

Decision Notice



Decision 288/2013 Mr Alan Laing and the Scottish Ministers

Ministerial trip to China

Reference No: 201302123

Decision Date: 16 December 2013

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

Kinburn Castle

Doubledykes Road

St Andrews KY16 9DS

Tel: 01334 464610



Summary

On 24 June 2013, Mr Laing submitted an information request to the Scottish Ministers (the Ministers) for information relating to Humza Yousaf MSP's trip to China. The fifth part of Mr Laing's request was for all correspondence relating to the organisation of this trip. The Ministers submitted that it would cost more than £600 to respond to part 5 and, therefore, that they were not required to comply with Mr Laing's request (section 12 of FOISA).

The Commissioner accepted this, but found that the Ministers failed to provide reasonable advice and assistance to Mr Laing in line with section 15 of FOISA.

Relevant statutory provisions

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)

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 24 June 2013, Mr Laing wrote to the Ministers regarding a visit to China that month by Humza Yousaf MSP, Minister for External Affairs and International Development. He made a request for information about this visit which was broken into five parts. In part 5 of his request, he asked for:

...“all correspondence relating to the organisation of this trip between Mr Yousaf's office, the First Minister's Office, other Scottish Government offices, the Foreign and Commonwealth office and any third party organisation, the Chinese Consulate in Edinburgh and the Chinese government”.



2. The Ministers responded on 25 July 2013. They refused to comply with part 5 of Mr Laing's request on the grounds that the costs of locating, retrieving and providing the information would exceed the upper cost limit of £600 set by the relevant Fees Regulations.
3. On 2 August 2013, Mr Laing wrote to the Ministers requesting a review of their decision as he did not accept that it would cost more than £600 to fulfil part 5 of his request. He queried why a "trawl" of all databases would be required, given that the timeframe involved was short and the topic was specific.
4. On 21 August 2013, the Ministers notified Mr Laing that, after review, they had upheld their original decision. The Ministers explained that the correspondence in question would have been created over a six month period due to the amount of planning required for a trip such as this one. The correspondence involved 13 separate departments and a number of external partners.
5. On 10 September 2013, Mr Laing 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 Laing 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 14 October 2013, 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 sections 12(1) and 15 of FOISA. The Ministers were asked to clarify their cost calculations, and to explain where the relevant information was likely to be located in the 13 departments involved in the correspondence.
8. The Ministers responded on 30 October 2013, with an indicative calculation of cost details together with their responses to the questions posed by the investigating officer.
9. On 8 November 2013, the investigating officer emailed the Ministers seeking further clarification, which the Ministers provided on 21 November 2013.



Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mr Laing and the Ministers. She is satisfied that no matter of relevance has been overlooked.

What information did the Ministers hold?

11. The Ministers explained to the investigating officer that Mr Yousaf visited China and Hong King from 25 to 27 June 2013, undertaking a series of diplomatic, cultural, business and trade engagements. He was joined on the trip by the Chief Executive of Scottish Development International. The preparation for this trip involved liaising with both internal and external stakeholders. The external partners included external government departments, agencies and private companies. The 13 Scottish Government departments were:
- The China Team
 - Scottish Affairs Office, Beijing
 - Visits and Events
 - Transport (Aviation)
 - Private Office
 - Communications
 - Marketing
 - Special Advisers
 - Culture
 - International Higher Education
 - IT Support
 - Food & Drink
 - Scottish Development International (offices in Glasgow, Hong Kong and Beijing)
12. The Ministers also indicated that the preparations for this trip generated correspondence from December 2012 until June 2013. Email was the main means of communication, with the volume of emails estimated to be in the thousands, but letters and documents were also held. The Ministers also confirmed that all the correspondence would have been saved into their "eRDMS" which is an electronic records management system.



