

Decision Notice



Decision 134/2012 Mr S and the Scottish Criminal Cases Review Commission

Applications considered by SCCRC

Reference No: 201201342

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Summary

Mr S asked the Scottish Criminal Cases Review Commission (the SCCRC) for information about applications it had considered. The SCCRC provided some of the information requested in the form of minutes of meetings. It considered that the cost of complying with the request in full would exceed £600 and that it was therefore not obliged to comply. Following an investigation, the Commissioner accepted this argument.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 11(1), (2) and (4) (Means of providing information); 12(1) (Excessive cost of compliance); 15(1) (Duty to provide advice and assistance)

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

Background

1. On 11 April 2012, Mr S wrote to the SCCRC requesting information which included the following:
 - 1) For each calendar month between 1 January 2010 and 31 March 2012, how many initial applications being considered by the Board of the [SCCRC] were either: (a) accepted for review; (b) rejected, or (c) continued pending further inquiries or investigation, where “initial applications” are applications which have neither been accepted nor rejected at the time of consideration by the Board, but which may previously have been continued?
 - 2) In relation to cases either “accepted”, “rejected” or “continued” each calendar month between 1 January 2010 and 31 March 2012 please advise how many cases within each monthly category has been the subject of:



- (i) an application for leave to appeal to the HCJAC [High Court of Justice Appeal Court] in terms of the full extent of the application (irrespective of the outcome of any such application for leave or of the outcome of any subsequent appeal);
 - (ii) an application for leave to appeal to the HCJAC in more restricted terms than those of the SCCRC application (irrespective of its outcome);
 - (iii) an application to the HCJAC for leave to appeal to the UKSC [UK Supreme Court] in relation to any “devolution issue” which may have been said to arise in the case (irrespective of the outcome of that application for leave), or
 - (iv) a direct application to the UKSC for leave to appeal on a “devolution issue” already said to have been determined by the HCJAC.
 - 3) In the 12 month period between 1 May 2009 and 30 April 2010, how many applications for review did the SCCRC reject as “premature” where the HCJAC had already refused leave to appeal to the UKSC in relation to what was said to have been a “devolution issue”?
 - 4) In the 12 month period between 1 May 2009 and 30 April 2010, how many cases for review did the SCCRC accept in relation to which: (a) there had been no application to the HCJAC for leave to appeal to the extent of the SCCRC application (i.e. in relation to conviction, sentence or both); (b) there had been no application to the HCJAC for leave to appeal a “devolution issue” to the UKSC, or (c) there had been no direct application to the UKSC in the event that the HCJAC had refused leave to appeal a “devolution issue” to the UKSC?
 - 5) In the period since 1 May 2010, how many applications for review has the SCCRC rejected as “premature” where the HCJAC had already refused leave to appeal a “devolution issue” to the UKSC?
 - 6) In relation to the period since 1 May 2010, how many applications for review has the SCCRC accepted in relation to which: (a) there had been no application to the HCJAC for leave to appeal to the extent of the SCCRC application (i.e. in relation to conviction, sentence or both); (b) there had been no application to the HCJAC for leave to appeal “devolution issue” to the UKSC, or (c) there had been no direct application to the UKSC in the event that the HCJAC had refused leave to appeal a “devolution issue” to the UKSC?
2. The SCCRC responded on 1 May 2012, explaining that it did not collate the information requested. Acknowledging that Mr S did not have internet access to the published documents, the SCCRC provided Mr S with copies of its Board minutes for the period from 1 May 2009 to 24 February 2012. It explained that each month’s minutes recorded the number of new and continued applications the Board considered that month, the number accepted for review, the number rejected and the reasons for any rejection, and the number continued and the reasons for any continuation. The SCCRC also provided copies of some Policy Meeting minutes, which recorded the Board’s consideration of a number of applications for review (including the decision on review and the reasons for any rejections).



