

Decision Notice

Decision 217/2016: Ms Kelly and VisitScotland

Trump International Golf Links Scotland

Reference No: 201601142

Decision Date: 7 October 2016



Scottish Information
Commissioner

Summary

On 6 April 2016, Ms Kelly asked VisitScotland for correspondence relating to Trump International Golf Links Scotland.

VisitScotland told Ms Kelly that complying with her request would cost in excess of the £600 limit (and so they were not obliged to comply). VisitScotland also offered to fulfil the request for a fee but Ms Kelly rejected the offer. She was dissatisfied with the lateness of VisitScotland's reply to her request and requirement for review.

Following an investigation, the Commissioner was satisfied that the costs did exceed £600. However, she found that VisitScotland had not complied with the statutory timescales in FOISA.

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); 15 (Duty to provide advice and assistance); 21(1) (Review by Scottish public authority)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Section 12 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 6 April 2016, following earlier related correspondence, Ms Kelly made a request for information to VisitScotland. The information requested was:
“... all correspondence your computers found when doing my initial search [i.e. in response to an earlier request] that pertain[s] to Trump's Menie course i.e. discounting Turnberry – for 2014 and 2015.”
2. VisitScotland responded on 13 May 2016, referring to the searches it had conducted previously and confirming that it still considered the request (although an attempt to narrow earlier requests) to be wide-ranging in scope. For the same reasons as communicated in relation to these earlier requests, it considered the £600 limit specified under section 12(1) of FOISA to apply to this request, with the result that it was not obliged to comply with the request. It offered to disclose information for £423, in line with the Freedom of Information (Fees for Disclosure under section 13) (Scotland) Regulations 2004 (the Section 13 Fees Regulations).
3. On 16 May 2016, Ms Kelly wrote to VisitScotland, requiring a review of its decision. She considered the costs quoted to be excessive, submitting that the terms of her request were, in her view, straightforward.

4. VisitScotland notified Ms Kelly of the outcome of its review on 16 June 2016. It accepted it could have given better advice on narrowing her request initially, but considered this had been done in subsequent correspondence. It reduced its fee to £237.50.
5. On 20 July 2016, Ms Kelly wrote to the Commissioner. She applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms Kelly stated she was dissatisfied with the outcome of VisitScotland's review because she believed that the reply was late and that the costs were "extraordinarily high". She was also critical of VisitScotland's advice and assistance during the handling of her request.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Ms Kelly made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 19 July 2016, VisitScotland was notified in writing that Ms Kelly had made a valid application.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. VisitScotland was invited to comment on this application and answer specific questions, including questions on its application of section 12(1) of FOISA and its associated provision of advice and assistance.

Commissioner's analysis and findings

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

Fees Notice

10. The Section 13 Fees Regulations 2004 allow a Scottish public authority to charge for the provision of information where it considers the £600 cost limit set under section 12(1) of FOISA to apply. Such a fee can only be charged with the agreement of the applicant.
11. In this case, it is clear that Ms Kelly does not wish to pay the fee proposed by VisitScotland, rejecting its conclusion that it would cost more than £600 to comply with the request. The question for the Commissioner, therefore, is whether VisitScotland was correct in its application of section 12(1) of FOISA.

Section 12(1) - Excessive cost of compliance

12. 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 Section 12 Fees Regulations. This amount is currently set at £600 (regulation 5). Consequently, the Commissioner has no power to require the disclosure of information should she find that the cost of responding to a request for information exceeds this sum.
13. The projected costs the public authority can take into account in relation to a request for information are, according to regulation 3 of the Section 12 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 whether it actually holds the information requested, or whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.

Searches/methodology

14. Ms Kelly submitted that VisitScotland was wrong to suggest it was not possible to do a search which omitted unwanted data. She also queried the efficiency of the searches, and search parameters. She felt the estimated fees were “extraordinarily high” and suggested that a simple search using a “minus” sign would reduce costs considerably.
15. VisitScotland did not attempt the “minus sign” search suggested by Ms Kelly. It submitted that such a search was a “generic approach that is not applicable to our [VisitScotland’s] mail system”. It confirmed it there was an existing search function built into the email software which it had used instead. It acknowledged this function was “quite limited” in capability (using only keyword searches, specific dates and from/to addresses). VisitScotland also noted there was the facility to remove some unwanted data, but confirmed that attempts to use this with specific keywords had not reduced the number of emails significantly.

