

Decision Notice



Decision 092/2011 Dr X and the Scottish Ministers

Correspondence with the University of Edinburgh and the Scottish Public Services Ombudsman

Reference No: 201100338
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Scottish Information Commissioner

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Summary

Dr X asked the Scottish Ministers (the Ministers) for details of correspondence exchanged between the First Minister or the Minister of Education (the Cabinet Secretary for Education and Lifelong Learning) and the University of Edinburgh or the Scottish Public Services Ombudsman (the SPSO), since June 2009.

The Ministers refused to comply with Dr X's request on the grounds that the cost would exceed the sum of £600 prescribed for the purposes of section 12(1) of the Freedom of Information (Scotland) Act 2002 (FOISA).

After investigation, the Commissioner found that it would cost more than £600 to provide the information covered by the terms of Dr X's request, and therefore that the Ministers were not obliged to comply with the request under FOISA. He was satisfied that the Ministers had provided reasonable advice and assistance to Dr X in making the request, and had therefore complied with section 15 of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (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 31 January 2011, Dr X sent an email to the Ministers asking for “the dates, subjects and description of the correspondences the First Minister and Minister of Education have exchanged with the University of Edinburgh or the SPSO ... since June 2009.” Dr X also asked for the number of pages involved, and provided a template of a table which could be completed with the requested information.



2. On 3 February 2011, the Ministers wrote to Dr X in relation to this request. The Ministers referred to earlier correspondence in which they had explained why information previously requested by Dr X could not be identified or located without some further information, and why the Ministers were unable to provide a description of the information falling within the scope of the previous request without that information. The Ministers advised that the same difficulties (which had included the cost of identifying and locating the information) applied in relation to the request of 31 January 2011, and asked Dr X to provide the additional information they had asked for so that they could respond to that request.
3. On the same day, 3 February 2011, Dr X wrote to request a review of the Ministers' response. Dr X did not accept that there was any need to provide additional information to enable the Ministers to respond to the request as submitted.
4. After some further correspondence between the Ministers, Dr X and the Commissioner's office, the Ministers wrote to Dr X on 17 March 2011 with the outcome of their review. The Ministers accepted that they should have made a decision on Dr X's request without seeking further clarification of the request. The Ministers advised Dr X that the cost of complying would exceed the upper limit of £600 prescribed in the Fees Regulations, and so they were not obliged to comply with the request. The Ministers advised that the cost might be reduced if Dr X were able to identify the subject(s) of the correspondence that Dr X wished to obtain.
5. Dr X remained dissatisfied with the Ministers' response, and applied for a decision from the Commissioner on 17 March 2011.
6. The application was validated by establishing that Dr X had made a request for information to a Scottish public authority and had applied for a decision from the Commissioner, in terms of section 47(1) of FOISA, only after asking the authority to review its response to that request. The case was allocated to an investigating officer.

Investigation

7. On 21 March 2011, the Ministers were notified in writing that an application had been received from Dr X and were invited to provide comments on Dr X's application (as required by section 49(3)(a) of FOISA).
8. The Ministers were asked to provide information which would enable the Commissioner to determine whether the cost of complying with Dr X's request of 31 January 2011 would exceed £600. This included information about the types of searches which could be carried out on the Scottish Government's electronic records system; whether it was possible to retrieve correspondence by searching for the names of the correspondents; whether the Ministers had attempted such a search; and an estimate of the time that would be required to review each record held for the period June 2009 – 31 January 2011 in order to establish whether it fell within the scope of Dr X's request.



9. The Ministers responded on 21 April 2011. Their response is discussed in full in the next part of this decision notice, but, in summary, they presented arguments to support their view that it would cost over £600 to provide Dr X with the information requested.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the submissions which have been presented to him and is satisfied that no matter of relevance has been overlooked.

Scope and nature of the request

11. The Ministers explained to the Commissioner that they had initially assumed that Dr X's request was for correspondence relating to Dr X. Dr X had previously requested all correspondence which the First Minister's office and Minister of Education had exchanged with the University of Edinburgh and/or other third parties, if any, "related to me". The Ministers had treated this earlier request as a subject access request under the Data Protection Act 1998; however, Dr X had pressed for it to be dealt with under FOISA (as considered in *Decision 078/2011 Dr X and the Scottish Ministers*). On 31 December 2010, Dr X had submitted another request phrased in very similar terms, again specifying that the request was for information relating to Dr X.
12. Dr X's request of 31 January 2011, which is the subject of this decision, was expressed in broadly similar terms but this time did not specify that the correspondence should relate to Dr X. However, given their ongoing correspondence, the Ministers believed it was reasonable to assume that this request was a further attempt to obtain information about Dr X. The Ministers had therefore explained again that if the request was for Dr X's own personal data, it would have to be considered under the DPA, while advising that if Dr X wanted general correspondence, Dr X should specify the subject matter in which Dr X was interested to keep the costs involved in identifying and locating the information within the £600 limit.
13. The request of 31 January 2011 did not specify that Dr X was seeking information relating to Dr X, and Dr X has since made it clear that the terms of the request should stand unamended. The request must therefore be understood to cover details of all correspondence between the parties named in the request during the period from June 2009 to the date on which the request was received, regardless of its subject. The Commissioner will therefore consider whether the Ministers were justified in refusing to comply with the request on the grounds that to do so would cost more than £600, the maximum amount permitted by the Fees Regulations.



