



Decision Notice 080/2024

Correspondence to, and from, the First Minister

Authority: Scottish Ministers

Case Refs: 202200397 and 202200735

Summary

The Applicant asked the Authority for all correspondence (including personal SNP emails) sent to, and sent by, the First Minister (or on her behalf) on 5 February 2020. The Authority stated that it would cost too much to respond to the request. The Applicant subsequently made a new, narrower request, but the Authority stated that it would still cost too much to respond. During the investigation, the Authority concluded that responding to the original, broader request would not exceed the upper cost limit. The Commissioner therefore required the Authority to comply with both requests.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 47(1) and (2) (Application for decision by Commissioner)

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 3 February 2022, the Applicant made a request for information to the Authority. The Applicant asked for all emails/communications (including personal SNP emails) sent to, and sent by, the First Minister (or on her behalf by others, i.e. her private office) on 5 February 2020.

2. The Authority responded on 25 February 2022 and issued the Applicant with notice, under section 17(1) of FOSIA, that it did not hold the information requested.
3. On 27 February 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not believe that the Authority did not hold the information requested.
4. The Authority notified the Applicant of the outcome of its review on 25 March 2022. The Authority changed its original decision as it acknowledged that it did hold information falling within the scope of the request. However, the Authority stated that it would exceed the upper cost limit under section 12(1) of FOISA to comply with the request as it had identified around 5,000 emails potentially falling within scope. The Authority provided the Applicant with advice on how to narrow the scope of his request (e.g. by specifying a subject matter) to help bring it within the cost limit.
5. On 4 April 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because he considered the number of emails identified for a single day excessive and he disagreed that providing the information requested would exceed the upper cost limit under section 12(1) of FOISA.
6. On the same day, the Applicant also made a new, narrower request to the Authority. The Applicant requested the same information, but asked that searches be restricted to specific email addresses in order to narrow the scope of his request.
7. The Authority responded on 4 May 2022 and issued the Applicant with notice, under section 17(1) of FOSIA, that it did not hold the information requested.
8. On 5 May 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because the Authority had misinterpreted the scope of his request and had informed him that it did not hold the information requested despite accepting in its response to his original, broader request that it did hold the information requested.
9. The Authority notified the Applicant of the outcome of its review on 1 June 2022. The Authority changed its original decision as it acknowledged that it did hold information falling within the scope of the request. However, the Authority stated that it would exceed the upper cost limit under section 12(1) of FOISA to comply with the request as it had identified around 2,700 emails potentially falling within scope. The Authority again provided the Applicant with advice on how to narrow the scope of his request (e.g. by specifying a subject matter) to help bring it within the cost limit.
10. On 27 June 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because he disagreed that providing the information requested would exceed the upper cost limit under section 12(1) of FOISA.

Investigation

11. The Commissioner determined that the applications complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
12. On 9 May 2022, the Authority was notified in writing, in respect of the original, broader request, that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
13. On 4 July 2022, the Authority was notified in writing, in respect of the subsequent, narrower request, that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
14. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on both applications and to answer specific questions.
15. On 22 March 2024, the Authority, in response to further questions from the Commissioner, concluded that it could not continue to rely on section 12(1) of FOISA for the original, broader request. The Authority stated that it would conduct revised searches and issue a revised review response to the Applicant, providing a copy of the response to the Commissioner once issued.
16. The Authority also apologised for only reaching this conclusion at this point in the appeal process.
17. As both applications are linked, the Commissioner has elected to issue a single decision covering both.

Commissioner's analysis and findings

18. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Section 12(1) – Excessive cost of compliance

19. 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 amount prescribed in the Fees Regulations. This amount is currently set at £600 (regulation 5). 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 would exceed that sum.
20. The projected costs the 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.
21. The authority may not charge for the cost of determining whether it:
 - (i) actually holds the information requested; or
 - (ii) should provide the information.
22. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.

The Applicant's submissions on the original, broader request

23. The Applicant stated that he believed the Authority's initial decision to issue him with a section 17(1) notice under FOISA was "deliberately false", and that it was unacceptable to go from having no information falling within the scope of his request to identifying around 5,000 emails potentially within scope.
24. The Applicant noted that the Authority provided no evidence to support its finding around 5,000 emails, which he considered excessive for a single day. The Applicant stated that if the Authority lied in its initial response to his request then it was entirely feasible that it had lied again.
25. The Applicant also stated that he felt organisations were going out of their way to inflate the estimated time to comply with requests and that, despite narrowing down timeframes and the number of people involved, his requests continue to be rejected. The Applicant explained that he considered only personal information held within emails to require redaction and that there is no requirement to redact every single email.

