

Decision Notice

Decision 145/2017: Mr X and the Scottish Criminal Cases Review Commission

Fees notice

Reference No: 201700940

Decision Date: 5 September 2017



Summary

The SCCRC was asked for various minutes, position papers and other reports.

The SCCRC confirmed there was information available online, but recognised that there was no internet access for prisoners and confirmed that it would supply the information in hard copy on payment of a fee of £12.20. The applicant questioned whether a fee was chargeable under FOISA in such circumstances.

The Commissioner investigated and found SCCRC had properly responded to this request for information in accordance with Part 1 of FOISA. She was satisfied that the Fees Regulations were complied with and that the SCCRC was entitled to issue a fees notice for £12.20.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 9(1), (3) and (4) (Fees)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs), 4 (Fee payable) and 5 (Excessive cost – prescribed amount)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 27 February 2017 Mr X made a request for information to the Scottish Criminal Cases Review Commission (the SCCRC), in which he asked for:
 - a. All Board minutes
 - b. All policy Committee minutes
 - c. All position papers
 - d. All other reports contained in the SCCRC's Publications Database
2. The SCCRC responded on 24 March 2017, confirming it was willing to disclose all the information. Much of the information, the SCCRC stated, was published on its website already. The SCCRC acknowledged that Mr X had no internet access, however, and indicated it would disclose the information in hard copy. It stated that it was charging a fee of £12.20 for this, as it considered itself entitled to do under the Fees Regulations. It explained the basis of the fee charged.
3. On 10 April 2017, Mr X wrote to the SCCRC requesting a review of its decision. He did not believe he should be required to pay a fee, given his circumstances and weekly income.

4. The SCCRC notified Mr X on 12 May 2017 that it was upholding the original decision. It confirmed the fee calculation remained the same, and re-iterated that it would provide the information upon receipt of payment.
5. On 22 May 2017, Mr X wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr X stated he was dissatisfied with the outcome of the SCCRC's review because he did not accept he should be charged for hard copies when much of the information could be obtained online (if he had access) without charge. He believed the SCCRC should at least give him what they could outwith the fee.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr X made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 12 June 2017, the SCCRC was notified in writing that Mr X had made a valid application and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SCCRC was invited to comment on this application and answer specific questions, in particular to justify the costs it was seeking to charge Mr X.

Commissioner's analysis and findings

9. 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 X and the SCCRC. She is satisfied that no matter of relevance has been overlooked.

Fees

10. Section 9 of FOISA states that a Scottish public authority receiving a request which requires it to comply with section 1(1) may, within the time allowed by section 10 for so complying, give the applicant a notice in writing (a "fees notice") stating that a fee of an amount specified in the notice is to be charged by the authority.
11. There are strict rules on what can and cannot be charged for, and how much an authority can charge. These rules are set out in the Fees Regulations.
12. Under the Fees Regulations, any fee a Scottish public authority may charge must be based on "projected costs". These are defined (regulation 3) as the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates that it is likely to incur in locating, retrieving and providing the requested information in accordance with FOISA. The projected costs cannot include the costs of determining whether the authority holds the requested information, or (if it does) whether that information should be provided. The regulation sets a maximum of £15 per hour for charging for staff time.
13. Regulation 4 goes on to specify what may be charged. The authority cannot charge any fee where the projected costs do not exceed £100. Where the projected costs exceed £100 but do not exceed the "prescribed amount" (£600, in terms of regulation 5 – over that cost, the authority may refuse the request as excessively costly under section 12 of FOISA), the

authority may charge a fee. That fee shall not exceed 10% of the difference between the projected costs and £100.

14. Finally, regulation 4(4) requires that the fees notice shall set out the manner in which the fee has been calculated. The SCCRC appears to have done this in its notice of 24 March 2017 and whether it met this requirement has not, in any event, been raised by Mr X in his application. It is not, therefore, a point the Commissioner will consider further in this decision.
15. It will be noted that this charging regime makes no direct provision for ability to pay, or for the applicant's personal circumstances in any other respect. The fee charged must be derived from a reasonable estimate of the projected costs but, unlike fees charged under the Environmental Information (Scotland) Regulations 2004 (the EIRs), the fee is not subject to any wider test of reasonableness. On the other hand, unlike fees charged under the EIRs, the maximum fee which might be charged under the Fees Regulations is £50.
16. The information need not be provided by an authority until the fee has been paid (section 9(3) of FOISA). This prevents unnecessary work in the event that the applicant decides not to pay for the information.
17. The Commissioner will now consider the issues on which Mr X has applied for a decision – the SCCRC's entitlement to charge a fee in the circumstances of this case and whether the level of fee charged was in accordance with the requirements of the Fees Regulations.

Mr X's submissions and the SCCRC's right to charge

18. In his requirement for review, Mr X did not accept that he should pay for hard copies simply because he did not have an internet connection. He also provided details of his weekly income as a prisoner.
19. In his application to the Commissioner, he re-iterated his dissatisfaction at being asked to pay a fee, commenting that most of the information caught by his request appeared to be available online. He stated that if he had access to the internet, he would be able print the information himself.
20. Mr X also thought the SCCRC should at least give him what they could outwith the fee, then put the rest in the prison library for easy access to all. He submitted that the SCCRC had, in the past, provided prisoners with "information of far more value with no charge".
21. The Commissioner has considered these points carefully, but she would refer to what she has said at paragraph 15 above. This is not a charging regime which makes any provision for consideration of the applicant's personal circumstances. None of the reasons put forward by Mr X can require a Scottish public authority not to charge a fee under the Fees Regulations. In the circumstances of this case, the Commissioner can identify no basis on which she could challenge the SCCRC's right to charge a fee – all she can do (and what she will proceed to do below) is consider whether the fee charged was in accordance with the Fees Regulations.

