



# Decision Notice 078/2022

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## Documents stating “not disclosable under FOISA”

**Applicant: The Applicant**

**Authority: Chief Constable of the Police Service of Scotland**

**Case Ref: 202101062**

### Summary

The Applicant asked the Authority for documents which stated that they were not disclosable under FOISA. The Authority told the Applicant it was not obliged to comply with the request because it would cost more than £600 to do so. The Commissioner agreed.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 47(1) and (2) (Application for decision by Commissioner)

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 Appendix 1 to this decision. The Appendix forms part of this decision.

### Background

1. On 8 July 2021, the Applicant made two requests for information to the Authority. He asked how many documents held by the Authority stated that they were not disclosable under FOISA (request 1) and for copies of every document created between 1 and 7 July 2021 containing that statement (request 2).
2. The Authority responded on 26 July 2021. It informed the Applicant that, in respect of both requests, it would cost too much to provide the information, and that section 12 of FOISA applied.

3. For request 2, the Authority explained that the searches required to identify documents created over a particular date range would require an estate wide search of all documents. The Authority commented that it had more than 20,000 police officers and staff, and that documents created in a particular week could be held anywhere across the entire ICT estate. Such documents would only be identifiable by searching the related metadata for information created between two dates. While the Authority had the ability to conduct a “free text” search, this would have to be done in small batches due to the intense level of processing required. The Authority could search for an exact term (such as “not disclosable under FOISA”, but there were numerous variations of this phrase (such as “not disclosable under FOI”; “non-disclosable under FOI” and “FOI – non-disclosable”) which would also be relevant to the request.
4. On 26 July 2021, the Applicant wrote to the Authority requesting a review of its decision in respect of request 2. While he accepted that section 12 would apply to request 1, he queried whether it applied to request 2.
5. The Authority contacted the Applicant that day. It reiterated why it considered section 12 applied and asked the Applicant to let it know if he still wanted to proceed with the review. The Authority also suggested to the Applicant that he may wish to consider whether it might be more appropriate to submit a new, more refined request.
6. The Applicant confirmed (28 July 2021) that he wished to proceed and the Authority notified the Applicant of the outcome of its review on 20 August 2021. It upheld its original finding.
7. On 25 August 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority’s review because he believed the Authority had not undertaken proportionate searches in regards to his request. He stated that a time window of a week should be a narrow enough for the Authority to respond.

## **Investigation**

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 7 October 2021, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions.
11. The Authority provided the investigating officer with submissions.

## **Commissioner’s analysis and findings**

12. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

13. Under section 12(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the amount prescribed in the Fees Regulations. This amount is currently set at £600 (regulation 5). Consequently, the Commissioner cannot require an authority to disclose information should he find that the cost of responding to a request for information would exceed that sum.
14. The projected costs the 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 is likely to incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA.

#### *Submissions from the Authority*

15. The Authority emphasised that it had engaged with the Applicant to suggest that he clarify what he meant by “document” and whether he wanted to specify an exact phrase for any searches, but that he did not come back to them on either point. The Authority confirmed that it had explained to the Applicant that it operates no policy of marking documents as non-disclosable under FOISA. Therefore, there would be no “standard” text that would appear on documents.
16. The Authority stated that, while there would be difficulties with electronic searches, the request also covered hard copy documents. The Authority expressed doubt that even the hard copy documents within one full filing cabinet could be individually assessed against the Applicant’s criteria within the £600 limit.
17. The Authority submitted that it is a large organisation with more than 20,000 staff, each of whom have an individual email account and a “personal” drive. It also has a large number of shared email accounts and shared drive areas, the latter accounting for the bulk of its records. The Authority provided a snapshot example as at the end of March to illustrate this.
18. Electronically held data can be searched electronically but, even with a restricted creation date range, the entire IT estate would still require to be searched.
19. Documents held by the Authority are not only contained within folders according to the date on which they were created and are not just held in one location. In that sense, the Authority submitted, request 2 was no different from request 1.
20. The Authority commented that it had attempted to carry out a few searches, but that the searches kept crashing their servers, necessitating smaller and smaller sections to be done one at a time. On dividing the shared drive estate into around 30 sections, the searches were still crashing/running overnight, at which point the searches were stopped.
21. In addition to these difficulties, email searches would have to be carried out on an account by account basis.
22. It was therefore the view of the Authority that the Applicant’s request in its current format could not be complied with within the cost limit.

#### *Submissions from the Applicant*

23. The Applicant considered that the Authority’s approach to records management actively harms and restricts the ability of the public to access information. He was “incredulous” that a request such as his would require the entire IT system to be searched in such a way that would cause the system to crash.

24. The Applicant believed that, for FOISA to be applied correctly, searches such as the ones required in his appeal must be able to be responded to in a meaningful way. If not, then the systems of the Authority must change rather than the scope/terminology of the requests.
25. The Applicant provided copies of two documents provided to him by the Authority which both contained the phrase “Disclosable under “FOI 2002”. He therefore believed that other documents held by the Authority may have contained the phrase “Non-disclosable under “FOISA 2002” and questioned whether this should have been an easily searchable term.

### *The Commissioner's findings*

26. Request 2 is for every document with a creation date between 1 and 7 July 2021 marked as not disclosable under FOISA. In effect, the Applicant is asking the Authority to search through every document it holds which was created during this period (including electronically held documents, hard paper copy documents and emails and their attachments).
27. Although one week is a short period, for reasons set out elsewhere, the whole of the ICT estate would have to be searched. Additionally, paper documents would have to be searched.
28. Given that the Authority does not have a policy surrounding marking documents as “non-disclosable under FOISA”, then this search term would not have been sufficient to narrow down the number of documents to be reviewed.
29. The Applicant clearly believes that the Authority’s records management systems are inadequate to allow it to respond to information requests. However, the Commissioner is required to consider whether section 12 applies in the light of the Authority’s current systems, and not in the light of how others might wish the systems to be. Additionally, as noted in [Decision 050/2021<sup>1</sup>](#) (which did not involve this Authority), it is not within the Commissioner’s remit to instruct a public authority to change its record keeping systems.
30. Given the detailed submissions provided by the Authority, and having considered the nature of the work involved in searching for any relevant information, in both electronic and hard copy format, the Commissioner is satisfied in all the circumstances that the Authority could not have complied with the Applicant’s request within the £600 cost limit. Consequently, he finds that the Authority was entitled to rely on section 12(1) of FOISA and was under no obligation to comply with the request.

## **Decision**

The Commissioner finds that the Chief Constable of the Police Service of Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

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<sup>1</sup> <https://www.itspubliknowledge.info/decision-0502021>

## **Appeal**

Should either the Applicant or the Authority 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**  
**Head of Enforcement**  
**20 July 2022**

## Appendix 1: 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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.
- ...

#### 47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
  - (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -
  - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify –
    - (i) the request for information to which the requirement for review relates;

- (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);  
and
- (iii) the matter which gives rise to the dissatisfaction mentioned in 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.