



Scottish Information
Commissioner

Decision 154/2007 Mr Andrew Picken (Evening News) and Mr Robert Seaton and the City of Edinburgh Council

PF/PPP contracts for schools in Edinburgh

**Applicants: Mr Andrew Picken
(Evening News) and Mr Robert Seaton
Authority: City of Edinburgh Council
Case No: 200601775 and 200601914
Decision Date: 24 August 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 154/2007 Mr Andrew Picken (Evening News) and Mr Robert Seaton and the City of Edinburgh Council

Requests for information relating to PFI/PPP contracts for schools in Edinburgh – section 12 of the Freedom of Information (Scotland) Act 2002 (FOISA) applied – excessive cost of compliance – Commissioner held that the cost of compliance exceeded the £600 prescribed limit set out in the Fees Regulations and the City of Edinburgh Council was not obliged to comply with the requests in line with section 12 of FOISA

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): section 1(1) (General entitlement); section 12(1) (Excessive cost of compliance); section 15 (Duty to provide advice and assistance); section 20(5) and (6) (Requirement for review of refusal etc.); section 21(1) (Review by Scottish public authority).

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations): regulation 3 (Projected costs); regulation 5 (Excessive cost - prescribed amount).

Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002: paragraph 20; Annex 3, Paragraph 14 (Projected costs which exceed the prescribed amount).

The text of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Picken wrote to the City of Edinburgh Council (the Council) and requested information relating to a number of public private partnership (PPP) projects. The Council provided Mr Picken with information relating to an "Investing in Education" project (PPP1) to which a number of exemptions had been applied. Mr Picken was dissatisfied with the Council's response and sought a review.



The Council responded to the request for review and advised Mr Picken that the cost of supplying the information he had requested had already exceeded £600 and the Council was therefore not obliged to comply with his request in line with section 12 of FOISA. The Council informed Mr Picken that this should have been applied to his original request but it had previously underestimated the time it would take to comply with his request.

Two days after Mr Picken submitted his initial request to the Council, Mr Seaton wrote to the Council requesting copies of any private finance initiative or PPP contracts for Edinburgh schools. The Council provided Mr Seaton with the same information as had been provided to Mr Picken. Mr Seaton was dissatisfied with the information he had received and asked the Council to carry out a review.

The Council responded to Mr Seaton's request for review and advised him that the cost of locating, retrieving and providing the information he had requested exceeded £600 and the Council was therefore not obliged to comply with his request in line with section 12 of FOISA.

Both Mr Picken and Mr Seaton were dissatisfied with the Council's responses to their requests for review and they asked the Commissioner to consider the Council's handling of their requests and its estimate of the cost of providing the information.

Following an investigation, the Commissioner found that the Council had provided sufficient evidence to support its estimate of the cost of providing the information requested by both Mr Picken and Mr Seaton. Accordingly, section 12(1) of FOISA constituted appropriate grounds for the Council's refusal to comply with both requests.

In addition, the Commissioner found that the Council had failed to provide reasonable advice and assistance to either Mr Picken or Mr Seaton in terms of section 15(1) of FOISA. In future instances where requests for information would be refused on cost grounds, the Commissioner expected the Council to consider what information could be released free of charge or below the prescribed amount.



Background

Mr Picken's request

1. On 25 October 2005, Mr Picken wrote to the Council requesting information relating to a number of PPP projects. The Council failed to respond to his requests and Mr Picken applied to my Office for a decision in relation to the way the Council had failed to deal with his request. My ruling in relation to that particular application can be found on my website:
<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2006/200600528.asp>.
2. Mr Picken's subsequent application for a decision in this particular instance concerns information he had requested from the Council on 25 October 2005, regarding an "Investing in Education" project (PPP1). The requested information consisted of a copy of the contract between the Council and the Edinburgh Schools Partnership and a copy of the original business case for the PPP1 project.
3. The Council responded to Mr Picken's request on 2 August 2006, providing him with copies of the information he had requested on CD-ROM. However, some of the information in the documents provided had been redacted by the Council and Mr Picken was supplied with a list of the exemptions under FOISA that had been applied to specific documents.
4. On 6 November 2006, Mr Picken wrote to the Council requesting a review of its decision to withhold information from him in relation to his PPP1 requests. Although Mr Picken's request for review was submitted to the Council outwith the 40 working day timescale allowed by section 20(5) of FOISA, the Council agreed to carry out a review of its decision. This is in line with the terms of section 20(6) of FOISA which allows a Scottish public authority to comply with a requirement for review made after the expiry of the time allowed by section 20(5) of FOISA where the authority considers it appropriate to do so.
5. The Council wrote to Mr Picken by e-mail on 10 November 2006, advising him of the outcome of its review. In its e-mail the Council stated that the costs associated with the staff time that had already been spent in locating, retrieving and providing the information had been analysed and amounted to £1733.25.



