

Decision Notice



Decision 147/2013 Ms Jackie Baillie MSP and the Scottish Ministers

Complaints about waiting times

Reference No: 201300573
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Scottish Information Commissioner

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Summary

On 5 December 2013, Ms Jackie Baillie MSP asked the Scottish Ministers (the Ministers) for complaints about waiting times to the Cabinet Secretary for Health and Wellbeing. The Ministers withheld the information on the basis that it would cost more than £600 to comply with Ms Baillie's request (section 12 of FOISA).

The Commissioner accepted that the costs would exceed the £600 threshold and that the Ministers were entitled not to comply with the request. However, she also found that the Ministers failed to comply with the statutory timescale for responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 10(1)(a) (Time for compliance); 12(1) (Excessive cost of compliance)

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 5 December 2012, Ms Baillie wrote to Ministers with the following request:
"All complaints made by MSPs, employees or the public about waiting times to the Cabinet Secretary for Health & Wellbeing for the period a) 2010/11, b) 2011/12 and c) April 2012 to date."
2. The Ministers wrote to Ms Baillie on 15 January 2012 to explain there would be a delay in providing their response.
3. On 31 January 2013, Ms Baillie wrote to the Ministers requesting a review on the grounds that her request remained unanswered.



4. The Ministers notified Ms Baillie of the outcome of their review on 22 February 2013, explaining that, in terms of section 12 of FOISA, the costs of locating, retrieving and providing the information would exceed £600. (This is considered in more detail below.)
5. On 26 February 2013, Ms Baillie wrote to the Commissioner stating that she was dissatisfied with the outcome of 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 Ms Baillie 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 25 March 2013, the Ministers were notified in writing that an application had been received from Ms Baillie and were given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and to respond to specific questions. These questions focused on the cost of compliance with the request and how complaints are recorded, as well as technical aspects of the handling of Ms Baillie's request.

Commissioner's analysis and findings

8. In coming to a decision on this matter, the Commissioner has considered the relevant submissions, or parts of submissions, made to her by both Ms Baillie and the Ministers. She is satisfied that no matter of relevance has been overlooked.
9. Ms Baillie's application raised concerns about the time taken to respond to her request and the failure to provide the requested information. She also made it clear that she did not consider the cost of providing the information would exceed the £600 limit.

Section 12(1) excessive cost of compliance

10. 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 in terms of regulation 5 of the Fee 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 that the authority can take into account in relation to a request for information are, according to regulation 3 of the Fee 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 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. Ms Baillie was told in the review decision that the Cabinet Secretary receives a very high volume of correspondence, with letters often covering multiple topics. She was informed that, where waiting times were not the primary topic raised in the correspondence, it would be hard to identify all letters containing references to that subject. To search every single piece of correspondence received by the Scottish Government would clearly exceed £600. In her application to the Commissioner, Ms Baillie queried whether retrieval of the information she sought would exceed £600.
13. The investigating officer asked the Ministers to explain why it would be necessary to search all correspondence held by the Scottish Government in order to retrieve the information covered by Ms Baillie's request. The Ministers were asked to provide detailed explanations of the search functions available for paper and electronic record systems, and to explain how complaints are recorded within the Scottish Government.
14. The Ministers explained that, in addition to information held by the Health Workforce and Performance Management team, there are a considerable number of waiting time targets across a number of Directorates (covering accident and emergency, mental health, cancer, IVF, drug and alcohol treatments as well as access to primary care). The search facility in the MACCS (Ministerial Correspondence system) was not capable of identifying all the information falling within the scope of MS Baillie's request.
15. Specifically, the Ministers explained that the naming convention used in the MACCS system is based upon the wording which appears in the first couple of sentences in a letter or complaint. For example, if someone writes "I would like to complain about orthopaedic services in Edinburgh", the term "orthopaedic services in Edinburgh" would be used to record this correspondence in MACCS. If the same letter went on to specify that the complaint related to the waiting times for orthopaedic treatment, this would not be reflected in the MACCS naming convention. In this example, the complaint about waiting times could not be discovered other than by reading the contents of the letter.
16. Another example put forward by the Ministers was where a letter covered a number of topics. For example, if a letter covered the subjects of transport and waiting time issues, the MACCS system would only reflect the first topic to appear in the letter, in this case "transport". The letter would not be retrieved through a search for correspondence about waiting times, because of the naming convention used in creating the record relating to the letter.
17. For these reasons, the Ministers considered it would be necessary to search all Ministerial correspondence to retrieve the information covered by Ms Baillie's request.



18. The Ministers indicated there were around 2,000 items of correspondence per year, making a total of 6,000 for the 3 years covered by Ms Baillie's request. Besides reviewing each piece of correspondence, officials would be required to copy letters containing relevant information and redact personal information. In a test, the Ministers found that 120 letters could be trawled in a day (i.e. reading and identifying correspondence containing waiting times complaints information). The Ministers calculated that the cost per day would be £108.60 for an official working at a staff rate of £15 per hour over 7 hours and 24 minutes (a working day). If only 120 letters could be processed in a day, it would require 50 days work to go through 6,000, and would cost £5,430 to comply with the request.
19. In light of these issues, the investigating officer asked the Ministers to provide more detail about keyword search facilities. The Ministers explained that they had carried out a keyword search for "waiting times" but this had resulted in a large amount of correspondence not specific to health service waiting times being returned in the search results. The Ministers confirmed that a search for information using date parameters was also possible.
20. The investigating officer asked what further advice the Ministers could give on reducing the cost of complying with Ms Baillie's request (other than reducing the time period covered by the request). The Ministers commented that no further advice on reducing costs could be provided, given all the issues outlined above.
21. The Commissioner has considered whether the costs could be brought within the £600 threshold, if staff employed on a lower hourly rate were used to carry out the search. However, it is clear that, even if savings could be made in areas such as the staff rates per hour, the costs remain substantially above the £600 threshold. The only way to reduce the cost of complying with the request would be to reduce the timescale by a substantial amount i.e. to the point where fewer than five days' worth or 600 letters were caught by the request; and even then, this would not take into account the time required to physically redact personal data.
22. Taking into consideration the terms of Ms Baillie's request and the manner in which information about correspondence is recorded by the Ministers, the Commissioner is satisfied that the cost of complying fully with the request would exceed £600.
23. Consequently, the Commissioner accepts that the Ministers were entitled to rely on section 12(1) of FOISA in relation to this request.
24. The Commissioner notes that the Ministers' response to Ms Baillie's request for review did not provide her with any details of the cost calculations specified above, nor was she informed what the specific issues were with the capture of information in the MACCS system. This would have helped Ms Baillie to understand the reasoning behind the Ministers' refusal of her request and may have removed the need for her to apply for a decision from the Commissioner.



Timescales

25. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt to comply with the request, subject to exceptions which are not relevant to this case.
26. The Commissioner finds that the Ministers failed to respond to Ms Baillie's request within 20 working days, as required in section 10(1) of FOISA. She does not require the Ministers to take any action in relation to this breach.

DECISION

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

The Commissioner finds that section 12(1) of FOISA was engaged in this case, but the Ministers failed to respond to Ms Baillie's request within the statutory timescale set out in section 10(1) of FOISA.

The Commissioner does not require the Ministers to take any action in relation to this breach.

Appeal

Should either Ms Baillie 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.

Margaret Keyse
Head of Enforcement
23 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.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

...

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.

...



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.