

# Decision Notice



Decision 210/2011 CaL Solutions Limited and Scottish Water

Whether a request is vexatious

Reference No: 201101109

Decision Date: 20 October 2011

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

CaL Solutions Limited (CaL Solutions) requested from Scottish Water a copy of the report produced by Scottish Water's solicitors into allegations it had made. Scottish Water responded by advising CaL Solutions that it considered the report to be exempt from disclosure in terms of section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). CaL Solutions requested a review of this response and Scottish Water responded by advising CaL Solutions that it now considered its request to be vexatious and (in line with section 21(8) of FOISA) it was therefore refusing to conduct a review. CaL Solutions remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Scottish Water was obliged to conduct a review.

The Commissioner therefore required Scottish Water to conduct a review in line with sections 21(1), (4) and (5) of FOISA, the outcome of which should either confirm or amend Scottish Water's original decision, but not find that section 14(1) of FOISA is applicable.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 14 (Vexatious or repeated requests) and 21(1), (4), (5), (8) and (9) (Review by Scottish public authority)

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

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1. On 11 April 2011, CaL Solutions wrote to Scottish Water with regard to correspondence received from Scottish Water, which referred to a report concerning accusations made by a contracting supplier being fully investigated by lawyers for Scottish Water. CaL Solutions noted that these comments referred to CaL Solutions (Billingham) Limited (CaL Billingham), a subsidiary of CaL Solutions, and requested a copy of the report produced for Scottish Water by their solicitors.



2. Scottish Water responded on 16 May 2011. It notified CaL Solutions that it considered the report to be exempt from disclosure in terms of section 36(1) of FOISA, as it comprised legal advice.
3. On 17 May 2011, CaL Solutions wrote to Scottish Water requesting a review of its decision. CaL Solutions drew Scottish Water's attention to the fact that CaL Billingham (its predecessor) had made the allegations and provided the evidence that instigated the investigation by Scottish Water's solicitors. It also indicated that it did not consider that the content of the report would constitute legal advice.
4. Scottish Water responded to CaL Solutions' request for review on 14 June 2011. It indicated that it now considered CaL Solutions was abusing freedom of information legislation and was engaged in vexatious behaviour. Scottish Water refused to conduct a review in accordance with section 21(8) of FOISA. (Section 21(8) of FOISA provides that a public authority is not obliged to comply with a requirement for review where that requirement is vexatious, or the request for information to which it relates is one to which, by virtue of section 14 of FOISA (Vexatious or repeated requests), the public authority is not obliged to respond.)
5. On 16 June 2011, CaL Solutions wrote to the Commissioner, stating that it was dissatisfied with the outcome of Scottish Water's 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 CaL Solutions 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

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7. The investigating officer subsequently contacted Scottish Water, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, Scottish Water was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
8. Scottish Water provided its submissions in response to this request on 9 August 2011. It confirmed that it considered CaL Solutions' request for information to be vexatious in terms of section 14(1) of FOISA. It also noted in passing that the same information had been requested in the past, and so it also considered that section 14(2) applied in that the request was a repeated request.
9. The submissions of both Scottish Water and CaL Solutions are considered, where relevant, in the Commissioner's analysis and findings below.



## Commissioner's analysis and findings

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10. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both CaL Solutions and Scottish Water and is satisfied that no matter of relevance has been overlooked.

### Was CaL Solutions' information request vexatious?

11. Section 14(1) of FOISA states that section 1(1) (which confers a general entitlement to access information held by a Scottish public authority) does not oblige a public authority to comply with a request for information if the request is vexatious.
12. FOISA does not define the word "vexatious". However, the Commissioner's *general* approach is that a request (which may be a single request, the latest in a series of requests, or one among a large number of individual requests) may be vexatious where it would impose a significant burden on the public authority and one or more of the following conditions can be met:
- it has the effect of harassing the public authority; and/or
  - it does not have a serious purpose or value; and/or
  - it is designed to cause disruption or annoyance to the public authority; and/or
  - it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
13. While the Commissioner's view is that the term "vexatious" must be applied to the request and not the requestor, he also acknowledges that the applicant's identity, and the history of their dealings with a public authority, may be relevant in considering the nature and effect of the request and surrounding circumstances. It may be reasonable, for example, for the authority to conclude that a particular request represents a continuation of a pattern of behaviour it has deemed vexatious in another context.