6. The Council informed Mr Picken that, under section 12 of FOISA, a Scottish public authority could at any point (including during the course of an investigation) submit that the cost of supplying information that had been requested would exceed the £600 limit set out in the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) and decline the further supply of information.
7. Mr Picken was informed by the Council that when his request had first been received and dealt with there had been an underestimate of the staff time that it would take to provide the PPP1 documentation and comply with his request. The Council added that section 12 in FOISA should have been applied to the original request for information and, therefore, under the Council's policy, Mr Picken would not have received the information with which he had already been provided. The Council therefore declined to provide Mr Picken with further information at the review stage and refused to consider whether the exemptions it had applied to certain parts of documents were justified.
8. Mr Picken was dissatisfied with the outcome of the Council's review and, on 11 November 2006, he wrote to my Office applying for a decision in terms of section 47(1) of FOISA.

Mr Seaton's request

9. On 27 October 2005, Mr Seaton submitted a request for information through the Council's website. In his request, Mr Seaton asked for a copy of any private finance initiative/public private partnership contracts for Edinburgh schools. The Council acknowledged receipt of Mr Seaton's request, but did not respond directly to the request. On 26 November 2005, Mr Seaton wrote to the Council and requested a review, but the Council did not provide a response to his request for review. Mr Seaton then complained to my Office and a technical investigation was carried out into his case.
10. On 18 July 2006, Mr Seaton received a response from the Council in relation to his original request. The Council provided Mr Seaton with the same information that had been issued to Mr Picken, i.e. some of the information in the documents provided had been redacted by the Council under a number of exemptions in FOISA.
11. On 16 August 2006, Mr Seaton wrote to the Council asking for a review of its decision not to supply him with all of the information he had requested. The Council acknowledged receipt of Mr Seaton's request for review on 21 September 2006. Mr Seaton was informed by the Council that it would endeavour to provide him with a response within 20 working days. The Council advised Mr Seaton that it was a complex case and would require substantial work in examining contract documentation.



12. The outcome of the Council's review was relayed to Mr Seaton by e-mail on 18 October 2006. In its response the Council informed Mr Seaton that the costs associated with the hours that had already been taken by staff in locating, retrieving and providing the information that he had been provided with amounted to £1733.25. The Council advised Mr Seaton that when his initial request had been received there had been an underestimate of the time it would take to comply with his request. The Council therefore declined to provide any further information to Mr Seaton on the grounds that it was not obliged to comply with his request in terms of section 12(1) of FOISA, which concerns excessive cost.
13. Mr Seaton was dissatisfied with the outcome of the Council's review and, on 5 December 2006, he wrote to my Office applying for a decision in terms of section 47(1) of FOISA.

The Investigation

14. The applications from Mr Seaton and Mr Picken were validated by establishing that each applicant had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to their requests.
15. In Mr Picken's case, the Council was notified on 11 December 2006 that an application had been received from Mr Picken and the Council was asked to provide my Office with copies of documents which were required for the purposes of the investigation. The Council was also asked for its comments on the application in terms of section 49(3)(a) of FOISA.
16. On 12 December 2006, the Council was informed that an application had been received from Mr Seaton. Copies of documents which were required for the purposes of the investigation were obtained from Mr Seaton and the Council was asked to provide comments on the application in terms of section 49(3)(a) of FOISA. On 11 April 2007, the Council was informed that both of the applications submitted to me would be conjoined since they concerned requests for the same information.



The Commissioner's Analysis and Findings

17. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by the applicants and the Council and am satisfied that no matter of relevance has been overlooked.

Section 12 - Excessive cost of compliance

18. Under section 12(1) of FOISA, a Scottish public authority is not obliged 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. Under regulation 5 of the Fees Regulations, made under section 12, the Scottish Ministers set the prescribed amount at £600.
19. The principal issue to be considered in relation to this case is whether the Council was in fact correct in its assertion that the cost of responding to the initial request would exceed the prescribed limit of £600.
20. If it can be concluded that the cost of complying with the request would indeed exceed this prescribed limit, it will not then fall to me to consider the exemptions applied by an authority, for the reason that the Council could legitimately and appropriately have refused to respond to the initial request on the basis of section 12(1) of FOISA.
21. This means that under section 12(1) of FOISA, read in conjunction with regulation 5 of the Fees Regulations, public authorities are under no obligation to comply with requests for information where the cost of doing so would exceed the prescribed amount of £600. The estimate must be a reasonable one. Consequently, as Commissioner, I have no power to require the release of information should I find that the authority's reasonable assessment of the cost of responding to any single request for information exceeds this amount.