The SCCRC's submissions

22. The SCCRC confirmed that the fees notice issued to Mr X covered all the information he had requested.
23. The information in question comprises 110 documents already published online and 106 unpublished documents which the SCCRC stated were not current enough to be available

online. The SCCRC identified the volume of information involved as extending to over 770 pages.

Method

24. The SCCRC provided the following breakdown of projected costs to Mr X in its fees notice:

Cost of staff time	9 hours @ £15.00 per hour	£135
Photocopying	770 x A4 sheets at 10p per sheet	£77
Postage		£10
Subtotal		£222
Less first £100		£122
Chargeable amount = 10%	<i>(i.e. 10% of remaining £122)</i>	=£12.20

25. The tasks the SCCRC included under the heading “staff time” were described in the original response as “locating, printing, collating and packaging requested documents.”
26. In its submissions, the SCCRC indicated that a small part of the information requested (mainly older annual reports) were held in hard copy only. These documents, it stated, were located either in the SCCRC’s own small library or in a file storage room.
27. The SCCRC stated that a significant majority of the information was held electronically (in MS Word or PDF formats). It was in multiple locations, on various drives and folders in the main computer servers of SCCRC, with different classes of information being kept in different locations. Knowledge of the content and structure of the servers’ drives and folders, and of how records were stored in accordance with the authority’s Records Management Plan, was considered necessary in order to retrieve the relevant documents.
28. This, the SCCRC submitted, would require a member of staff at the level of a Legal Officer or above (hence the charge at the maximum rate of £15 per hour). It considered only the packaging and posting of the relevant documents (which had not been included in the fees notice) suitable for administrative staff: even if any of the work involved in locating, printing, verifying and collating the documents could be done by administrative staff, it would still require to be supervised and verified by a Legal Officer.
29. The SCCRC explained its concerns that all information needed to be rigorously checked prior to disclosure, to militate against the risk of disclosing the wrong information in an organisation processing large amounts of sensitive personal data. With this in mind, documents located from the authority’s electronic records would need to be checked before being sent for printing, to ensure that they fell within the scope of the request. The office had only a single printer and it was considered most effective to send documents there in small batches. Once the documents were printed, they would be checked again, to ensure that all the correct documents had been printed and (given the risks involved in inadvertent disclosure of the wrong information) that only the correct documents had been taken from the printer for disclosure.
30. The SCCRC also revisited the actual costs of postage. Originally it had estimated the cost at £10. It now stated that the real costs would be slightly higher, at £13.75, based on the expected size and weight of a package containing the 770 sheets involved.

The Commissioner’s conclusions

31. It is quite clear (and acknowledged by Mr X) that the only feasible means of providing Mr X with the information is on paper. He is not in a position to view it electronically by any means. In the circumstances, the Commissioner acknowledges that electronic documents do require to be printed and existing hard copy documents require to be photocopied in order to furnish Mr X all the information he asked.
32. Having considered the SCCRC's submissions, the Commissioner is satisfied that it has made a reasonable estimate of the work involved and the time required to carry it out. Given the SCCRC's circumstances, the checks identified as necessary – and the level of staff allocated – appear reasonable and proportionate. She is satisfied that the SCCRC arrived at a reasonable estimate of the projected costs in this case and then imposed a charge in accordance with the Fees Regulations. She is satisfied that it complied with the Fees Regulations in responding to Mr X's request.

Decision

The Commissioner finds that the Scottish Criminal Cases Review Commission complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr X.

Appeal

Should either Mr X or the Scottish Criminal Cases Review Commission 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 Keyse
Acting Scottish Information Commissioner

5 September 2017

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.

9 Fees

- (1) A Scottish public authority receiving a request which requires it to comply with section 1(1) may, within the time allowed by section 10 for so complying, give the applicant a notice in writing (in this Act referred to as a "fees notice") stating that a fee of an amount specified in the notice is to be charged by the authority for so complying.

...

- (3) If a fees notice is given to the applicant, the authority is not obliged to give the requested information unless the fee is duly paid; and for the purposes of this subsection and section 10(2) due payment is payment within the period of three months beginning with the day on which the notice is given.

- (4) Subject to subsection (7), a fee charged under subsection (1) is to be determined by the authority in accordance with regulations made by the Scottish Ministers.

...

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.

4 Fee payable

- (1) For the purposes of section 9(1) of the Act (fees), the fee which a Scottish public authority may charge is to be determined in accordance with paragraphs (2) to (4).
- (2) Where the projected costs do not exceed £100, no fee shall be payable.
- (3) Where the projected costs exceed £100 but do not exceed the prescribed amount, the fee shall not exceed 10% of the difference between the projected costs and £100.
- (4) The fees notice shall set out the manner in which the fee has been calculated.

5 Excessive cost – prescribed amount

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

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