### Scottish Water's submissions

14. In its submissions, Scottish Water commented upon the Commissioner's general approach, suggesting that this may be at odds with the provision in section 14(1), and that the Commissioner should not seek to narrow the interpretation. Scottish Water referred to the comments on vexatious proceedings made by Lord Bingham of Cornhill CJ in *Attorney General v Barker* [2000] 1 FLR 759:

"...whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain that is likely to accrue to the claimant; and that it involves and abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".



15. Scottish Water also highlighted the First Tier Tribunal (Information Rights) decision in case number EA/2010/0041<sup>1</sup>, which it considered relevant to the circumstances in this case. Scottish Water highlighted the approach taken in that case, in which the (UK) Information Commissioner had referred to the need to give the term vexatious its plain and simple meaning, and the need for flexible balancing. Scottish Water argued that the Commissioner's approach had made other factors secondary to a concept of "significant burden plus one of four specified factors".
16. With regard to the particular circumstances of this case, Scottish Water argued that the request from CaL Solutions relates to a matter previously raised by CaL Billingham and that, for all intents and purposes, requests in the name of CaL Solutions or CaL Billingham are actually requests by the same party.
17. Scottish Water explained that it had a contractual relationship with CaL Billingham, which broke down after a reduction in work orders led to a disagreement between the two parties. Scottish Water claimed that CaL Solutions holds it responsible for the demise of CaL Billingham and that it is now seeking to 'mete out some kind of revenge' against Scottish Water.
18. Scottish Water argued that the current request lacks serious purpose or value. It explained that CaL Billingham had raised allegations which, following internal and external independent investigations, were judged to be unfounded. Scottish Water commented that CaL Solutions appears not to accept these findings and went on to contrast this situation with one where people are aggrieved by a public authority's action in respect of a matter in which they had no ability to influence or meaningfully inform the outcome.
19. Scottish Water submitted that CaL Solutions has persisted with a campaign designed to unearth some wrongdoing. Scottish Water alleged that the requests form part of a smear campaign against Scottish Water and named individuals.
20. Scottish Water noted that, despite its attempts to answer CaL Solutions' queries, offers to meet, the instigation of investigations, providing access to examine records as part of an adjudication, and giving the company and its advisors the opportunity to air their position before the adjudicator, CaL Solutions persists in submitting additional, often overlapping requests.
21. Scottish Water argued that it is of the view that CaL Solutions is on a fishing exercise and that it is unreasonable for the Commissioner to compel it to continue to deal with these information requests, when they lack a serious purpose.

<sup>1</sup> [http://foiwiki.com/foiwiki/info\\_tribunal/DBFiles/Decision/i426/Decision%20&%20PTA%20\(w\).pdf](http://foiwiki.com/foiwiki/info_tribunal/DBFiles/Decision/i426/Decision%20&%20PTA%20(w).pdf)



22. Scottish Water also argued that the intention of the requests was not to seek information, but, having failed to uncover evidence of wrongdoing, to cause disruption to Scottish Water's business. Scottish Water argued that while it may appear to be a large organisation with many employees, the actual number of employees who can deal with CaL Solutions' requests is small and CaL Solutions knows this. Scottish Water submitted that the target of many of the allegations and those familiar with the background of these issues are no longer employed by Scottish Water. Scottish Water submitted that other employees have had to spend time dealing with these requests, when their time would be better spent on other matters. Scottish Water argued that this has a demotivating effect and has negatively influenced employees' opinions on whether FOI legislation is effective and appropriate or is creating too big a burden on public authorities.
23. Scottish Water alleged that the applicant obtains some satisfaction from the fact that its continuing requests for information cause annoyance to Scottish Water and its staff. Scottish Water submitted that, while the requests the Commissioner deals with are often bland, other correspondence and actions are accusatory, hurtful and potentially defamatory. Scottish Water maintained that public policy prevents a public authority from pursuing cases of defamation, or funding employees to do so, other than in extreme circumstances. Scottish Water considers that section 14(1) of FOISA identifies that this avenue is not open and provides an opportunity to curtail such conduct. Scottish Water submitted that it is the only way that a public authority can bring an end to such a vendetta.
24. Scottish Water also argued that the applicant's request has the effect of harassing Scottish Water, for the reasons described above. Scottish Water submitted that those employees who were involved in dealing with the requests, or were the targets of accusations, became frustrated that no reasonable amount of attempts to assist with the provision of information was able to satisfy the applicant. Scottish Water submitted that FOI legislation is being used (by CaL Solutions) as a weapon, to hurt, damage and disrupt, and it does not believe that this is the intention of the legislation. Scottish Water noted that the personal attacks should not be downplayed as normal criticism that is part and parcel of being a public authority employee.
25. Scottish Water referred to *Decision 212/2010 CaL Solutions (Billingham) Ltd and Scottish Water* in which the Commissioner found a series of requests made by CaL Billingham to be vexatious. Scottish Water argued that the current request (from CaL Solutions) is a continuation of the behaviour that led to the Commissioner finding CaL Billingham's requests to be vexatious in *Decision 212/2010* and it has invited the Commissioner to uphold the application of section 14(1) of FOISA in this case.