Would the cost of complying with the request exceed £600?

22. In response to Mr Seaton's request for review, the Council supplied him with a breakdown of the costs that had been incurred previously when processing Mr Picken's request for the same information. In his application to me, Mr Seaton queried the £1,733.25 cost of compliance cited by the Council and asked me to investigate on his behalf.



23. The Council identified 4 sets of documents which were covered by the scope of Mr Seaton's and Mr Picken's requests: project documents from November 2001, supplemental projects (stage 1 changes), project documents (stage 2 changes) and property documents. The first set of documents alone consisted of 96 separate files containing a total of 2950 pages. The Council listed 395 instances of the application of exemptions in FOISA in relation to different parts of documents within the 4 files.
24. In its submission to me the Council explained how the costs had been arrived at. Two members of staff had been involved in processing Mr Picken's request, resulting in 27.5 hours spent locating, retrieving and providing the information at a cost of £15 per hour. This amounted to £412.50. The Council also stated that 88.05 hours of staff time had been spent redacting information at a rate of £15 per hour. This amounted to £1320.75. The Council therefore estimated that the total cost of providing the redacted information to Mr Picken in response to his initial request amounted to £1733.25.
25. After responding to Mr Picken's initial request by providing him with the PPP1 documentation to which a number of exemptions under FOISA had been applied, the Council declined to provide Mr Picken with any further information when responding to his request for review. In its response to Mr Picken the Council argued that, given the excessive costs that had already been incurred in the provision of the data that he had been given, to provide him with further information regarding the application of exemptions would simply incur additional costs which had already exceeded the limit that should have been applied to his initial request. The Council advised Mr Picken that the review would therefore not be taken any further.
26. The Council explained in its submission to me that, on formally reviewing the request, it was noted that the initial request submitted by Mr Picken should have been rejected at the outset on the basis of cost. The Council conceded that this should have been identified when Mr Picken's request was first received, but it was not until the work of redacting the relevant documents was undertaken to fulfil the initial response that the extent of the task was fully appreciated. Accordingly, while a CD-ROM of redacted documents with detailed notes was actually sent to Mr Picken (and the same information was subsequently sent to Mr Seaton), the Council was of the view that the cost of the work to prepare the information would have entitled it to refuse to provide the information in the first instance under section 12 of FOISA.



27. My investigating officer wrote to the Council asking to be provided with details of how it had calculated its projected costs, including the rate which was used to calculate staff costs for providing the information requested. The Council had estimated the staff cost of processing the information (redaction, locating, and retrieving the information) at £15 per hour. However, it should be noted that the guidance to the Fees Regulations makes it clear that £15 per hour is an upper limit and that the charge per hour should reflect the actual cost of undertaking the work.
28. The Council provided me with details of the grades of staff that had been involved in processing Mr Picken's request. It was argued that the documentation relating to the contract in question was large and complicated and the work required a relatively senior person to interpret and apply legal advice. The work was deemed to be unsuitable to hand over to, for example, an admin support worker.
29. Having considered in detail the submissions made by the Council in favour of applying section 12(1) of FOISA to the requested information, I accept that a reasonable estimate of the cost of providing the information requested by Mr Picken or Mr Seaton would be around £1,733, which is well in excess of the £600 limit laid down in the Fees Regulations. I therefore accept that the Council had no obligation to respond to either Mr Picken's or Mr Seaton's information requests, on the grounds that to do so would have exceeded the upper limit of £600 prescribed within the Fees Regulations.
30. Both Mr Picken and Mr Seaton are, of course free to make a fresh request, more closely defined, so as to attempt to reduce any estimated cost of compliance.

Conclusion

31. Having considered the Council's submission and having examined the documentation provided by the Council for the purposes of my investigation, I accept that the Council's estimate of the costs incurred in providing the information was reasonable in the circumstances.
32. I am therefore of the view that, in relation to both Mr Picken's and Mr Seaton's requests, the Council was correct to rely upon section 12 of FOISA. This is on the grounds that, as both requests were made virtually simultaneously, to comply with either request would have exceeded the prescribed amount of £600 as set out in regulation 5 of the Fees Regulations.