The Authority's submissions on the original, broader request

26. The Authority initially confirmed that it wished to continue to rely on section 12 of FOISA.
27. The Authority stated that it had carried out searches of the Scottish Government's electronic filing system and corporate record, eRDM, which were global in nature because of the broad nature of the request (which was not limited by subject matter). The Authority explained it was therefore not possible to focus searches to specific files as emails to, or from, the First Minister could have been sent to, or by, anyone part of the Scottish Government.
28. The Authority identified the following information potentially falling within the scope of the Applicant's request using the following keywords:
 - "firstminister@gov.scot" (initial search of Feb/Mar 2020) – 2,315 emails returned
 - "Nicola.sturgeon.msp@parliament.scot" (initial search of Feb/Mar 2020) – 457 emails returned
 - "05/02/2020" – 2,083 emails returned
 - "@snp.org" and "05/02/2020" – 9 emails returned
29. The Authority explained that experience suggested that a search period of two to three months offered the most effective return of information because, when saving Government business to eRDM, officials will often wait until the topic or subject matter is completed before saving to the corporate record.
30. The Authority noted (and provided evidence to support) that searching eRDM to focus specifically on 5 February 2020 using "firstminister@gov.scot" only returned 40 emails, 38 of which were out of scope as they had been sent prior to 5 February 2020.
31. For the above reasons, the Authority submitted that, to provide a thorough response, it needed to expand the parameters of its searches to go beyond 5 February 2020.
32. The Authority noted that it expected, after sifting, that around 600 emails would fall within the scope of the request and that redaction would likely be required, with personal data (at least) in many of the emails within scope. The Authority estimated that it would take, on average, 2

minutes per document to redact information as some emails were likely to be long and may contain multiple lengthy attachments:

600 emails x 2 minutes per document = 20 hours

33. Based on this, and the search results set out in paragraph 21, the Authority provided the following estimated cost calculation to comply with the Applicant's request:

Search time = 15 minutes (0.25 hours)

Sift time = estimated at 30 seconds, on average, to open and review each of the 4,855 emails to establish whether they fall within the scope of the request (4,855 x 30 seconds per document = 2427.5 minutes (40.5 hours)

Estimated cost of locating, sifting and redacting information = (0.25 + 40.5 + 20) hours x £15/hour = £911.25

34. The Authority stated that the above cost calculation clearly demonstrated that complying with the request would exceed the £600 upper cost limit under FOISA.
35. However, as rehearsed earlier, the Authority informed the Commissioner during the investigation that it had concluded that it cannot continue to rely on section 12(1) of FOISA and that it would issue a revised review response to the Applicant.

The Commissioner's view

36. As the Authority has concluded that it cannot continue to rely on section 12(1) of FOISA and stated that it intends to issue the Applicant with a revised review response, the Commissioner must find that the Authority was not entitled to rely on section 12(1) of FOISA in this case.
37. As the Authority withdrew its reliance on section 12(1) of FOISA for the Applicant's original, broader request, the Commissioner is satisfied that the Authority was therefore not entitled to rely on section 12(1) of FOISA for his subsequent, narrower request.
38. For this reason, the Commissioner has not summarised in this decision notice the submissions the Authority provided on the Applicant's subsequent, narrower request. (Those submissions were similar in nature to those on the original, broader request, providing a cost calculation and details of the searches carried out.)
39. The Commissioner therefore requires the Authority to provide the Applicant with a revised review response other than in terms of section 12(1) of FOISA for both of the Applicant's requests.
40. The Commissioner would also urge the Authority to ensure that its cost calculations are robust. The Authority went from stating, during the investigation, that responding to the request would "clearly" exceed the upper cost limit under FOISA (by over £300) to withdrawing, during the investigation, its reliance on section 12(1) entirely. That is plainly unsatisfactory.

Handling concerns

41. In the Commissioner's view, this case has highlighted poor operational awareness of the Authority's record-keeping and eRDM system resulting in inadequate and inaccurate calculations being provided. This is clearly unacceptable, and the Commissioner will seek reassurance on these matters as part of his ongoing intervention with the Authority.

42. The Commissioner also notes that the Applicant's original request asked for "all emails/communications", but the Authority only searched for emails. The Commissioner would have expected for other forms of communication to have been searched (e.g. WhatsApp and SMS messages). The Commissioner expects all platforms (e.g. eRDM and personal and business accounts/devices) to be searched as part of the review responses (noting that the request seeks information sent or received on a single day).
43. The Authority initially mishandled the Applicant's original, broader request by issuing him with a section 17(1) notice under FOISA. While frustrating for the Applicant, one of the purposes of the review process is to correct such errors.
44. However, it is doubly frustrating for the Applicant that the Authority repeated this error in its initial response to his subsequent, narrower request. That is plainly unsatisfactory, particularly when the Applicant's subsequent request clearly referred to his original request.
45. Section 15 of FOISA provides that 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.
46. The Commissioner considers that where section 12(1) of FOISA is engaged, the duty to provide advice and assistance is particularly important in order to enable a requester (who will not necessarily understand how information is held or organised) to effectively narrow the scope of their request.
47. In this case, the Authority's approach appears to have been to ensure its searches were as comprehensive as possible while providing the Applicant with fairly generic advice and assistance. Ultimately, however, this resulted in no information being disclosed to the Applicant.
48. Should similar situations arise in the future, the Commissioner would urge the Authority to fully engage with requesters, in line with its duty under section 15 of FOISA, to enable requesters to understand how information is held and how they might narrow the scope of their requests to either obtain all of the information they are seeking or at least some of it.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by the Applicant.

The Commissioner is not satisfied that the Authority was entitled to inform the Applicant that it would incur excessive costs in line with section 12(1) of FOISA to respond to his requests.

The Commissioner requires the Authority to provide new responses to the Applicant's requirements for review, in terms of section 21(4)(b) of FOISA and other than in terms of section 12(1) of FOISA, by **20 June 2024**.

Appeal

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

David Hamilton
Scottish Information Commissioner

6 May 2024

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
- ...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in 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.