#### *Submissions from CaL Solutions*

26. In its application to the Commissioner, CaL Solutions commented that, after the Commissioner issued *Decision 212/2010*, it had contacted the Commissioner's office indicating that it still wanted to obtain information held by Scottish Water, and seeking advice on how to do this without being deemed vexatious.



27. It noted that it was advised to limit the number of questions asked over a short period of time and to be conscious of the scope of its requests to avoid putting a burden on Scottish Water's resources. CaL Solutions submitted that it had taken this advice, along with the Commissioner's findings in *Decision 212/2010*, and that it had followed that advice ever since.
28. CaL Solutions submitted that, between 21 February 2011 and 7 June 2011, it had submitted nine information requests to Scottish Water. CaL Solutions maintained that Scottish Water had answered seven of those requests to its satisfaction and that only two of those requests (including the request under consideration in this case) were still outstanding. CaL Solutions noted that Scottish Water did not object to any of its information requests until 14 June 2011, and so it is of the view that Scottish Water did not consider the information requests it had submitted prior to that point to be vexatious or overly burdensome. In light of this, CaL Solutions has argued that Scottish Water only deems this current request to be vexatious as it does not wish to disclose the requested information.
29. CaL Solutions also submitted that its requests for information have a serious purpose and are not designed to cause disruption or annoyance. It noted that the report it is seeking access to in this case is the outcome of an investigation into allegations of wrongdoing within Scottish Water. CaL Solutions indicated that Cal Billingham (its predecessor) had made the allegations that formed the focus of the investigation and that the report was therefore based on information that it (in essence) had provided to Scottish Water.

### ***The Commissioner's findings***

30. The Commissioner has first of all noted Scottish Water's comments regarding his approach to considering section 14(1) of FOISA. While this approach generally involves considering whether a request would involve a significant burden, and whether one of the other factors identified in paragraph 12 above is present, he recognises that each case must be considered on its merits, and in all the circumstances of the case.
31. He does not exclude the possibility that, in any given case, a request may not involve a significant burden, but one or more of the other listed factors may be of such overwhelming significance that it would be appropriate to consider the request vexatious in the absence of a significant burden. He also recognises that other factors may result in a request being vexatious.
32. In a number of previous decisions, the Commissioner has accepted that a request which, when considered in isolation, would not appear to be manifestly unreasonable or to have the effect of harassing a public authority, should be considered to be vexatious when considered in a wider context of long-standing, voluminous and persistent correspondence and information requests on similar matters.



33. In *Decision 212/2010*, the Commissioner considered a series of 60 requests made by CaL Billingham and accepted Scottish Water's contention that each was vexatious for the purposes of section 14(1) of FOISA when considered in the context of CaL Billingham's ongoing pattern of making numerous requests for information to Scottish Water. As noted above, Scottish Water has referred to *Decision 212/2010* in its submissions, and has asked the Commissioner to find that CaL Solutions' current request is a continuation of that series of vexatious requests.
34. The Commissioner recognises that CaL Solutions and CaL Billingham are closely related companies, and that CaL Solutions is effectively continuing to pursue concerns that were originally raised by CaL Billingham. Indeed, CaL Solutions' submissions have acknowledged this point, since it is seeking information about the allegations made by CaL Billingham, and highlights its interest in that information as the maker of those allegations.
35. In this case, the Commissioner must consider whether, having found that CaL Billingham made a series of vexatious requests between October 2009 and June 2010, a further request effectively from that same requester on a related topic made some 10 months later should be considered also to be vexatious.
36. The Commissioner notes that the information requested by CaL Solutions in this case is very specific (a single named report) and is information that was generated by allegations of wrongdoing made by CaL Billingham. The Commissioner notes that Scottish Water could easily identify the requested information and that it did so in its initial response to the request, when it notified CaL Solutions that it considered the report to be exempt from disclosure in terms of section 36(1) of FOISA.
37. Considered in isolation, this request does not appear burdensome, although the Commissioner is well aware that requests made by CaL Billingham have clearly imposed a significant burden in the past.
38. The Commissioner is unable to accept that the request under consideration has no serious purpose or value. While Scottish Water may consider that the allegations raised by CaL Billingham have been investigated thoroughly and found to be unfounded, he considers that CaL Solutions has a genuine interest in understanding how these conclusions were reached. It is quite reasonable and understandable that a person who raised allegations wishes to understand the steps taken to investigate them, and how the available evidence was assessed.
39. The Commissioner turned next to the question of whether the request under consideration represents a continuation of the pattern of communications considered in *Decision 212/2010*.



