



Scottish Information
Commissioner

**Decision 133/2006 – Mr Andrew Forsyth and the
Scottish Executive**

*Request for information as to how the National Programme for
Improving Mental Health and Well-Being intends to measure a Well
Scotland and how the Scottish Executive will know if the
programme is working and providing value for money.*

**Applicant: Mr Andrew Forsyth
Authority: Scottish Executive
Case No: 200600504
Decision Date: 4 July 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 133/2006 – Mr Andrew Forsyth and the Scottish Executive

Request for information on how the National Programme intends to measure a Well Scotland and how the Scottish Executive will know if the programme is working and providing value for money – Scottish Executive indicated that this question did not fall within the remit of the Freedom of Information (Scotland) Act 2002 (FOISA)

Facts

Mr Forsyth submitted an information request to the Scottish Executive Health Department (the Executive) for information on how the National Programme for Improving Mental Health and Well Being (the National Programme) intended to measure a Well Scotland and how the Executive would know if the programme was working and providing value for money. The Executive responded to Mr Forsyth, giving a detailed explanation of the way in which the National Programme would operate and how it would be evaluated. The Executive did not indicate that it was withholding any information from Mr Forsyth or cite any exemptions. The Executive did not provide Mr Forsyth with any information about his right to request a review of its response, or his right to appeal to me. Nevertheless, Mr Forsyth sought a review from the Executive. In response to the request for a review, the Executive advised Mr Forsyth that it did not consider that the questions that had been asked about the National Programme fell under the provisions of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Forsyth applied to the Commissioner for a decision.

Outcome

The Commissioner found that the Executive had failed to comply with Part 1 of FOISA in failing to respond to a valid request for information under section 1 of FOISA, in line with the requirements of Part 1 of FOISA.

The Commissioner found that the Executive had failed to comply with Part 1 of FOISA in failing to respond to a request for information within the timescale laid down in section 10(1) of FOISA.



The Commissioner found that the Executive had failed to comply with Part 1 of FOISA in failing to respond to a request for a review within the timescale laid down in section 21(1) of FOISA.

The Commissioner found that the Executive had failed to comply with section 19(b) of FOISA in failing to provide Mr Forsyth with information about his rights to seek a review and apply to the Commissioner for a decision.

Appeal

Should either Mr Forsyth or the Executive 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 of receipt of this notice.

Background

1. Mr Forsyth submitted an information request to the Executive on 20 December 2005, for information on the National Programme. Mr Forsyth's initial email had a word missing and asked how the National Programme intends to [missing words] a Well Scotland and how it will be known if the National Programme is working and providing value for money. Mr Forsyth clearly stipulated in his request that he wanted his request to be dealt with under FOISA. Mr Forsyth submitted a second email to the Executive on the same date to advise that he had identified a mistake in his earlier request, in that he had missed out the word 'measure' in the request the first time that he submitted it (i.e. the information request should have read "...how the National Programme intends to measure a Well Scotland...").
2. Both of the emails sent by Mr Forsyth with the information request and the correction in them were acknowledged as having been received by the Executive.



3. The Executive responded to Mr Forsyth on 21 February 2006, providing a detailed summary of the way in which the National Programme was intended to work and how this would be evaluated. In its response, the Executive detailed the question that it had responded to. The Executive had not noted Mr Forsyth's correction to his question and had arrived at its own interpretation of the missing part of his first emailed information request, inserting "contribute to" instead of "measure". The Executive did not advise as to whether it was withholding any information from Mr Forsyth, nor did it cite any exemptions. The Executive did not advise Mr Forsyth of his rights to request a review of its response or his right to make an appeal to me.
4. Mr Forsyth sought a review of the Executive's response on 23 February 2006.
5. The Executive responded to Mr Forsyth's request for a review on 1 March 2006. In its response, the Executive indicated that it did not consider that the questions that had been asked by Mr Forsyth came within the provisions of FOISA.
6. On 1 March 2006, Mr Forsyth submitted an application to me for a decision as to whether the Executive had breached Part 1 of FOISA in its response to him. The case was subsequently allocated to an investigating officer.

The Investigation

7. The nature of this case is such that part of the investigation was to consider whether the application from Mr Forsyth was valid by establishing whether a valid request had been made to a Scottish public authority under FOISA, and had been appealed to me only after requesting that the authority review its decision.
8. A letter was sent by the investigating officer to the Executive on 13 March 2006, asking for its comments on Mr Forsyth's application in terms of section 49(3)(a) of FOISA. The Executive was asked to provide, amongst other items, a copy of any information which had been withheld from Mr Forsyth, confirmation of which exemption(s) the Executive was relying on in not disclosing information to Mr Forsyth and details of why the Executive did not consider the request made by Mr Forsyth to come within the provisions of FOISA.



