



Decision Notice 135/2024

Cost of legal challenges

Authority: Scottish Ministers

Case Ref: 202400013

Summary

The Applicant asked the Authority, in nine separate requests, for details of the total amount spent on legal challenges over a specified period. The Authority informed the Applicant that it considered the requests to be vexatious, and so it was not obliged to respond. The Commissioner investigated and found that the Authority was entitled to refuse to comply with the requests on the basis that they were vexatious.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 14(1) (Vexatious or repeated requests); 47(1) and (2) (Application for decision by Commissioner)

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 14 August 2023, the Applicant made a request for information to the Authority. He asked for the total amount it spent on legal challenges since November 2014 in relation to cases that it lost in court or settled outside of court.
2. The Authority responded on 7 September 2023. The Authority refused the request in terms of section 12(1) of FOISA as it considered the cost of complying would exceed the upper cost limit of £600. The Authority offered advice the Applicant on how he might reduce the

scope of his request in order that the costs might be brought below the £600 threshold (e.g. by specifying the subject matter).

3. On 12 October 2023, the Applicant made nine new requests for information to the Authority. He asked the Authority for the total amount it spent on legal challenges in relation to relation to cases that it lost in court or settled outside of court:
 - 1) between November 2014 and December 2015
 - 2) in 2016
 - 3) in 2017
 - 4) in 2018
 - 5) in 2019
 - 6) in 2020
 - 7) in 2021
 - 8) in 2022
 - 9) in 2023
4. The Authority responded individually to each of the nine requests on 8 November 2023. The Authority refused to comply with each request on the basis that to comply would exceed the upper cost limit under section 12(1) of FOISA.
5. On 17 November 2023, the Applicant wrote to the Authority requesting a review of its decision in relation to all 9 requests. The Applicant stated that he was dissatisfied with the decision because he considered that the information requested should be easy to compile and that the Authority's legal department (or another relevant department) should have filed how much they spent each year as part of budget monitoring.
6. The Authority notified the Applicant of the outcome of its review on 15 December 2023 in a single response covering all nine requests. The Authority changed its original decision and notified the Applicant that it was refusing to comply with the requests because it considered them to be vexatious, in line with section 14(1) of FOISA. The Authority explained that to comply with the requests would impose a significant burden on it and would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
7. On 4 January 2024, 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 (in respect of all nine requests) because he rejected that the requests were vexatious or time-consuming and that it should be easy for the Authority to compile the information requested.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

9. On 26 February 2024, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application.
10. The case was allocated to an investigating officer, and the Authority was invited to comment and answer specific questions relating to the Application. The Authority responded on 5 April 2024, and its submissions are considered below.

Commissioner's analysis and findings

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

Were the requests vexatious or manifestly unreasonable?

12. Section 14(1) of FOISA states that section 1(1) (which confers the general entitlement to information held by such authorities) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious. Section 14(1) does not create an exemption, but its effect is to render inapplicable the general right of access to information contained in section 1(1). Accordingly, section 14(1) is not subject to the public interest test in section 2(1)(b) of FOISA.
13. FOISA does not define "vexatious" or "manifestly unreasonable". However, the Commissioner's general approach is that the following factors are relevant when considering whether a request is vexatious or manifestly unreasonable:
 - (i) it would impose a significant burden on the public body
 - (ii) it does not have a serious purpose or value
 - (iii) it is designed to cause disruption or annoyance to the public authority
 - (iv) it has the effect of harassing the public authority; or
 - (v) it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
14. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.
15. While the Commissioner's view is that the terms "vexatious" and "manifestly unreasonable" must be applied to the request and not the requester, he acknowledges that an applicant's identity, and the history of their dealings with a public authority, may be relevant in considering the nature and effect of a request and its surrounding circumstances. It may be reasonable, for example, for the authority to conclude that a request represents a continuation of a pattern of behaviour it has deemed vexatious in another context.

