



Scottish Information
Commissioner
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Decision Notice 133/2022

Responses to requests and requests for review in 2021

Applicant: The Applicant

Authority: Caledonian Maritime Assets Ltd (CMAL)

Case Ref: 202101429

Summary

The Applicant asked the Authority for its responses to freedom of information requests and requests for review made in 2021. The Authority initially refused to comply with the request on the basis that it would cost more than £600 to provide the information (section 12). During the investigation, the Authority responded to the request. The Commissioner found that section 12 did not apply. He also found that the Authority was correct to treat an email from the Applicant as a request for review.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 12(1) and (2) (Excessive cost of compliance); 20(1), (2), (3), and (9) (Requirement for review of refusal etc.); 21(1), (8) (Review by Scottish public authority); 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 24 September 2021, the Applicant made a request for information to the Authority. They asked for copies of all responses to freedom of information requests and requests for review made to the Authority in the calendar year 2021.
2. On 27 October 2021, the Applicant emailed the Authority as they had not received a response to their request.
3. The Authority responded on 28 October 2021, acknowledging the Applicant's "request for review".
4. On 29 October 2021, the Applicant informed the Authority that they did not require a review to be carried out at this stage, but wanted a response to their initial request.
5. On 18 November 2021, the Authority informed the Applicant that it was treating their email of 27 October 2021 as a request for review, and that it was applying section 12 (Excessive costs) of FOISA to the request.
6. On 18 November 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant subsequently clarified (16 December 2021) that they were dissatisfied with the outcome of the Authority's review because:
 - (i) they did not believe that section 12 applied and
 - (ii) they believed the Authority was wrong to treat their email of 27 October 2021 as a request for review.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 21 December 2021, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 6 May 2022, the Authority was invited to comment on this application and to answer specific questions on the Applicant's grounds for dissatisfaction (see paragraph 6).
10. During the investigation, the Authority changed its position on charging and informed the investigator that it now intended to disclose information in response to the Applicant's request. It subsequently did this on 7 July 2022, with some personal data redacted.
11. The Applicant confirmed, on 20 July 2022, that they had received the Authority's revised response. The Applicant questioned why some of the information had been redacted by the Authority.
12. Following correspondence from the investigator (who had seen a copy of the unredacted information), the Authority explained (on 17 August 2022) that the information that had been redacted was personal data which it considered to be exempt from disclosure under section 38(1)(b) (Personal information) of FOISA. The Authority explained that in all cases the redacted information was summarised where the redaction may have prevented the

Applicant from being able to understand the information (i.e. the request or response) and only fully redacted where the information was personal information.

13. This decision cannot consider whether these redactions were justified, but it is hoped that the comments from the Authority will be of interest to the Applicant.

Commissioner's analysis and findings

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

Section 12(1) – Excessive cost of compliance

15. 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 for that purpose in the Fees Regulations. This amount is currently £600 (regulation 5).
16. The Authority's review response to the Applicant (18 November 2021) indicated that the Authority was aggregating the costs of responding to their two requests for similar information (which were for the same information but covering different calendar years).
17. The Commissioner does not agree that the Authority was entitled to attempt to aggregate the costs of responding to the requests. Section 12(2) of FOISA (see Appendix 1) gives the Scottish Ministers the power to make regulations to allow costs to be aggregated where two or more requests are made to an authority. The Commissioner's [guidance](#)¹ notes, at paragraphs 34 and 35, that no regulations have been brought into force which would allow (amongst others) an authority to aggregate the costs of responding to two or more requests from the same individual.
18. The Commissioner's guidance also notes (at paragraph 37) that in a small number of cases the Commissioner has found that multiple requests are so interconnected that the requests should be treated as a single request for the purpose of determining whether the cost of complying with the request exceeds £600. The fact that the requests in question are for separate time periods is not sufficient to make those requests interconnected. They are clearly separate requests and need to be treated as such.
19. In the absence of any argument from the Authority explaining why responding to the request would exceed £600, or providing an estimate of the cost of responding, the Commissioner must find that the Authority was not entitled to refuse to comply with the request in terms of section 12 of FOISA.