Breakdowns of estimated costs

16. VisitScotland originally estimated that it would require at least 53 hours work at £15 per hour to respond to Ms Kelly’s request. Visit Scotland’s calculation was based on the following methodology and estimated costs:

Step 1 – A member of the IT team would need to “clone” all the mailboxes to isolate them from the live system before searching them. This was estimated at two hours work, at £15 per hour. The total cost for this step was stated as £30.

Step 2 – A member of staff in the FOI team would open all staff 178 mailboxes to retrieve relevant items. They would search every folder within, and identify any emails relevant to this request, which would then be copied to a document. Each email identified would also be printed and saved for future reference. The estimated time to complete this work was 11 hours at £15 per hour (i.e. £165 in total). No print costs were specified for this step.

Step 3 – Further processing was required for the 2463 email items identified at step 2. Each item would be appraised individually to remove all duplicates. Any third party emails or attachments that were not within the scope of the request would also be removed. This work was estimated at 30 hours, on the basis that approximately 80 items would be processed each hour. The total cost of step 3 was stated as £450.

Step 4 – Printing and scanning work was estimated at two hours, at £15 per hour, totalling £30 in staff time plus the costs of the paper/printing itself. The printing identified at this step was to allow redaction of personal data, costed at £58. The redacted version would require to be rescanned. No charge was included for the second print run and the print costs were charged as 10p per black and white double-sided A4 print i.e. £200. The total for this step is £288.

17. Addition of the costs for each of the four steps outlined above provides a total of £933.
18. With regard to the manual sift of records described at step 3, the investigating officer asked VisitScotland whether its email software had a “de-duplication” function. This function enables an electronic “sift” of duplicated emails to be done, i.e. without the need to do so manually, thereby reducing staff costs.

19. VisitScotland confirmed that a de-duplication function existed in the latest version of its email software and it ran this process to establish how many duplicates it could remove without manually sifting the emails. The outcome was a reduction from 2463 to 2090 email items in total. VisitScotland submitted this was still not enough of a reduction to bring the total costs below the £600 threshold.
20. The Commissioner notes that the deduplication function achieves approximately a 15% reduction in the number of email items. If a 15% reduction is applied to the overall total figure of £933, the total figure is £793.05, still some way over the £600 threshold.
21. The investigating officer also queried why the more administrative or routine elements of the work, such as scanning and printing, was charged at the maximum rate of £15, instead of a lower fee commensurate with a more administrative grade. The PA explained that it had no administrative support for FOISA requests and that all work was undertaken by either FOI officers or IT Staff, all of whom were at a higher grade than administrators. The Commissioner has concerns about this approach, although in this instance a charge of £12 per hour would only reduce the cost of the administrative work at step 4 from £30 to £24, producing only a slightly reduced total of £785.05.
22. During the investigation, VisitScotland conducted a “sampling exercise” to evidence its estimated costs (set out above). It identified that a member of staff could process 88 items (not 80 as original thought) in one hour, assuming all items were reasonably similar to the sample.
23. That said, there were four attachments in this sample, meaning the total number of pages was quite high, at 63 pages. On this basis, VisitScotland contended that the printing costs were higher than first anticipated, as were the redaction costs for the higher number of pages per item. VisitScotland argued that to process the original figure of 2463 items, it would not cost the £933 as first thought, the figure nearly doubling to £1702.70. This did not take into account the 15% reduction afforded by the deduplication tool. Taking this into account, the sampling cost can be scaled to a cost of approximately £1400.

Commissioner's conclusions

24. Having taken account of the scope of the request and the nature of the information requested, and having considered VisitScotland's calculations, the Commissioner is satisfied that the request could not have been dealt with within the £600 cost limit. Even if the deduplication method reduces some of the manual hours, the sampling exercise suggests that the emails may be larger than first anticipated, thereby incurring additional redaction and print costs. Even if some of the tasks could be charged at the lesser rate of £12 per hour, the costs remain high due to the volume of information caught by this request (2090 items, with attachments). The Commissioner is satisfied that the overall cost would still exceed the £600 cost limit by some way.
25. The Commissioner is therefore satisfied that VisitScotland was entitled to apply section 12(1) of FOISA and was under no obligation to comply with the request.