3. On 22 May 2012, Mr S wrote to the SCCRC requesting a review of its decision. He considered it immaterial whether the SCCRC collated the information requested in such a manner as to facilitate a ready response to his request: it was, in his view, obliged to state whether it held the information and to either provide it or refuse to do so under an exemption in FOISA.
4. The SCCRC notified Mr S of the outcome of its review on 18 June 2012. It considered the minutes supplied to him had addressed points 1, 3 and 5 in his request. In relation to points 2, 4 and 6, the SCCRC concluded that the cost of collating the information would exceed £600: consequently, section 12(1) of FOISA applied and it was not required to comply with the request.
5. On 10 July 2012, Mr S wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SCCRC'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 Mr S 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

7. On 20 July 2012, the investigating officer notified the SCCRC in writing that an application had been received from Mr S, 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. It was asked to justify its reliance on section 12(1) of FOISA, and also to comment on points raised by Mr S in relation to the completeness of the information provided and the form in which it had been provided.
8. The SCCRC responded with its submissions on 27 July 2012. These, along with the relevant submissions received from Mr S, will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered all the submissions made to her by both Mr S and the SCCRC and is satisfied that no matter of relevance has been overlooked.



Section 12(1) – excessive cost of compliance

10. Section 12(1) provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently set at £600 in terms of regulation 5 of the Fees Regulations. Consequently, the Commissioner has no power to require the release of information should she find that the cost of responding to a request for that information would exceed this sum.
11. 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. The authority may not charge for the cost of determining (i) whether it actually holds the information requested or (ii) whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
12. The SCCRC submitted that section 12(1) applied to points 2, 4 and 6 in Mr S' request. It acknowledged that it held the information he was seeking under these points, but argued that the cost of locating, retrieving and providing that information would exceed the £600 cost limit. It also provided submissions to the effect that these points were so inextricably linked that they should be treated as one request for the purpose of determining whether the cost limit was exceeded.
13. The SCCRC also considered the different sub-requests narrated in points 4 and 6 to be so interconnected to the sub-requests narrated in point 2, and with each other, that all of these should be treated as one for the purpose of determining whether the cost of complying with the request exceeds £600. It went on to describe specific connections.
14. FOISA does not allow Scottish public authorities to aggregate multiple requests for information made by the same person. However, in a small number of cases, the previous Commissioner found that multiple points in the same piece of correspondence are so interconnected that they should be treated as a single request for the purpose of determining whether the cost of complying with the request exceeds £600.
15. Having considered the schedule attached to Mr S' letter of 11 April 2012, the Commissioner is satisfied that separating the information required to address points 2, 4 and 6 would be a wholly artificial exercise. Essentially, on any reasonable interpretation, the information requested is such that the identification and location of what is required to address each point cannot realistically be separated out into discrete tasks: indeed, the same could be said in relation to all six requests under consideration in this case. In all the circumstances, therefore, the Commissioner accepts that the SCCRC was entitled to conclude that points 2, 4 and 6 (and, for that matter, the remaining points in addition) should be treated as a single request.



16. The SCCRC explained that it had received 350 applications falling within the scope of request 2. Taking the periods specified in requests 4 and 6 together, it had received 180 applications for review. In respect of both types of application, it considered that addressing each point would require a legally qualified person to read all the relevant papers for every application, the result being that the maximum hourly rate of £15 would be applicable.
17. During the investigation, the SCCRC carried out sampling exercises in relation to various elements of the request, all of which produced costs in excess of £600. Having considered the SCCRC's comments on the tasks required – which she accepts will involve voluminous records and require the exercise of judgement – the Commissioner is satisfied that these, and the time required to carry them out, should be considered reasonable in the circumstances. She also accepts the SLCC's arguments to the effect that the maximum hourly rate would apply.
18. In all the circumstances, therefore, the Commissioner is satisfied that the costs identified in this case represent a reasonable estimate of the cost of complying with Mr S' request for information. Given the nature of the work required, the Commissioner does not consider that the request could have been responded to within the £600 limit. Consequently, the Commissioner is satisfied that the SCCRC was entitled to rely on section 12(1) of FOISA in relation to Mr S' information request, and therefore was under no obligation to comply with the request. As indicated above, although the SCCRC's arguments on section 12(1) were advanced in relation to points 2, 4 and 6 only, the Commissioner is prepared to accept that all of points 1 to 6 inclusive should be taken together as a single request: for the sake of completeness, however, she has considered the arguments put forward by Mr S in relation to the information disclosed to him.