Handling of the request

20. As noted above, the Applicant was unhappy that the Authority had treated their email of 27 October 2021 as a request for review.
21. Under section 20(1) of FOISA, an applicant who is dissatisfied with the way an authority has dealt with a request for information may require the authority to review its actions and

¹ <https://www.itspublicknowledge.info/sites/default/files/2022-03/FeesandExcessiveCostofComplianceBriefing.pdf>

decisions in relation to that request. Section 20(9) makes it clear that “actions” and “decisions” includes inaction and failure to reach a decision.

22. In line with section 20(3) of FOISA, a requirement for review must fulfil certain requirements. It must:
 - (i) be in writing;
 - (ii) state the name of the applicant and an address for correspondence; and
 - (iii) specify the request for information (to which the requirement for review related), and the matter which gave rise to the applicant's dissatisfaction.
23. On receiving the Applicant's email of 27 October 2021, the Authority carried out a review within the statutory timescale. The Authority referred to the [Section 60 Code of Practice²](#) (section 10.4.1) issued by the Scottish Ministers. This states that, when an applicant complains to an authority that they have not received a response to their request within the statutory timescales, this should be treated as a formal request for review of a failure to respond. The Authority also commented that in all other ways the Applicant's email of 27 October 2021 met the requirements of FOISA for a request for review.
24. In the Applicant's view, FOISA provides applicants with the right to require a review, and that it is for the applicant to decide if they require a review or not.
25. Having considered the circumstances, the Commissioner is of the view that the Authority was entitled to treat the email of 27 October 2021 from the Applicant as a request for review under section 20 of FOISA.
26. It is clear that the Applicant's email of 27 October 2021 complied with the requirements of section 20(3). It is also clear from section 20(3) that a requester is not obliged to state whether they require a review or not. This is designed to safeguard requesters – just as FOISA places an obligation on public authorities to respond to (valid) information requests under FOISA, even if the requester is not aware that they are making an FOI request, section 21(1) places an obligation on authorities to respond to (valid) requests for review (unless the requirement is withdrawn or section 21(8) applies), even if the requester is not aware that what they consider to be a “reminder” is in fact a formal request for review under FOISA.
27. There may be circumstances where, having been told by an applicant not to treat what would otherwise be a valid request for review as a request for review, the authority acts in pursuance of this request. However, that is not the case here. It is also clear that the Applicant did not “withdraw” his request for review.
28. The Commissioner also notes that, had the response of 18 November 2021 not been a review response, the Applicant would not have been entitled to make an application to the Commissioner, yet chose to do so.

² <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/12/foi-eir-section-60-code-of-practice/documents/foi-section-60-code-practice-pdf/foi-section-60-code-practice-pdf/govscot%3document/FOI%2B-%2B60%2Bcode%2Bof%2Bpractice.pdf>

Decision

The Commissioner finds that the Authority failed to comply fully with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that the Authority was not entitled to refuse to comply with the request under section 12(1) of FOISA. However, the Commissioner is satisfied that Authority was entitled to treat the Applicant's email of 27 December 2021 as a request for review under section 20(3) of FOISA.

Given that the Authority responded to the request during the investigation, the Commissioner does not require the Authority to take any action.

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.

Daren Fitzhenry
Scottish Information Commissioner

25 November 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."
- ...
- (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.
- (2) The regulations may provide that, in such circumstances as they may specify, where two or more requests for information are made to the authority –
 - (a) by one person;
 - (b) by different persons who appear to it to be acting in concert or whose requests appear to have been instigated wholly or mainly for a purpose other than the obtaining of the information itself; or
 - (c) by different persons in circumstances where the authority considers it would be reasonable to make the information available to the public at large and elects to do so,

then if the authority estimates that the total cost of complying with both (or all) of the requests exceeds the amount prescribed, in relation to complying with either (or any) of those requests, under subsection (1), section 1(1) does not oblige the authority to comply with either (or any) of those requests.

...

20 Requirement for review of refusal etc.

- (1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.
- (2) A requirement under subsection (1) is referred to in this Act as a "requirement for review".
- (3) A requirement for review 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; and
 - (ii) the matter which gives rise to the applicant's dissatisfaction mentioned in subsection (1).

...

- (9) In subsection (1), the reference to "actions" and "decisions" includes inaction and failure to reach a decision.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (8) Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if-
 - (a) the requirement is vexatious; or
 - (b) the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply.

...

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 (Scotland) Act 2002 (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.