Section 15 - Duty to provide advice and assistance

26. In her application, Ms Kelly stated she was unsure that VisitScotland had the right to ask her, under FOISA, for details of what she is looking for. She also complained that she had not received the advice she needed to enable her to sufficiently narrow her request.

27. 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 has made, or proposes to make, a request for information to it.
28. The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004¹ provides (at paragraph 9.3.3 in Part 2):

“When refusing a request on cost grounds, it is good practice for the authority’s response to provide clear advice on how the applicant could submit a new, narrower request within the cost limit. In giving advice, you may wish to take account of how much the cost limit has been exceeded. Any narrowed request would be a separate new request and should be responded to accordingly.”
29. The Commissioner considers this important if the public authority is to fulfil its duty to provide advice and assistance under section 15 of FOISA which does actually take the costs under £600. Frequently a dialogue between the authority and the applicant will be desirable if the applicant is to understand fully what can be provided within the cost limit. This may mean a PA does ask the applicant for direction on what it is they are looking for, though not necessarily why they require the information, unless this is the only way to suggest information that will be of interest.
30. During the investigation, VisitScotland was asked to explain how it had discharged this duty in relation to Ms Kelly’s request of 6 April 2016. VisitScotland acknowledged that its initial response (dated 6 April) did not offer Ms Kelly assistance in narrowing her request, for which it apologised in its correspondence with her. However, it believed it had rectified this in letters dated 13 and 25 April 2016, explaining its position and attempting to set up a dialogue with her. The Commissioner is satisfied that this letter does contain reasonable guidance on options for narrowing the request, and that this and other correspondence (email dated 14 April 2016) invites her to make contact and discuss the options.
31. In the circumstances, the Commissioner is satisfied that VisitScotland took reasonable steps following the request to provide advice and assistance on how it might be narrowed to bring it within the £600 limit, albeit in correspondence separate from the formal notice refusing the request under section 12(1). Therefore, the Commissioner is satisfied that Visit Scotland complied fully with its duty under section 15(1) of FOISA, noting both the correspondence and the offer of dialogue.
32. Ms Kelly can make a new, narrowed request in different terms to her request here. Clearly, a considerable volume of email items have been identified for 2014 and 2015 and she should note that there attachments to these emails. She may wish to take this into account and either restrict the timeframe significantly or ensure she describes more specifically which topics or matters are of particular interest within the 2090 emails held by VisitScotland. A telephone phone discussion with VisitScotland may prove beneficial in this instance, in informing Ms Kelly on how to frame any new request.

¹ <http://www.gov.scot/Resource/0046/00465757.pdf>

Failure to comply with timescales in FOISA

33. In her application to the Commissioner, Ms Kelly complained at the “lateness” of the response, both initially and at review stage. VisitScotland asserted that it had responded within statutory timescales, based on its correspondence of 13 April 2016. However, the correspondence in which Ms Kelly’s request was actually addressed is dated 13 May 2016. This is the response to the request. The due date for responding was a week earlier, on 5 May 2016 (taking into account the public holiday on 2 May 2016).
34. Section 10(1) of FOISA gives a Scottish public authority a maximum of 20 working days following receipt of an information request to respond to that request, subject to qualifications which do not apply here. In this case, VisitScotland failed to respond to the request within that period and consequently breached the requirements of section 10(1).
35. Section 21(1) of FOISA requires a Scottish public authority to comply with a requirement for review not later than the twentieth working day after receipt of the requirement. VisitScotland responded to Ms Kelly’s request for review two working days outwith the prescribed timescale, taking into account the public holiday on 30 May 2016. In doing so, the Commissioner finds that VisitScotland breached the requirements of section 21(1) of FOISA.

Decision

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

The Commissioner is satisfied that VisitScotland was not obliged to comply with Ms Kelly’s information request, given that section 12(1) of FOISA applied.

She is also satisfied that VisitScotland complied with section 15(1) of FOISA in providing advice and assistance to Ms Kelly on how to narrow her request.

However, the Commissioner finds that VisitScotland failed to comply with the timescales for responding to Ms Kelly’s information request and requirement for review, thereby breaching sections 10(1) and 21(1) of FOISA.

Appeal

Should either Ms Kelly or VisitScotland 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.

Margaret Keyse
Head of Enforcement

7 October 2016

Appendix 1: 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.

...

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).

21 Review by Scottish public authority

- (1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.

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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