Section 12 – Excessive cost of compliance

14. Section 12(1) provides that a Scottish public authority is not obliged to comply with a request for information where the cost of doing so (on a reasonable estimate) 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. The Commissioner has no power to require the release of information should he find that the cost of responding to a request for information exceeds this amount.
15. The projected costs the public 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 public 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 set at £15 per hour.
16. Dr X asked for the date, subject and description of the correspondence between the specified parties, and the number of pages involved. The Ministers advised Dr X that it would be necessary to review all records held by them for the period covered by the request, in order to provide this information. Documents were indexed according to their subject matter, not by the names of correspondents. It would therefore not be possible to identify and locate information by a search using only the names of individuals or organisations, and, instead, each record would have to be physically reviewed.
17. During the investigation, the Ministers explained that for the most part, the title used to index the document is added by the person creating the document, drawing upon their own knowledge of the subject of the document and using their own preferred terminology. The Ministers provided examples of the indexing variations which could result. Searching for “University of Edinburgh” had retrieved 2061 records, while “Edinburgh University” had retrieved 1071 records, and “UoE” another 94.
18. The Ministers also demonstrated some of the difficulties encountered in retrieving correspondence from or to the First Minister or the Cabinet Secretary for Education and Lifelong Learning (described as the Minister of Education in Dr X’s request). A search for records with the keywords “First Minister” or “FM” had in each case returned more than 3000 records, with the system “unable to return full search results within search time parameters”. It was noted that staff working to the Cabinet Secretary might also use “CS”, “CabSec”, “Minister”, “Surname”, or no Ministerial prefix in document titles.
19. The Commissioner accepts that it is not possible to search the Ministers’ records management system using a controlled indexing vocabulary; it is therefore not possible to be sure that all records relevant to Dr X’s request would be returned by carrying out keyword searches on the system as it is not known which indexing terms were used in creating the record. In order to be completely certain that all relevant records had been retrieved, the Commissioner accepts that all records added to the Ministers’ record management system between June 2009 and 31 January 2011 would have to be individually reviewed by staff.



20. The Ministers were unable to say how many records had been added during the period specified in Dr X's request, but advised that approximately 12 million records had been created since 2006. On the basis of this evidence, the Commissioner accepts that it would cost more than £600 to review every record from the period June 2009 to 31 January 2011, and that the Ministers were therefore not obliged to comply with Dr X's request under FOISA.
21. The Commissioner notes that the Ministers have provided evidence that it would cost them more than £600 to review even the 3226 records relating to the University of Edinburgh which were identified in the searches described in paragraph 17.

Section 15 – duty to advise and assist

22. Having established that the Ministers were correct to rely on section 12(1) of FOISA in relation to Dr X's request, the Commissioner has also considered whether the Ministers complied with the duty to advise and assist Dr X prescribed by section 15 of FOISA.
23. The Commissioner notes that the Ministers previously advised Dr X (email of 31 January 2011) that restricting the request to correspondence with either the SPSO or the University of Edinburgh, or restricting it to a shorter time period, would be unlikely to bring it within the cost limit because the Ministers would still need to search through all the records for that particular period. The Ministers' advice to Dr X was to specify the subject(s) of the correspondence that Dr X was interested in, which would enable them to limit the search parameters and reduce the associated costs.
24. The Commissioner accepts that the Ministers offered Dr X reasonable advice and assistance in relation to reducing the cost of the request, given that the electronic records management system used by the Scottish Government is set up and indexed in a way best suited to searching for documents by subject, rather than date or author/recipient (and given also the broad-ranging nature of this particular request – other search parameters may still be appropriate in cases more limited in their scope). The Commissioner therefore finds that the Ministers complied with section 15 of FOISA when responding to Dr X's request.

DECISION

The Commissioner finds that the Scottish Ministers complied with the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Dr X.



Appeal

Should either Dr X or the Scottish Ministers 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
19 May 2011



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.

...

- (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.

...

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).



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.