Section 12(1) – excessive cost of compliance

13. Section 12(1) of FOISA provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently £600 (see regulation 5). Consequently, the Commissioner has no power to require the release of information should she find that the cost of responding to a request for that information would exceed this sum.
14. The projected costs a Scottish public authority can take into account for 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 locating, retrieving, and providing the information requested in accordance with Part 1 of FOISA. The maximum hourly rate the authority can charge for staff time is £15 per hour. The authority may not charge for the cost of determining whether it actually holds the information, or whether or not it should provide the information.
15. The Ministers explained that, in order to locate and retrieve all relevant information, each of the 13 departments listed above would be required to carry out a full search. In total, the Ministers contended it would take 87 hours to fulfil part 5 of Mr Laing's request at a total cost of £1,305.
16. The costs were estimated on the basis of 80 officials working a total of 87 hours, charged at the maximum hourly rate of £15. The investigating officer asked why the maximum hourly rate was charged for all staff. The Ministers explained that the majority of the officials involved in any search would be at B1 grade or above (i.e. earning at least £15 per hour). They explained that not all of the departments involved in this work have access to staff at lower grades (e.g. at A grade which is charged at a rate of “nearly £12” per hour).
17. The Ministers estimated that each official would spend an estimated average time of 20 minutes for file retrieval, i.e. 26.66 hours in total. The Ministers also added a further 20 minute per official per file to determine what information required to be redacted (a further 26.66 hours in total). The work of redacting (removing) exempt information was estimated at a further 33.33 hours. This work requires documents to be printed, sections blacked out, then scanned and resaved with the redactions. The Ministers estimated that five minutes per page would be required; if each of the 80 officials had five pages requiring redaction, this would equate to 33.33 hours:
 - 20 minutes x 80 officials = 26.66 hours for file retrieval
 - 20 minutes x 80 officials = 26.66 hours to determine what to redact
 - 5 minutes per page x average of 5 pages x 80 officials = 33.33 hours redaction work.



18. The Commissioner has looked carefully at the approach suggested by the Ministers and, in general, accepts that it is reasonable. The Fees Regulations explain what can and cannot be included in the projected costs; specifically, regulation 3(2)(a)(ii) does not permit costs to be charged for any time taken to determine what the requester is entitled to receive. For this reason, the Commissioner does not accept that the Ministers were entitled to consider the cost of the 26.66 hours required to determine what to redact (and therefore what to release). That said, the Commissioner is satisfied that the Ministers were entitled to consider the costs for the remaining 60.34 hours detailed in their calculation.
19. The Commissioner has also considered whether the hourly rates included in the Ministers' cost estimates are reasonable. It is clear that not all of the 80 officials attract the maximum rate of £15 per hour, and that some of the officials would attract the lower rate of "nearly £12 per hour". The Ministers failed to provide an exact breakdown, but indicated that the majority of officials involved in the searching would earn at least £15 per hour.
20. The Commissioner notes that the Ministers estimated that most staff would be paid at least £15 per hour. Even if the costs of searching are calculated at the lower hourly rate (taking "nearly £12" to mean "at least £11"), the Commissioner is satisfied that the minimum cost of complying with part 5 of the request would be more than £600 (£11 x 60.34, giving a total of £663.74).
21. During the investigation, the Ministers were also asked to explain in more detail why a different approach to the search, involving fewer officials, was not possible, given that much (if not all) of the information was stored by electronic means, in the eDRMS or on computer hard drives (known as "H" drives) or in email systems.
22. The Ministers explained a number of difficulties in undertaking centralised searches of the eRDMS, the H drives and the email systems on the scale required for this request. They contended that the search results from keyword searches of the eDRMS would require an extensive sifting, given the volume of unrelated results a search of this kind would retrieve. This would entail the officials having to check any central search results from the eDRMS, so there would be little benefit. The Ministers suggested that the H drives were set up in a way that did not lend itself to the kind of centralised search being suggested. The Ministers also commented that there were technical difficulties in attempting to search officials' inboxes centrally in the email system.
23. In his application, Mr Laing noted that previous Scottish Government responses to information requests had explained that correspondence is arranged by subject matter. He therefore believed that, despite asking for correspondence from a number of departments, the information should be easily accessible. He pointed out that his request was time limited and related to a specific event.



24. The Commissioner has weighed up carefully the points made by the Ministers and Mr Laing. The Commissioner accepts that the correspondence for this trip was generated over six months. It is not clear whether this is a longer period than Mr Laing first realised when making his request. She can also accept that there would be a number of departments involved in a trip of this kind, given its stated purpose and the involvement of other external bodies, and that thousands of pieces of correspondence may have been generated during the six month period in question. The Ministers have explained that searching by subject keyword would be likely to require further intervention by staff, to eliminate irrelevant results.
25. On balance, given the volume of correspondence involved and the difficulties with conducting searches centrally, the Commissioner accepts that the likely costs of complying with the request would exceed the £600 threshold.
26. Consequently, the Commissioner concludes that the Ministers were entitled to rely on section 12(1) of FOISA in relation to part 5 of Mr Laing's information request, and were under no obligation to comply with the request.