Section 15 – Duty to advise and assist

33. Having established that the Council was correct to rely upon section 12 in FOISA to justify its refusal to comply with both requests, I must go on to consider whether the Council complied with its duty to advise and assist as required by section 15 of FOISA, read in conjunction with the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Section 60 Code).
34. In his application to me, Mr Seaton complained that the Council had failed to provide him with advice and assistance regarding his request. Mr Seaton was of the view that if the Council found the cost of answering the request to be excessive, it should have consulted with him with a view to narrowing down his request in order to prevent the cost of complying with his request from exceeding the £600 threshold set out in the Fees Regulations.
35. Under section 15 of FOISA, a public authority must, so far as it is reasonable to expect it to do so, provide reasonable advice and assistance to a person who proposes to make, or has made, a request for information. The Section 60 Code advises, under paragraph 20, that appropriate help could include an indication of what information could be provided within the cost ceiling, in instances where a request would be refused on cost grounds.
36. Similarly, in Annex 3, paragraph 14, of the Section 60 Code, it is stated that although public authorities are under no obligation to comply with a request for information which would exceed £600, an authority should consider what information could be released free of charge or below the prescribed amount. I note however that the Council failed to offer such advice in its correspondence with Mr Seaton or Mr Picken.
37. Taking into account the fact that the Council advised both Mr Picken and Mr Seaton that it had underestimated the cost of complying with their requests, that the Council should have applied section 12 of FOISA to the original requests in this instance, and that if this had been done Mr Picken and Mr Seaton would not have received the information that had been provided to them, I consider that it would have been reasonable in the circumstances for the Council to have offered to identify what information could have been released free of charge or below the prescribed amount in both instances. This would have allowed Mr Picken and Mr Seaton to narrow down their requests and would have enabled the Council to provide them with details of its reasoning in relation to the application of any exemptions and any consideration of an applicable harm test or the public interest test.



Technical breach of FOISA

38. Section 21(1) of FOISA gives authorities a maximum of 20 working days from receipt of the requirement to comply with a requirement for review.
39. Mr Seaton submitted his requirement for review to the Council on 16 August 2006. The Council did not provide him with a response until 18 October 2006, well outside the 20 working day limit for responding.
40. In its response to Mr Seaton, the Council apologised to Mr Seaton for the delay in issuing its response. I do not require any remedial action to be taken by the Council in respect of this breach.

Decision

I find that the City of Edinburgh Council (the Council) was entitled to refuse to comply with Mr Picken's and Mr Seaton's requests for information under section 12(1) of FOISA and that the Council's reliance on section 12(1) was an appropriate response to each request in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA).

I find that, in failing to provide reasonable advice and assistance to either Mr Picken or Mr Seaton in terms of section 15 of FOISA, the Council failed to comply with Part 1 of FOISA. In future instances where requests for information would be refused on cost grounds, I would expect the Council to consider what information could be released free of charge or below the prescribed amount.

I find that the Council failed to comply with Part 1 of FOISA in dealing with Mr Seaton's requirement for review by failing to respond within 20 working days as required by section 21(1) of FOISA. I do not require any remedial action to be taken by the Council in respect of this breach.



Appeal

Should Mr Picken wish to appeal my decision insofar as it relates to section 12(1) or section 15(1), or should Mr Seaton wish to appeal my decision insofar as it relates to section 12(1), section 15(1) or section 21(1), there is a right to appeal to the Court of Session on a point of law only. Similarly, should the City of Edinburgh Council wish to appeal against my decision, there is a right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
24 August 2007



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.

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).

20 Requirement for review of refusal etc.

(...)

(5) Subject to subsection (6), a requirement for review must be made by not later than the fortieth working day after-

(a) the expiry of the time allowed by or by virtue of section 10 for complying with the request; or

(b) in a case where the authority purports under this Act-



(i) to comply with a request for information; or

(ii) to give the applicant a fees notice, a refusal notice or a notice under section 17(1) that information is not held,

but does so outwith that time, the receipt by the applicant of the information provided or, as the case may be, the notice.

(6) A Scottish public authority may comply with a requirement for review made after the expiry of the time allowed by subsection (5) for making such a requirement if it considers it appropriate to do so.

(...)

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.

The 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.

Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002

20. Where the applicant has provided insufficient information to enable the authority to identify and locate the information sought, or where the request is unclear, the authority should help the applicant to describe more clearly and particularly what information they require

(...)

Appropriate help could include (...) an indication of what information could be provided within the cost ceiling, in instances where a request would be refused on cost grounds.

Annex 3 Guidance to Scottish public authorities on charging fees for providing information

Projected costs which exceed the prescribed amount

14. Although under no obligation to comply with a request for information which would exceed £600, an authority should consider what information could be released free of charge or below the prescribed amount, particularly in circumstances where it is apparent that the applicant has a low income or is in receipt of state benefits ...