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| Decision 204/2006 Mr Richard Lochhead MSP and Scottish Executive |
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| <i>Discussions between the Scottish Executive and the UK Government over the EU Constitution and its potential impact in Scotland</i> |

Applicant: Mr Richard Lochhead MSP

Authority: Scottish Executive

Case No: 200502625

Decision Date: 15 November 2006

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 12(1) (Excessive cost of compliance).

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004, regulations 3 and 5.

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Lochhead requested from the Scottish Executive (the Executive) copies of all correspondence regarding discussions between the Executive and the UK Government regarding the EU Constitution and its potential impact in Scotland.

The Executive refused Mr Lochhead's request, initially citing 9 exemptions.

Following Mr Lochhead's application to the Commissioner, the Executive also informed the Commissioner that it believed it was entitled to refuse the request under section 12(1) of FOISA (Excessive cost of compliance).

The Commissioner found that the Executive acted in accordance with Part 1 of FOISA in refusing to respond to Mr Lochhead's information request, in that section 12(1) of FOISA constituted appropriate grounds for refusal in the circumstances of the case.

Background

1. On 17 March 2005 Mr Richard Lochhead MSP sent a letter to the Executive, requesting copies of all correspondence regarding discussions between the Executive and the UK Government over the European Union (EU) Constitution and its potential impact in Scotland.
2. The Scottish Executive replied on 23 May 2005, stating that it had received the request on 14 April 2005, and confirming that it held the information requested. The Executive released one document to Mr Lochhead and refused release of the remaining documents on the grounds that they were exempt under section 25 (information otherwise accessible), section 28 (relations within the UK), section 29 (formulation of Scottish Administration policy etc), section 30 (prejudice to the effective conduct of public affairs) and section 36 (confidentiality) of the Freedom of information (Scotland) Act 2002 (FOISA).
3. Mr Lochhead requested by letter of 30 May 2005 that the Executive review its refusal notice.
4. The Executive's review, the outcome of which was notified to Mr Lochhead in a letter of 17 June 2005, upheld the decision not to reveal the documents sought, quoting the exemptions above and also section 3(2)(a)(ii) (in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the UK) of FOISA.
5. Mr Lochhead contacted my office by letter of 15 September 2005 requesting that I investigate the Executive's refusal to provide him with the information.
6. The case was allocated to an investigating officer and Mr Lochhead's appeal was validated by establishing that he had made a valid information request to a Scottish public authority and had appealed to me only after asking the public authority to review its response to his request.

The Investigation

7. My Office then contacted the Executive on 21 September 2005 for its comments on the application of the exemptions claimed and for further information in relation to this case, as required by section 49(3)(a) of FOISA. The Executive responded on 30 November 2005 and provided further submissions on 12 April 2006. The 30 November letter enclosed the information withheld from Mr Lochhead, along with a copy of the Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government and the devolved administrations.
8. On 23 August 2006, my investigating officer contacted the Executive again seeking its submissions on the cost of complying with Mr Lochhead's request and how this would be calculated. This had not been raised by the Executive, but it appeared from examination of the information withheld that it might be relevant to the request.
9. In a response of 4 September 2006, the Executive provided details of how it would arrive at the projected cost of providing the information to Mr Lochhead.

The Commissioner's Findings and Analysis

10. In this case the Executive initially applied several exemptions to the material withheld. During the investigation, it was asked to estimate the projected costs in complying with Mr Lochhead's request. As a consequence of its calculation of the projected costs of complying, the Executive considered that section 12 of FOISA applied to the requested information.
11. Taking into account the fact that a Scottish public authority can, at any point (including during the course of an investigation), submit that the cost of supplying information that has been requested would exceed the £600 limit set out in the Fees Regulations, I am obliged to consider such a submission.
12. Section 12 of FOISA relates to excessive cost of compliance, section 12(1) providing that section 1(1) [of FOISA] does not oblige a Scottish public authority to comply with a request for information if the authority's reasonable estimate of the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers.

13. The Scottish Ministers have, under regulation 5 of the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) set this prescribed amount at £600.
14. Section 12(1) of FOISA, read in conjunction with regulation 5 of the Fees Regulations, therefore sets out that public authorities are under no obligation to comply with requests for information which exceed this figure of £600. Consequently, as Commissioner, I have no power to force the release of information should I find that the cost of responding to any single request for information exceeds this amount.
15. The initial issue to be considered in relation to this case, therefore, is that of whether the Executive was correct to determine that the cost of responding to Mr Lochhead's request would exceed the prescribed limit of £600. If it can be concluded that the cost of complying with the request would indeed exceed this prescribed limit, it will not then fall to me to consider the exemptions applied by an authority, for the reason that the Executive could legitimately and appropriately refuse to respond to the request on the grounds of section 12(1) of FOISA.

Will the cost of complying with the request exceed £600?

16. The Executive provided an estimate of the costs of complying with Mr Lochhead's request.
17. It explained that within the Europe Division it would take a member of staff of grade C1 1 day to locate and identify the files and 4 ½ days to retrieve the information which fell within Mr Lochhead's request. It would take a full day for two members of staff (at grades A1 and A3) to copy and collate this information. The cost would be:
 - 40.75 hours at £15.00 per hour (C1): £611.25
 - 7.5 hours at £9.44 per hour (A3): £70.60
 - 7.5 hours at £7.56 per hour (A1): £56.70
18. Additionally, the Executive stated that, to comply with the request, it would require to search other policy departments, particularly Justice, Fisheries, Solicitors and Structural Funds. This would be done by a member of staff at grade B2. The Executive estimated this would take 4 hours with a cost of £60.00.
19. On the Executive's calculations, the total cost of locating and retrieving the information would be £797.95.
20. The Executive estimated that the cost of providing the information, which comprised 184 documents withheld and consisted of 1200 pages, would be £120.00 (i.e. 1,200 pages at 10 pence per sheet).

21. The total estimated cost provided by the Executive was £917.95. This did not take account of the cost of redacting any information considered to be exempt from disclosure under FOISA.
22. Having considered in detail the submissions made by the Executive in relation to its application of section 12(1) of FOISA to the requested information, I am satisfied that the cost of complying with Mr Lochhead's request would exceed the upper limit of £600 prescribed by the Fees Regulations. I am satisfied, therefore, that the Executive was entitled to apply section 12(1) of FOISA to Mr Lochhead's request. Consequently, I shall not consider the other exemptions applied by the Executive to the information.
23. I would remind authorities that under paragraph 14 of the Guidance to Scottish Public Authorities on Charging Fees for Providing Information (which forms Annex 3 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002), an authority is expected to consider alternatives to complying with the request in full, for example considering what information could be released free of charge or below the prescribed amount, where the cost of providing all the information would exceed £600. I would regard this as good practice in all cases. In addition, I take the view that section 15 of FOISA requires authorities, in discharging their duty to provide advice and assistance, to advise the applicant what information might be provided, for example, if they narrowed their request.
24. It remains to Mr Lochhead, should he wish, to make a modified request to the Executive, in which case the Executive should assist him to ensure that his request is within the £600 limit.

Decision

I find that section 12(1) of FOISA constitutes appropriate grounds for refusal of Mr Lochhead's request in the circumstances of this case.

Appeal

Should either the Scottish Executive or Mr Lochhead 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.

Kevin Dunion
Scottish Information Commissioner
15 November 2006

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.

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.

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

Projected costs

3. - (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.

Excessive cost - prescribed amount

5. - The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.