Information disclosed to Mr S

19. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to certain restrictions which, by virtue of section 1(6), allow Scottish public authorities to withhold information or charge a fee for it. These restrictions include section 12(1). The information to be given is that held by the authority at the time the request is received, as defined in section 1(4).
20. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
21. In his application to the Commissioner, Mr S stated that, although he had asked for information from 1 May 2009 to 31 March 2012, the SCCRC only provided minutes up to 24 February 2012. In any event, he did not believe the supply of minutes to be, on any proper view, the provision of information in response to his request. The minutes were voluminous and dealt with a very broad range of issues in addition to those covered by the request: he had been provided with no assistance in identifying and collating the information he sought from within the minutes. He also suggested that it would have been relatively easy for the SCCRC to extract the relevant sections and collate them.



22. Finally, Mr S questioned the completeness of the information provided as a response to points 1, 3 and 5.
23. The SCCRC explained that the information requested by Mr S in points 1, 3 and 5 was contained within the minutes provided, although it acknowledged that perhaps the position could have been made clearer. The SCCRC provided an explanation of the relevant information in the minutes provided to Mr S, which generally confirmed Mr S' understanding of that information, as outlined in his application to the Commissioner. In the circumstances, having considered the SCCRC's submissions, there would appear to be a cogent argument to the effect that a full set of information was provided in respect of points 1, 3 and 5.
24. The SCCRC further stated that the minutes for March 2012 had not been approved when it received Mr S' request. The Commissioner would still take the view, however, that the information in these minutes (in the form in which it existed at the time the request was received) was held by the SCCRC at that time. Had section 12(1) of FOISA not applied to the request, the Commissioner would have found a failure to comply with section 1(1) of FOISA in that respect. That said, during the investigation, the SCCRC provided Mr S with a copy of the March 2012 minutes.
25. The Commissioner also notes Mr S' dissatisfaction with the form in which the information was provided. However, she cannot accept that the SCCRC would (assuming section 12(1) had not applied) have been under any obligation to do as Mr S has suggested. While section 11(1) of FOISA, read with section 11(2), requires a Scottish public authority (so far as is reasonably practicable) to comply with certain preferences expressed by applicants as to the means by which information is to be provided, Mr S expressed no such preference within either his request or his requirement for review. In the absence of such an expressed preference, section 11(4) of FOISA permits the authority to provide the applicant with information using any means which are reasonable in the circumstances: in this case, the Commissioner is unable to characterise the provision of minutes containing the information requested as other than reasonable in the circumstances.
26. The Commissioner also acknowledges that had a similar request for information been received from someone who was not in Mr S' position, then the SCCRC could have withheld the information under section 25(1) of FOISA, on the basis that it was available through the SCCRC's publication scheme. In this case, to the extent that the SCCRC recognised Mr S did not have access to the internet and provided him with copies of the minutes without charge, the Commissioner is satisfied that it complied with its duty to provide advice and assistance under section 15(1) of FOISA.

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 S.



Appeal

Should either Mr S or the Scottish Criminal Case Review Commission 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.

Margaret Keyse
Head of Enforcement
10 August 2012



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.
- ...
- (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.

11 Means of providing information

- (1) Where, in requesting information from a Scottish public authority, the applicant expresses a preference for receiving it by any one or more of the means mentioned in subsection (2), the authority must, so far as is reasonably practicable, give effect to that preference.
- (2) The means are-
- (a) the provision to the applicant, in permanent form or in another form acceptable to the applicant, of a copy of the information;
 - (b) such provision to the applicant of a digest or summary of the information; and
 - (c) the provision to the applicant of a reasonable opportunity to inspect a record containing the information.
- ...
- (4) Subject to subsection (1), information given in compliance with section 1(1) may be given by any means which are reasonable in the circumstances.
- ...



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.

...

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.