

Decision Notice



Decision 145/2013 Mr Tom Gordon and the Scottish Ministers

Whether request is vexatious

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Summary

On 7 August 2012, Mr Gordon asked the Scottish Ministers (the Ministers) for all agenda items contained in meetings of the Scottish Cabinet since 2007. The Ministers refused to comply with the request on the basis that they considered it vexatious.

Following an investigation, the Commissioner found that the Ministers were entitled to adopt this approach in the circumstances.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 14(1) (Vexatious or repeated requests)

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 7 August 2012, Mr Gordon wrote to the Ministers, requesting the following information:
“... all items of information contained in all agendas for all meetings of the Scottish cabinet since 2007.
Please note, this is not a request for cabinet papers or cabinet minutes, simply cabinet agendas.”
2. The Ministers responded on 3 September 2012. The Ministers informed Mr Gordon that they considered the request to be invalid. In their view, it did not (in terms of section 8(1)(c) of FOISA) clearly identify the particular information being sought.



3. This response was ultimately the subject of an application for a decision from the Commissioner. In *Decision 207/2012 Mr Tom Gordon and the Scottish Ministers*¹, the Commissioner concluded that Mr Gordon's request was valid and required the Ministers to review their handling of his request.
4. On 25 January 2013, the Ministers responded to Mr Gordon's requirement for review as required by the Commissioner's decision. The Ministers now informed Mr Gordon that they considered the request to be vexatious in terms of section 14(1) of FOISA.
5. On 29 January 2013, Mr Gordon wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' 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 Gordon 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. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. The Ministers were asked to justify their reliance on section 14(1) of FOISA and to explain in detail why they considered the request to be vexatious. The investigating officer also asked the Ministers to supply a representative sample of Cabinet agendas.
8. The Ministers subsequently responded to the investigating officer providing their explanation of why they considered Mr Gordon's information request to be vexatious. The Ministers also provided a sample of Cabinet agendas over the period 2007 to 2012.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to her by both Mr Gordon and the Ministers. She is satisfied that no matter of relevance has been overlooked.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201202044.aspx>



Section 14(1) – vexatious requests

10. Under section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information made under section 1(1) if the request is vexatious.
11. FOISA does not define the word “vexatious”. The Commissioner has published guidance on section 14 of FOISA² where she sets out her view on factors which she considers relevant to a finding that a request is vexatious. These are:
 - it would impose a significant burden on the public authority;
 - it does not have a serious purpose or value;
 - it is designed to cause disruption or annoyance to the public authority;
 - it has the effect of harassing the public authority;
 - it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

This is not an exhaustive list. Depending on the circumstances (and provided the impact on the authority can be supported by evidence), other factors may be relevant.

12. The term “vexatious” must be applied to the request, not the requester. It is not the identity of the applicant that determines whether a request is vexatious, but the nature and effect of the request made in the light of the surrounding circumstances.
13. The Ministers submitted that complying with the terms of the request would impose a significant burden on them. Additionally, the Ministers considered that the request lacked serious purpose or value and was manifestly unreasonable.
14. The Ministers noted that, in the time period covered by the request, the Scottish Cabinet had met 211 times and that 981 separate Cabinet papers were considered with the full, descriptive title of each listed in the weekly agenda paper. Of these items, 559 were “substantive” rather than “standing” agenda items.
15. The Ministers stated that the purpose of the Cabinet agenda paper is to provide Ministers and senior officials with a detailed and timely outline of forthcoming Cabinet business so that Cabinet members can prepare an effective contribution to the collective discussion.

² <http://www.itspublicknowledge.info/uploadedfiles/BriefingSection14VexatiousorRepeatedRequests.pdf>



16. The Ministers also referred to the principle of collective responsibility and the Guide to Collective Decision-Making (the Guide).³ The Ministers noted that the Guide provides (at paragraph 4.28) that Cabinet papers (including minutes and agendas) should never be made public and that they should be distributed strictly in accordance with the “need to know” principle. They also noted that the Guide states (at paragraph 4.29) that Ministers and officials should not normally disclose publicly whether or not a matter has been discussed by the Cabinet. Additionally, they noted that the Guide states (at paragraph 4.31) that the working assumption is that the proceedings of the Cabinet are exempt from disclosure under FOISA, subject to the public interest test.
17. In the Ministers’ view, Cabinet agenda papers, just as much as the substantive papers which they list, are drafted on the basis of the working assumption that they will not be disclosed until a significant amount of time has elapsed. They submitted that these papers form an essential, practical tool to inform and assist collective discussion in the private space which Ministers need in order to reach agreed positions, and that a request for their wholesale release should be considered in this light.

