

Decision Notice 118/2020

Fitness to Teach and competency hearings

Applicant: The Applicant

Public authority: General Teaching Council for Scotland

Case Ref: 201902291



Scottish Information
Commissioner

Summary

The GTCS was asked to provide information relating to all proceedings for Fitness to Teach and competency hearings disposed of since January 2012.

GTCS refused to provide the information covered by the request as it considered the cost of doing so would exceed the statutory maximum.

The Commissioner investigated and found that the GTCS was entitled to refuse to respond to the Applicant's request on cost grounds. However, while he accepted that the GTCS took some steps to comply with its duty to provide advice and assistance, he found that it should have offered the Applicant the opportunity to restrict the timescale of his request. The Commissioner required the GTCS to give the Applicant advice and assistance about what information it could provide within the cost limit, to assist him in submitting a new request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 9 October 2019, the Applicant made a request for information to the General Teaching Council for Scotland (the GTCS). He asked for copies of all proceedings for Fitness to Teach and competency hearings disposed of by the GTCS since January 2012, to include all published and archived cases, with complete documentation of the proceedings. He asked that information be provided in paper form, with a backup CD or memory stick.
2. The GTCS wrote to the Applicant on 18 October 2019, requesting clarification, specifically as to whether the Applicant:
 - (i) was asking for the outcome of Fitness to Teach hearings, or also the underlying evidence and information related to the cases, and
 - (ii) required the information to include procedural hearing outcomes and provisional registration related competence cases.
3. In an email response dated 21 October 2019, the Applicant explained that the request was for all cases dealt with under competency and Fitness to Teach from January 2012, including all documentation from referral until conclusion, as published on the website and archived after three months.

4. A response was provided by the GTCS on 22 October 2019, commenting that it was still not entirely clear what the scope of the request was but, in an effort to avoid any further delay, it had made a reasonable interpretation of what it understood the Applicant to be requesting.
5. From the information provided, the GTCS interpreted the request as seeking all information held for all Fitness to Teach cases (competence and conduct related) it had investigated and determined from 1 January 2012 to date. The GTCS indicated that it was refusing to comply with the Applicant's request in terms of section 12(1) of FOISA, as to do so would cost in excess of £600. The GTCS provided a breakdown of how it arrived at this cost.
6. In terms of its duty to provide advice and assistance under section 15 of FOISA, the GTCS explained that decisions reached on Fitness to Teach cases (resulting in either a full public hearing or a consent order) are published on its website for a period of three months. It noted that recent decisions could be accessed from a link, provided in its response, for a period of one month and past decisions remained on the website for the months (the Applicant was provided with a link to access these, too).
7. On 24 October 2019, the Applicant wrote to the GTCS requesting a review of its decision. He confirmed that his request related to the cases published on the GTCS website and then archived. As the information had already been placed in the public domain, he could see no reasonable grounds for refusing to provide it.
8. The GTCS notified the Applicant of the outcome of its review on 20 November 2019. It acknowledged that the Applicant was only seeking information about cases published on its website. It explained that cases removed from the website were removed completely and not held in any kind of archive where they could be retrieved electronically. It explained the steps required to retrieve the information, confirming that it still considered the £600 limit would be exceeded and therefore section 12(1) of FOISA applied.
9. On 23 December 2019, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the GTCS's review because he did not agree with the amount of work the GTCS claimed would be required. In his view, the documents in question should have been in a state fit for publication and therefore further redactions should not be required, referring also to what he believed to be a public interest in disclosure.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
11. On 10 January 2020, the GTCS was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The GTCS was invited to comment on this application and to answer specific questions. These related to its reliance on section 12(1), including any requirement to redact information from the cases in question.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the GTCS. He is satisfied that no matter of relevance has been overlooked.
14. As noted above, the GTCS withheld the information on the basis that the cost of locating, retrieving and providing this to the Applicant would exceed £600, with the result that section 12(1) of FOISA applied.

Section 12(1) – Excessive cost of compliance

15. Section 12(1) of FOISA 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 (regulation 5 of the Fees Regulations). Consequently, the Commissioner has no power to require the disclosure of information should he find that the cost of responding to a request for information exceeds this sum.
16. 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 in accordance with Part 1 of FOISA. The public authority may not charge the cost of determining whether it actually holds the information requested, or whether it should provide the information. The maximum rate a Scottish public authority can charge for staff time is £15 an hour.
17. In terms of the GTCS's position that it would cost in excess of £600 to fulfil the Applicant's request, the Commissioner will firstly consider the costs that the GTCS argues it would incur in the process of locating and retrieving the requested information.