Submissions from the Scottish Executive

9. In its submissions to my Office, the Executive has advised that it does not consider that the request made by Mr Forsyth represents a legitimate request under FOISA.
10. The Executive asserts that the email that Mr Forsyth sent to it was clearly seeking an explanation and comment from the Health Department on how the Executive intended to assess how effectively the action of the National Programme was impacting on a Well Scotland. The Executive contends that the request was not seeking recorded information in relation to the questions.
11. The Executive has cited the terms of sections 73 and 8(1)(c) of FOISA in advising that it does not accept that Mr Forsyth's request was one for recorded information.
12. The Executive is of the view that the request from Mr Forsyth was not a valid request under FOISA and that it is not refusing to release recorded information. It follows, the Executive argues, that it is not relying on any exemptions under FOISA. The Executive also argues that there was nothing in Mr Forsyth's request for a review (even if it were regarded as such) to indicate that he was seeking recorded information from the Health Department. The Executive states that this response from Mr Forsyth (the request for review) reinforced the view held by the Health Department that this was not an FOI request that it was handling but questions about the National Programme.
13. The Executive states that as the Health Department did not consider that it was dealing with an FOI request, it did not carry out any review in relation to the time taken to respond to the original correspondence, or with regard to Mr Forsyth's unhappiness with the Executive's response to his initial request.
14. The Executive asserts that the response that it made to Mr Forsyth's request was extremely detailed and full. It states that the Health Department provided a clear explanation of the work of the Programme and how this would be measured. It also advises that it apologised to Mr Forsyth for the delay in answering his initial questions.



Submissions from Mr Forsyth

15. In his submissions to my Office, Mr Forsyth has clearly indicated his dissatisfaction that the Executive has not answered the question that he submitted to it in his request for information.
16. Mr Forsyth has shown in the copies of the emails that he has forwarded to my Office that he identified the mistake in his first email that he sent to the Executive with his request for information, and that he sent a further email swiftly to correct the error.
17. Mr Forsyth is concerned, that instead of seeking clarification of the missing word from his request, the Executive instead inserted a word of their own which they thought was correct. Mr Forsyth has submitted that 'contribute' and 'measure' are two different things and as such he does not accept that the Executive has addressed his request.
18. When Mr Forsyth submitted his request for a review to the Executive, he stated that he did not accept that the information that the Executive had provided to him addressed his request as to how the National Programme intended to measure a Well Scotland and also how the Executive would know if the programme was providing value for money.
19. In his emails to the Executive, Mr Forsyth has shown that he has found information related to that in the Executive's response in places other than those cited by the Executive.

The Commissioner's Analysis and Findings

20. In determining whether the Executive has breached Part 1 of FOISA in dealing with Mr Forsyth's request there are two questions that need to be addressed. These are:
 - a) Did Mr Forsyth submit a valid request for information under FOISA?
 - b) If he did, has the Executive addressed the request for information that Mr Forsyth submitted?

I will consider each of these questions in turn.



Did Mr Forsyth submit a valid request for information under FOISA?

21. In its submissions to my Office, the Executive has contended that the request which Mr Forsyth submitted to it on 20 December 2005 was not a valid information request under FOISA.
22. The Executive has cited sections 73 and 8(1)(c) of FOISA for justifying that the request was not one for recorded information.
23. Section 73 of FOISA is the interpretation section of FOISA and it provides a definition of “information” for the purposes of FOISA. Under section 73 of FOISA, “information” means information recorded in any form.
24. Section 8 of FOISA deals with requesting information. This section states that any reference in FOISA to requesting information is a reference to making a request which-
 - (a) is in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference ...;
 - (b) states the name of the applicant and an address for correspondence; and
 - (c) describes the information requested.
25. In its submissions, the Executive has indicated that it is of the view that the request made by Mr Forsyth does not satisfy these requirements.
26. However, on the basis of the submissions I have received from Mr Forsyth, which include the email communications with the Executive in which he submitted his request for information, I am of the view that he has fulfilled these requirements.
27. The request which Mr Forsyth submitted was in writing, stated his name and an email address for response; that is not in dispute. What is disputed is whether the request described the information that he was seeking, and that request was in respect of recorded information.



28. I am satisfied that the request that Mr Forsyth made was one for recorded information. I do not read it as asking only for opinion or comment. I read this as asking what methodology of evaluation the Executive has in place, or what information it holds about how it will go about evaluating its work, and its worth. If the Executive had responded to the corrected request submitted by Mr Forsyth then it would have established whether it held information as to how the National Programme intends to measure a Well Scotland, and the means by which the Executive will know whether the programme is working and providing value for money. Even if this was not clear from Mr Forsyth's original request, it was certainly clear from his request for review in which he made clear that his dissatisfaction is that the Executive's response to his original request did not indicate "how things will be measured, how it would be known that things are working and how it would be known that value for money was being received."
29. Mr Forsyth's request is related to a programme of some significance being developed and taken forward by the Executive. Given the requirements for performance measurement and management across the public sector, it is reasonable to expect that there may be recorded information in existence as to how a major project of this kind will be measured or how its effectiveness and value for money will be assessed. In fact, in response, the Executive supplied not just comment and opinion but details of recorded information. I therefore accept that Mr Forsyth's initial (corrected) request was submitted on the basis that he was seeking recorded information.
30. I therefore do not accept that the request submitted by Mr Forsyth was not a valid request for information under the provisions of FOISA.
31. As I am satisfied that Mr Forsyth did submit a valid request for information I will go on to consider the second question.