Significant burden

18. The Ministers submitted that complying with the request would impose a significant burden on them. They explained that they had undertaken an analysis of the number of items that would have to be reviewed in order to comply with the request and the burden that this would impose.
19. The Ministers explained that there were an average of 2.6 “substantive” items on each agenda paper (i.e. non standing agenda items). The Ministers submitted that the title of each of the 559 substantive items would have to be reviewed individually in order to identify and redact any exempt information that they may contain. The Ministers explained the steps that they would have to take in order to carry out this process. This comprised:
- locating and reviewing the relevant Cabinet paper
 - considering whether the paper related to a policy issue that was still “live”
 - determining whether any FOISA exemptions applied
 - identifying the policy team concerned
 - writing to the policy team requesting that they review the Cabinet paper to establish the effect of disclosing its title and confirming whether they agree that FOISA exemptions should apply
 - the policy team reviewing the paper, considering if FOISA exemptions apply and drafting contributions to the response
 - considering the response from the policy team and resolving any queries and chasing any late responses
 - if an exemption applies, redacting the title of the paper and recording the reasons.

³ <http://www.scotland.gov.uk/About/People/14944/686>



The Ministers considered a high proportion of individual titles would require review and analysis by the policy team concerned before it could be determined whether a title could be released.

20. The Ministers estimated that consideration of each substantive agenda item would require between five and 90 minutes depending on their complexity and the issues raised. Consequently, the Ministers estimated the total time necessary for the exercise might be several weeks. The Ministers also stated that around one third of that time would be spread across different policy teams; the remaining two thirds would have to be found from within the Cabinet Secretariat. This would mean diverting a suitably qualified member of staff from their normal duties within a small team for an extended period.
21. To explain why all of the work described above would be necessary, the Ministers outlined the types of information that would have to be redacted, or considered for redaction.
22. Firstly, the Ministers considered the detail of some entries and Cabinet paper titles might reveal information about the nature of Ministers' discussions about particular issues and had the potential to undermine the convention of collective responsibility. Additionally, disclosure of the titles could anticipate an official announcement of a new policy or a change in policy. This could breach Parliamentary procedures that require major policy announcements to be made to the Scottish Parliament in the first instance.
23. The Ministers also stated that the principle of collective responsibility provides that disclosure of internal discussions amongst Ministers, or the fact that such discussions were taking place, might undermine the Government's position and the effectiveness of the policy or decision concerned. The Ministers stated that this would require a case by case consideration.
24. The Ministers considered that disclosure of certain information falling within the responsibility of individual Ministers might suggest uncertainty in the mind of the Ministers concerned. Additionally, it might lead to speculation that the matter had inspired some disagreement among Cabinet members.
25. In the Ministers' view, the fact that a particular decision was being considered at a given meeting constituted a form of Ministerial advice and was part of a decision making process that was incomplete. In their opinion, it could also comprise communications between Ministers.
26. In the Ministers' view, the number of times that a particular issue appears on an agenda over a given period may suggest (rightly or wrongly) that Ministers have had difficulty agreeing their position on an issue, or imply that an issue was of greater importance than it actually was. Conversely, if an item appeared on only one or two occasions, it may give the opposite impression. Either could undermine the convention of collective responsibility or the Ministers' eventual agreed policy position.



27. The Ministers considered the dates on which particular issues did, or did not, appear on agendas could be significant, particularly when comparing a series of agendas with issues which were a matter of public debate at the same time. Additionally, items may have been discussed under the standing items of Parliamentary business, SCANCE (Scottish Government Analysis of News and Events) or any other business. Consequently, an agenda could give the impression that an item had not been discussed when, in fact, it may have taken up much of a meeting. This could potentially give a misleading impression of the significance attached to a particular issue.
28. The Ministers noted that papers are issued in the name of particular Ministers and the titles therefore provide a clear insight into the sorts of issues which those Ministers wish to draw to the attention of their colleagues at a particular time. The Ministers considered that disclosure of the titles of papers would be easily identifiable with a Ministerial portfolio. This could permit a comparison of the numbers and types of issues which Ministers brought to their colleagues' attention, thereby detracting from the principle of collective responsibility.
29. Finally, the Ministers stated that certain entries may suggest or reveal that the Law Officers' advice was sought or obtained on particular issues. This would breach the Law Officer convention of the Scottish Ministerial Code.
30. In his application to the Commissioner, Mr Gordon noted that the Ministers had not cited section 12 of FOISA (excessive cost of compliance) and had not provided him with a breakdown of staff costs and staff time. He considered this significant. Mr Gordon also disputed the Ministers' reasons for asserting that the request was vexatious.
31. The Commissioner's briefing on section 14 of FOISA indicates that a request will impose a significant burden on a public authority where dealing with it would require a disproportionate amount of time and the diversion of an unreasonable proportion of its financial and human resources away from other statutory functions.
32. The Commissioner has considered carefully the Ministers' submissions regarding the impact of the request on their resources and the potential cost of deciding whether the information can be disclosed.
33. The Commissioner notes that the time and expense claimed by the Ministers in responding to the request is predominantly related to their consideration of whether any exemptions are applicable to the information. The Ministers have accepted that they would have little difficulty in locating and retrieving the information sought by Mr Gordon.
34. Accordingly, it would not have been appropriate for the Ministers to claim that the cost of complying with the request would be excessive in terms of section 12 of FOISA. This is because the costs which would be incurred in deciding whether information was exempt from disclosure under any of the exemptions in Part 2 of FOISA could not be taken into account by the Ministers in estimating projected costs under the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004.