40. He recognises that once, *Decision 212/2010* was issued, CaL Solutions contacted his office and asked for advice on how it could obtain further information from Scottish Water without being deemed to be vexatious. His staff provided general advice to the effect that a limit to the number of requests submitted within a given timeframe, and ensuring that the requests were focused may make it less likely that a request would be vexatious. CaL Solutions appears to have acted on this advice and has significantly reduced the number and frequency of requests it has submitted to Scottish Water. Although reducing the volume of requests may reduce the burden upon the authority that does not necessarily mean that the requests which have been made are not in some other respect vexatious.
41. Scottish Water has submitted that, between January and August 2011, CaL Solutions submitted at least 14 requests for information, the majority of which were received in April 2011. Scottish Water has not provided any evidence or copies of these requests.
42. However, if the Commissioner accepts that the numbers cited by Scottish Water are correct, this means that CaL Solutions has submitted 14 information requests in eight months. Without knowing the full details of these additional requests, the Commissioner is not in a position to know whether responding to them would be significantly burdensome.
43. Scottish Water has argued that it has received approximately 300 information requests from CaL Solutions and CaL Billingham since October 2009, and it maintains that these recent (fourteen) requests are a continuation of this previous campaign and must be viewed in that context.
44. The Commissioner acknowledges the history of acrimony that exists between both parties in this case and he has some sympathy with Scottish Water and the arguments it has put forward. The Commissioner understands that Scottish Water has (in the past) been overwhelmed by the number (and timing) of requests submitted by CaL Billingham and that this placed a considerable burden upon Scottish Water's resources. Indeed, the Commissioner would note that this is exactly the conclusion he reached in *Decision 212/2010*.
45. However, the term 'vexatious' must be applied to the request and not the requester, and the Commissioner is concerned that in this case Scottish Water may be relying too much upon its previous experiences with CaL Solutions (and CaL Billingham) and that it has not considered the specifics of this particular request, nor the change in behaviour that followed the publication of *Decision 212/2010*.
46. The Commissioner does not take the view that 14 requests in eight months is self – evidently overly burdensome (and as noted above he has not been provided with details of these requests which would demonstrate that they are in fact overly burdensome) Scottish Water has not provided any evidence to demonstrate that these particular 14 requests were vexatious in terms of, e.g., their language, scope, complexity or timing. In its submissions, Scottish Water referred to other correspondence received from CaL Solutions, noting that such correspondence has been accusatory and potentially defamatory. However, Scottish Water did not provide the Commissioner with copies of this correspondence to support its case. Given the lack of evidence provided by Scottish Water, the Commissioner is unable to give weight to this point.



47. The particular request under consideration is for one specific piece of information, a report readily identified by Scottish Water. The Commissioner also gives some weight to the fact that the report is the result of investigations into allegations raised by CaL Billingham and he considers it reasonable for CaL Solutions to request to see the report prepared by Scottish Water's solicitors, even though Scottish Water has advised it of the general outcome of the report.
48. In conclusion, the Commissioner does not accept that this request is a continuation of that pattern of requests which was deemed to be vexatious in *Decision 212/2010*. He acknowledges that the subject matter of this request may well relate to past requests, but he considers that the scope of this request is narrow in focus and that dealing with the request would not have placed a significant burden on Scottish Water. The Commissioner also considers that the request is reasonable, given that the report is for the outcome of investigations into allegations made by CaL Billingham, and that it serves a purpose in that it would demonstrate to the applicant that its allegations were taken seriously and investigated thoroughly.
49. On balance, having considered the arguments submitted by both parties along with the terms of the information request submitted by CaL Solutions, the Commissioner has found that the request is not vexatious in terms of section 14(1) of FOISA.