Location and retrieval of information

18. The GTCS explained that its submissions were based on the narrowest interpretation of the Applicant's request, that being "all documentation from referral until its conclusion as published on the website". The GTCS commented that this related to decisions published on its website and did not include Fitness to Teach investigation documents or any other documents not published on the website.
19. The GTCS perceived a misunderstanding on the part of the Applicant that all information relating to a Fitness to Teach investigation was published on its website, when this was not the case. It submitted that not all decisions had been published on its website, only those concluded at the hearing stage or where a consent order had been accepted at an earlier stage.
20. The GTCS submitted that locating and retrieving the information covered by the request would not be a simple process. It provided the Commissioner with a step-by-step description of the actions needed.
21. The GTCS commented that, in order to be able to locate and retrieve the information covered by this request, it would have to interrogate all Fitness to Teach case files it held: it had no means of filtering cases by outcome/disposal, date or by concluded cases. In order to identify relevant cases dating from 2012-2015, it would have to interrogate 4,753 case files. These would then have to be examined further to determine if the outcome was ultimately

published and when this took place (as noted above, not all decisions made by GTCS are published on its website). Where the decision had been published, each sub-folder within each case file would have to be reviewed to identify the information to be retrieved.

22. Since 2015, the GTCS has recorded data relating to Fitness to Teach cases on a spreadsheet, which, it stated, would assist it in identifying cases from 2015-2020 which led to a published decision. It would then be able to retrieve the relevant information from the individual case files concerned.
23. The GTCS submitted that, on average, it would take 15 minutes per file to complete the task of locating and retrieving the information.
24. Because of the level of knowledge that would be needed regarding the file structures in place within the GTCS, the terminology and procedures used, and also the documentation concerned, the GTCS explained that a senior administrator or Regulation Officer would need to undertake the work of locating and retrieving the relevant information. These actions would therefore be charged at £11.83 per hour.
25. Taking account of all of the actions that would have to be undertaken to locate and retrieve information falling within the scope of the Applicant's request, together with the number of case files involved, all of which the Commissioner accepts as reasonable in the circumstances, the Commissioner is satisfied that the cost of complying with the Applicant's request, in terms of simply locating and retrieving the information, would exceed £600.
26. The GTCS provided a separate calculation for the steps it would need to take to be able to produce the information to fulfil the Applicant's request. As the Commissioner has found that the cost of carrying out the steps to locate and retrieve the information would exceed £600, he will not go on to consider the costs associated with producing the information to fulfil the request. Nor will he go on to consider whether the GTCS would be entitled to rely on the exemption in section 38(1)(b) (Personal information) of FOISA for redacting certain of this information.
27. The Commissioner therefore finds, in line with section 12(1) of FOISA, that the GTCS was not obliged to comply with the request.

Section 15 – Duty to provide advice and assistance

28. Section 15 of FOISA requires a Scottish public authority, as far as is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
29. Where section 12(1) is engaged, the need for advice and assistance is crucial to the process of refining requests: a requester will not necessarily know how information is structured within a given authority, or the volume of information held in relevant systems, when framing a "narrowed" request, unless the authority advises them accordingly. The section 15 duty goes hand in hand, therefore, with section 12(1).
30. In its submissions to the Commissioner, the GTCS explained that it had made several attempts to clarify the scope of the Applicant's request and identify the information he was seeking, so it eventually sought advice from the Commissioner's office and looked to arrive at what it considered to be a reasonable interpretation of the request made.
31. The GTCS noted that, in its response letter of 22 October 2019, it had directed the Applicant to decisions available on its website.

32. Given the considerable scope of the Applicant's request, the GTCS considered it was unable to provide guidance on how he could reduce the scope to enable it to fall within the cost limit. In these situations, it stated that its usual practice was to provide the requester with advice, to enable them to consider how they might be able to re-frame the scope of their request. In this case, however, the request was so large would involve such a significant amount of resource that it was not possible to do so.
33. While preparing its submissions for the Commissioner, however, the GTCS considered what cost would be involved in responding to a request for the same information over a specified year's timescale. In doing so, the GTCS provided a breakdown which concluded that the cost of doing this would be below the cost limit: in the circumstances, it would be looking for the Applicant to pay a charge for this information, in accordance with the Fees Regulations.

Conclusions

34. The Commissioner accepts that the GTCS took reasonable steps, following receipt of the request, to clarify the scope of the information that the Applicant was seeking. He also acknowledges, given the number of cases covered by the timescale of the request, that it would be difficult to assist the Applicant in narrowing the scope of the request.
35. That said, it is evident from the GTCS' submissions that it is possible for it to provide some information under the cost limit. For this reason, the Commissioner considers that it could have given the Applicant the option of, and advice around, reducing the scope of his request to cover a more restricted timescale.
36. The Commissioner therefore finds that the GTCS failed to comply fully with the duty under section 15 of FOISA to provide advice and assistance, and requires the GTCS to inform the Applicant of what information it could provide within the cost threshold, to assist him in submitting a new request should he wish to.

Decision

The Commissioner finds that, in respect of the matters specified in the application, the General Teaching Council for Scotland (the GTCS) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant, in particular by refusing to comply with the request on the basis that section 12(1) of FOISA applied.

The Commissioner is not satisfied, however, that the GTCS met its duty to provide advice and assistance fully in responding to the request and requirement for review, as required by section 15(1) of FOISA.

The Commissioner therefore requires the GTCS to inform the Applicant of what information it could provide within the cost limit, to assist him in submitting a new request should he wish to, by 16 November 2020.

Appeal

Should either the Applicant or the GTCS wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the GTCS fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the GTCS has failed to comply. The Court has the right to inquire into the matter and may deal with the GTCS as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

2 October 2020

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.

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