35. However, it is legitimate for the Ministers to consider the time and expense incurred in analysing whether any exemptions are applicable to the information in the context of deciding whether a significant burden would be imposed on them as a consequence.
36. In this case, the Commissioner accepts that reviewing the number of agenda titles covered by the terms of Mr Gordon's request would take a significant amount of time. In this case, the Commissioner has also been mindful of the sensitivity of the information under consideration. This is particularly significant in the context of the convention of the collective responsibility of the Scottish Ministers.
37. She also accepts that the majority of the work would have to be undertaken by a limited number of staff in small teams within the Scottish Government. The Commissioner accepts that this would make it particularly onerous for these teams to carry out their other activities whilst diverting resources to the detailed examination of the information sought by Mr Gordon.
38. The Commissioner is satisfied that the Ministers have established that disproportionate resources would have to be diverted to respond to Mr Gordon's request. Accordingly, she is satisfied that compliance with the request would impose a significant burden and that the sensitivity of the information under consideration contributed appreciably to that significant burden.

Lacking serious purpose or value

39. The Ministers submitted that Mr Gordon had made no attempt to explain what he was trying to find out. In their view, such a broad, unfocussed request was an attempt to generate a news story, rather than a genuine attempt to obtain specific information. In the Ministers' view, there were a variety of publicly available sources from which Mr Gordon could have obtained the information he might be looking for, either on specific issues or on particular Cabinet meetings. These included weekly media briefings, news releases, Ministerial speeches and statements, Scottish Government consultations and publications and the Parliamentary business pages of the Scottish Parliament website. In their view, it was difficult to see what additional information could usefully be obtained by requesting all of the information in Cabinet agendas covering a period of over five years.
40. The Commissioner disagrees with the Ministers' assertion that the request lacks serious purpose or value. In the Commissioner's view, in order to conclude that a request was vexatious, it would have to be so obviously lacking in serious purpose or value that it could only be seen as vexatious. In this case, the Commissioner cannot accept that the examination of topics under discussion by the Scottish Government by a political journalist (or indeed any member of the public) lacks serious purpose or value. On the contrary, she considers there is clearly a serious purpose in Mr Gordon's request.



Manifestly unreasonable

41. The Ministers submitted that it was manifestly unreasonable to ask for all information in all Cabinet agendas over such a long period. In their view, collating and reviewing the agendas would take up a disproportionate amount of time and resources which would disrupt the work of the Cabinet and Corporate Business Support Directorate. This would have an impact on its ability to provide proper support to the Cabinet and its sub-committees. In the Ministers' view, the request was neither reasonable nor proportionate.
42. In this case, the Commissioner accepts that Mr Gordon's request should be considered to be manifestly unreasonable. As noted above, she considers the resources required to examine the information sought by Mr Gordon and to formulate a view on whether it could be disclosed under FOISA are disproportionate. In the Commissioner's view, the request is manifestly unreasonable due to the disproportionate effect of the significant burden that complying with the request would impose on the Ministers.

Conclusion

43. As noted above, whilst the Commissioner disagrees that the request lacks serious purpose or value, she has concluded that complying with the request would impose a significant burden on the Ministers and would be manifestly unreasonable and disproportionate. The Commissioner does not consider that it is necessary for all of the relevant factors cited by an authority to be engaged in order for the request to be vexatious. On balance, she considers the arguments advanced by the Ministers are persuasive and has concluded that the Ministers are not obliged to comply with Mr Gordon's request given that, in line with section 14(1) of FOISA, the request was vexatious.

DECISION

The Commissioner finds that the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Gordon.



Appeal

Should either Mr Gordon 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.

Rosemary Agnew
Scottish Information Commissioner
22 July 2013



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.

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.

...