#### **Section 14(2) – Repeated requests**

50. In its submissions to the Commissioner, Scottish Water submitted that "CaL" had previously made the same request (for the solicitors' report) which it had refused to disclose on the basis that it considered the report to be legally privileged. Scottish Water argued that it considers this current request (from CaL Solutions) to be a repeat request and it is therefore not obliged to comply with the request in terms of section 14(2) of FOISA.
51. Section 14(2) of FOISA states that "where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request".
52. Scottish Water provided no further submissions or documentation to support its view that section 14(2) of FOISA was applicable. The Commissioner has therefore been unable to confirm whether and when CaL Solutions (or CaL Billingham) had previously made such a request, nor how Scottish Water had responded to this request. Without this information, the Commissioner has been unable to establish whether Scottish Water had indeed complied with a previous request, or consider whether a reasonable time had passed between the making of a previous request and the one under consideration.
53. The Commissioner is therefore unable to conclude that Scottish Water was entitled to refuse to comply with CaL Solutions' request on the grounds that section 14(2) of FOISA was applicable.



### Failure to conduct a review

54. Section 21(1) of FOISA gives public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for a review, again subject to exceptions which are not relevant to this case.
55. Section 21(4) of FOISA states that, on receipt of a requirement for review, an authority may do the following in respect of the information request to which it relates
  - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
  - (b) substitute for any such decision a different decision; or
  - (c) reach a decision, where the complaint is that no decision had been reached.
56. Section 21(5) then requires the public authority to give the applicant notice in writing of what it has done under section 21(4) and a statement of its reasons for so doing.
57. Section 21(8), however, provides that a public authority is not obliged to comply with a requirement for review in cases where the requirement itself is vexatious, or where the request is one with which, the authority is not required to comply, because it is vexatious by virtue of section 14.
58. Where an authority judges that section 21(8) is applicable, section 21(9) states that it must give the applicant notice of this within the 20 working day period allowed by section 21(1).
59. As noted above, in response to CaL Solutions' request that Scottish Water carry out a review of its initial decision to withhold the report in question, Scottish Water declined to conduct a review on the basis that it considered the request to be vexatious.
60. Given that the Commissioner has concluded that CaL Solutions' request was neither vexatious in terms of section 14(1) nor repeated in terms of section 14(2) (and Scottish Water has not claimed during the investigation that CaL Solutions' request for review was vexatious), the Commissioner must conclude that Scottish Water was not entitled to refuse to conduct a review of its handling of that request.
61. The Commissioner therefore finds that Scottish Water failed to comply with section 21(1) of FOISA in this case. He now requires Scottish Water to conduct a review in response to CaL Solutions' requirement for review of 17 May 2011. This review should produce one of the outcomes specified in section 21(4). However, given the Commissioner's findings set out above, Scottish Water should not replace its previous decision with a refusal in terms of section 14(1) of FOISA.
62. Scottish Water should notify CaL Solutions of the outcome of this review in line with section 21(5) by [4 December 2011].



## DECISION

The Commissioner finds that Scottish Water failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by refusing to conduct a review of its handling of the request made by CaL Solutions Limited (CaL Solutions) in terms of section 21(8) of FOISA on the grounds that the request was vexatious.

The Commissioner found that the request under consideration was not one with which Scottish Water, by virtue of section 14 of FOISA, was not obliged to comply. He consequently concluded that Scottish Water had failed to comply with section 21(1) of FOISA.

The Commissioner therefore requires Scottish Water to conduct a review of its response to CaL Solutions' request for information. This review should produce one of the outcomes specified in section 21(4). However, Scottish Water should not replace its previous decision with a refusal in terms of section 14(1) of FOISA. Scottish Water should notify CaL Solutions of the outcome of this review in line with section 21(5) by 4 December 2011.

## Appeal

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Should either CaL Solutions or Scottish Water wish to appeal against this decision, there is an 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 notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**20 October 2011**



## Appendix

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### 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.

##### 14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.
- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

##### 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.

...

- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
  - (b) substitute for any such decision a different decision; or
  - (c) reach a decision, where the complaint is that no decision had been reached.



- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

- (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.
- (9) Where the authority considers that paragraph (a) or (b) of subsection (8) applies, it must give the applicant who made the requirement for review notice in writing, within the time allowed by subsection (1) for complying with that requirement, that it so claims.

...