Has the Scottish Executive addressed the request for information that Mr Forsyth submitted?

32. In his application to my Office, Mr Forsyth indicated his concerns that he felt that the Executive did not respond to his request properly as they did not address the question he asked.
33. On the basis of the submissions that have been provided by the Executive and Mr Forsyth, I accept that when he submitted his request for information to the Executive, Mr Forsyth realised he had made an error in omitting a word from his request, and that he sought to address this by sending a second email to the same person to rectify the error. Mr Forsyth has provided submissions which show that both of these emails were received.



34. I also accept the submission from Mr Forsyth that the Executive, in inserting its own choice of word in his request for information, did not interpret his question correctly.
35. If the Executive had treated the original request as an FOI request, then where the Executive was unsure of the wording of Mr Forsyth's request it could have contacted Mr Forsyth to request clarification from him, in terms of section 1(3) of FOISA. This would have allowed the Executive to require further information in order to identify and locate the requested information.
36. I accept the submissions from the Executive that it has provided a detailed response to Mr Forsyth in respect of the work of the National Programme and how this will be evaluated. However, I also accept the submissions from Mr Forsyth that the Executive has not provided a response as to how it will determine whether the National Programme is value for money.
37. I have not sought to establish whether there is any additional recorded information regarding the evaluation of the national programme, which meets Mr Forsyth's request as to 'how' the evaluation will be carried out. (The Executive have indicated, for instance, that some of that evaluation is still to be commissioned.)
38. Nor have I sought to establish whether there is any information held by the Executive regarding value for money.
39. What I am satisfied about at this stage is that the Executive have not demonstrated that the information they have supplied is a sufficient and proper response to a request under FOISA and so the Executive will have to properly consider Mr Forsyth's request and respond fully in accordance with FOISA.

Conclusion

40. In essence, this decision is simply to establish whether the Executive was right to regard Mr Forsyth's request as seeking explanation and comment but not seeking recorded information, and therefore not a request under FOISA; or whether Mr Forsyth is right in holding that his request could reasonably be read to require the Executive to provide information regarding the methodology of measuring or assessing performance aspects of the National Programme.



41. Matters are somewhat complicated by the fact that Mr Forsyth's original request omitted a key word and that his swiftly corrected version was not acted upon and instead the Executive attempted to respond to what it believed the original request to mean. In its submissions to my Office, the Executive has not relied on any exemptions in relation to the information that Mr Forsyth has sought and has indicated that it is not refusing to release recorded information.
42. It may well be that the Executive has provided all of the information it holds relevant to the request, or it does not hold information relevant to aspects of the request. But by not treating it as a request under FOISA, the Executive did not provide a notice under section 17 (Notice that information is not held) and did not treat Mr Forsyth's express dissatisfaction regarding the information he did receive as a request for review.
43. I do not accept the submissions from the Executive that there was nothing in Mr Forsyth's request for a review that indicated he was seeking access to recorded information. I am satisfied that Mr Forsyth clearly identified the request for information that the requirement for review related to and the matter which gave rise to his dissatisfaction in relation to the response he had received from the Executive, as required under section 20 of FOISA. As I have already indicated in paragraph 28 above, I am satisfied that the request submitted by Mr Forsyth was one for recorded information.

Technical Breaches

44. As I am satisfied that the request for information that was submitted by Mr Forsyth was a valid request, but it was not treated as such by the Executive, then it is only to be expected that number of technical breaches of FOISA will have occurred as a consequence.
45. I have considered the time taken by the Executive to respond to Mr Forsyth's request for information and his request for a review.
46. I am satisfied that the Executive did not respond to Mr Forsyth's request for information within the 20 working days laid down in section 10(1) of FOISA.
47. I am satisfied that the Executive did not comply with section 19 of FOISA, in that it did not provide Mr Forsyth with details of his right to request a review of its response to him, or his right to make an appeal to me.
48. I am satisfied that the Executive did not respond to Mr Forsyth's request for a review within the 20 working days laid down in section 21(1) of FOISA.



Decision

I find that the Scottish Executive (the Executive) has not complied with Part 1 of FOISA in that it did not respond to a valid request for information under section 1 of FOISA in line with the requirements of Part 1 of FOISA.

I find that the Executive has not complied with Part 1 of FOISA, in that it did not respond to a request for information within the timescale laid down in section 10(1) of FOISA.

I find that the Executive has not complied with Part 1 of FOISA, in that it did not respond to a request for a review within the timescale laid down in section 21(1) of FOISA.

I find that the Executive failed to comply with section 19(b) of FOISA in that it did not advise Mr Forsyth either of his right to seek a review from the Executive, or his right to refer the matter to me.

I require the Executive to respond to this request from Mr Forsyth as a valid request for information under Part 1 of FOISA and to either provide Mr Forsyth with the information that he has requested, or give notice in terms of section 16 (refusal of request) or section 17 (notice that information is not held) of FOISA (as appropriate), within 45 days of the date of this decision notice.

Kevin Dunion
Scottish Information Commissioner
4 July 2006