Ministers. Assuming the summaries provided are representative of the calendar entries (and, in the Commissioner's view, it was for the Ministers to ensure that they were), the Commissioner finds it difficult to accept the estimate of five minutes to review each page in this case. The Commissioner cannot accept the Ministers' contention that the sample clearly illustrates there would be a significant cost in reviewing 841 calendar entries; an argument which would appear to be based on the need to review attachments. The Commissioner would also observe that there is nothing in the summary information provided which would suggest that any of the information in these entries is of particular sensitivity.
37. The information is held in sequential date order, as would be expected of a diary or calendar, which should make the task of locating and retrieving anything covered by the request relatively straightforward. As indicated above, based on the sample seen, the Commissioner does not believe there to be anything in the nature of the information which should present any significant difficulty in providing it (or, assuming this were to be required, in assessing whether it can be provided).
38. Mr Rule's request did not express a preference for receiving the information requested by any of the means specified in section 11(2) of FOISA. The Ministers therefore have a discretion to supply the information by any reasonable means.



39. On the basis of the submissions she has received, the Commissioner does not consider it possible to accept that compliance with Mr Rule's request, on a reasonable interpretation of the request and a reasonable estimate of the cost of compliance, would cost in excess of the £600 limit prescribed for the purposes of section 12(1) of FOISA. She notes that the investigating officer has been offered the opportunity of inspecting the information, with a view to the Ministers demonstrating the work involved in dealing with the request. She does not consider this necessary. As explained above, she is satisfied – on what she considers to be a reasonable interpretation of the request – that the information does not require further appraisal in order to understand the work which should be involved in responding. If there had been specific difficulties relating to dealing with this request which were so significant and overwhelming as to have impacted on the costs of compliance, it is reasonable to assume that the Ministers would have set these out in their submissions to the Commissioner.
40. In all the circumstances, therefore, the Commissioner is unable to accept that section 12(1) applies to Mr Rule's request. She now requires the Ministers to respond to the request. In this case, that should be understood to mean the provision of information to Mr Rule. As indicated in paragraph 25 above, what Mr Rule requires is a list providing a basic description of each engagement. It should be possible to extract this readily from Mr Pringle's calendar entries. As also indicated above, no information on personal appointments should be required for a compliant response, and neither should personal data of third parties such as email addresses or telephone numbers. Equally, the Commissioner believes it should be possible to provide a list meeting the terms of Mr Rule's request without having to include information of particular sensitivity.

Section 15 – the duty to advise and assist

41. Having reached this conclusion, the Commissioner's normal practice is to consider whether the public authority concerned has provided adequate and appropriate advice and assistance in relation to the request under consideration.
42. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it. Examples of such advice and assistance given in the Scottish Ministers' Code of Practice on the discharge of functions by public authorities under FOISA include, in cases where section 12(1) applies, "consider[ing] what information could be provided below the cost limit, and suggest[ing] how the applicant may wish to narrow the scope of their request accordingly."
43. In response to the questions by the investigating officer, the Ministers explained that, given the Commissioner's broader interpretation of the definition of engagements, in their most recent correspondence Mr Rule was advised that he could reduce the cost by limiting the timeframe of his request.



44. The Commissioner considers that the Ministers could have provided further advice and assistance (in the way of guidance) to Mr Rule as to what information could be provided within the £600 limit if he were to reduce the scope of his request. The review outcome simply indicated that the cost of complying would exceed the cost limit and suggested narrowing the timeframe to bring the request within the limit. No indication was given on the extent to which Mr Rule could or should reduce the timeframe.
45. The Commissioner considers that it would have been reasonable in the circumstances of this case to explain how relevant records were arranged, and consequently which might be located and retrieved more easily, incurring less cost, than others. The Ministers might also in this case have indicated whether the cost of dealing with the request could be reduced if Mr Rule narrowed the scope of his request to seek information relating to a particular time period, rather than simply making a general reference to narrowing the timeframe). As an experienced requester, it is reasonable to assume that Mr Rule would have understood this approach.
46. In conclusion, the Commissioner considers it would have been a relatively simple matter for the Ministers to provide Mr Rule with appropriate advice and/or assistance to assist him in narrowing his request to the point where (in their view) section 12(1) of FOISA would not be applicable. In failing to do so, the Commissioner finds that the Ministers failed to discharge fully their duty under section 15(1) of FOISA.
47. As the Commissioner has not accepted that section 12(1) of FOISA applies to Mr Rule's request, she does not in this instance require the Ministers to provide Mr Rule with advice on how he might frame a narrower information request, with a view to avoiding the application of section 12(1).

General comments on the handling of this case



48. Finally, the Commissioner must record her concern that this is the third decision she has been required to make on the same request for information. She acknowledges the Ministers' desire to deal with requests in a comprehensive and considered manner. On the other hand, the primary purpose of Part 1 of FOISA (and associated good practice) is to secure the provision of information to applicants, unless there are good reasons for doing otherwise. This should involve, wherever practicable, a reasonable, straightforward approach to the interpretation and subsequent handling of the request, with a view to processing it expeditiously. The Commissioner must at least question whether this has been the approach adopted by the Ministers in relation to this request: she would (as a general rule) commend such an approach in future. While acknowledging that the Ministers may, from time to time, question the utility of requests submitted by particular applicants, she would suggest that FOISA provides adequately for addressing such concerns, where relevant, without resorting to provisions designed for other purposes.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Rule.

The Commissioner is not satisfied that the Ministers were entitled to refuse to comply with the request under section 12(1) of FOISA.

The Commissioner also finds that the Ministers failed to comply with section 15(1) of FOISA in providing reasonable advice and assistance to Mr Rule. Given that she has not upheld the Ministers' application of section 12(1), she does not require the Ministers to take any action in response to this failure.

The Commissioner requires the Ministers to respond to this request, by providing a list meeting the terms of Mr Rule's request (see paragraphs 25 and 40 of this decision), by 30 January 2013



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.

Rosemary Agnew
Scottish Information Commissioner
14 December 2012



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).



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.