Section 15 – duty to provide advice and assistance

27. Mr Laing commented in his application to the Commissioner that he was dissatisfied with what he termed “excessive barriers” to disclosure and complained that the Ministers had failed to provide advice and assistance which would enable him to get the information he requested.
28. Section 15(1) of FOISA requires a Scottish public authority, so far as reasonable to expect it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.
29. The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish public authorities under FOISA and the EIRs (the Section 60 code) provides¹ (at 1.9):

“Where the cost of responding to a request made under FOISA will exceed the upper cost limit of £600 ... the authority may again consider what information could be provided below the cost limit, and suggest how the applicant may wish to narrow the scope of their request accordingly.”
30. Section 15(2) of FOISA states that a Scottish public authority which, in relation to the provision of advice and assistance in any case, conforms with the Section 60 code, is taken to comply with the duty to provide reasonable advice and assistance in section 15(1).

¹ <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>



31. During the investigation, the Ministers were invited to comment on whether they could have taken any further steps to try to help Mr Laing reduce the costs involved in providing him with the information in question. For example, the Ministers were asked what further detail they could give to advise Mr Laing on the correspondence which they hold. The Ministers were also asked whether breakdowns of costs could be provided for each of the departments involved, and whether any of the 13 departments would be likely to hold more of the information than the others.
32. The Ministers commented, in their submissions of 30 October 2013, that by disclosing information covered by the other parts of Mr Laing's request and by suggesting to Mr Laing how he could narrow the scope of part 5 of his request, they gave adequate advice and assistance to allow him to make a revised request. They also commented that they had informed Mr Laing that the correspondence relating to Mr Yousaf's visit to China was not held centrally and that retrieving it would involve an extensive trawl [of information systems] across a wide range of teams within both the Scottish Government and its agencies.
33. The Commissioner notes that the response to Mr Laing's request suggested that he could specify which particular aspects of the visit he was interested in, or the particular office(s) whose correspondence he required. He was advised that the more specific he could be in describing the information, the more it would be possible to focus searches and find what he wanted within the cost limit.
34. The Commissioner accepts that this is good advice, but notes that the Ministers did not provide Mr Laing with information which would have helped him put it into practice. For example, the Ministers did not provide him with the names of the 13 departments or the external agencies involved in the correspondence, even though this information was provided to the Commissioner during the investigation. Nor did the Ministers give any indication of whether one department was likely to hold more information than another, or the range of subjects covered by the correspondence. The Ministers gave no indication to Mr Laing that preparations for the trip had generated "thousands" of emails.
35. In the Commissioner's view, the Ministers should have given more specific advice to Mr Laing on how to bring his request within the £600 limit. In all the circumstances, the Commissioner concludes that the Ministers failed to comply fully with the duty under section 15(1) of FOISA to provide Mr Laing with reasonable advice and assistance in relation to his request. In view of the background information provided in this decision, which explains how the relevant information is held by the Ministers, and noting the scale of the correspondence which is involved here, the Commissioner does not require the Ministers to take any further action in respect to this failure.
36. The Commissioner would also observe that, if the Ministers had explained more fully the processes and the estimated costs involved, it may well have resulted either in Mr Laing submitting a different request which was capable of being complied with, or in the Ministers avoiding an appeal to the Commissioner.



DECISION

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

The Commissioner finds that the Ministers were not obliged to comply with Mr Laing's information request, given that section 12(1) of FOISA applied.

However, the Commissioner also finds that the Ministers failed to provide reasonable advice and assistance to Mr Laing on how his request might be reduced in scope, and therefore failed to comply with section 15(1) of FOISA. The Commissioner does not require the Ministers to take any action in relation to this breach.

Appeal

Should either Mr Laing or the Scottish Ministers wish to appeal against this decision, they have the right to 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.

Margaret Keyes
Head of Enforcement
16 December 2013



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.