The Authority's submissions

16. The Authority contended that to comply with the requests would impose a significant burden on it and would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

17. The Authority submitted that the nine requests submitted on 9 October 2023 asked for the same information as requested by the Applicant in his previous request of 14 August 2023. The total time period covered by the nine separate requests was the same as in the previous request, but each individual request covered a shorter time period.
18. The Authority explained that the request made on 14 August 2023 was refused on the basis that providing the information requested would breach the upper cost limit of £600 under section 12(1) of FOISA. The Applicant did not request a review of that response.
19. The Authority submitted that, to comply with the nine requests submitted on 9 October 2023, would involve the same time and public resource to locate, retrieve and provide the information requested as in the request made on 14 August 2023. The Authority argued that this would impact on its statutory and core obligations and would clearly impose a significant burden.
20. The Authority explained that the information requested would not be easy to compile, as suggested by the Applicant. While financial records of spend in relation to legal cases is held, these records do not contain information about whether the case was raised by the Authority or whether the case was, lost or settled. Each case file would have to be interrogated to find this information.
21. In addition to cases which are handled “in-house” by the Authority’s legal department, cases are also handled by private law firms. Those records would also have to be identified and searched.
22. The Authority also advised that different information records systems had been used throughout the period covered by the request, and the information from all the various sources involved would need to be collated to provide the information requested.
23. The Authority stated that the cost of providing the information for only one year would exceed the upper cost limit of £600 under section 12(1) of FOISA. The Authority provided a detailed cost calculation for one year and estimates for the other years requested.
24. The Authority argued that providing the information requested (covering all nine requests) would therefore impose a significant burden on it by significantly exceeding the upper cost limit under FOISA and by diverting legal, financial and other staff across the Authority from their core functions.
25. The Authority explained that it considered that the Applicant had deliberately attempted to circumvent section 12(1) of FOISA by breaking down his original request into nine separate requests.
26. The Authority submitted that it would have been apparent, in the opinion of a reasonable person, from its response to the Applicant’s original request that it could not be expected to respond to the nine separate requests without them imposing the same significant burden that was the reason for the refusal of the original request.
27. The Authority submitted that its reasoning was consistent with that set out in the Commissioner’s [Decision 074/2008](#)¹. This decision concerned a number of separate and wide-ranging requests, where each request sought specified information over a single year time period. The Commissioner found that requests imposed a significant burden, were

¹ <https://www.foi.scot/decision-0742008>

made in a manner to avoid section 12 of FOISA being engaged and were therefore vexatious for the purposes of section 14(1) of FOISA.

The Applicant's submissions

28. The Applicant rejected the Authority's conclusion that his requests were vexatious or would breach the upper cost limit under FOISA.
29. The Applicant argued that the information sought should be easy to compile. He considered that the Authority's legal department (or another relevant department) should have records of how much was spent on legal fees each year as part of budget monitoring.

The Commissioners view

30. The Commissioner has taken account of all the relevant submissions and supporting evidence from the Applicant and the Authority.
31. Taken in isolation, the Applicant's request might not appear to be vexatious. However, the vexatious nature of a request may only emerge after considering it in the context created by previous correspondence.
32. In this case, the relevant previous context is the Applicant's request of 14 August 2023. The Commissioner is satisfied, having considered the detail of that request and the Authority's response, that it was reasonable for the Authority to consider that request when deciding whether the requests in this case should be treated as vexatious.
33. As rehearsed earlier, the Authority refused, under section 12(1) of FOISA, to comply with the Applicant's previous request of 14 August 2023 because to do so would exceed the upper cost limit under FOISA.
34. The Commissioner accepts as reasonable the Authority's view that the Applicant consequently separated out his request of 14 August 2023 into nine separate requests on 12 October 2023 so as not to engage the upper cost limit under FOISA.
35. In making the nine separate requests, the Applicant did not refine the scope of his original request; he covered the same time period, but through nine separate requests instead of a single request.
36. The Commissioner considers that, in the opinion of a reasonable person, it would be clear from the Authority's response to the Applicant's request of 14 August 2023 that to respond to his nine separate requests of 12 October 2023 would impose the same significant burden that was the reason for the refusal of the previous request.
37. Having considered the cost calculation provided to comply with one of the nine requests, the Commissioner is satisfied that this is a reasonable estimate. To comply with all of the requests would therefore incur significant costs (well in excess of the upper cost limit under FOISA) and require significant resource, which would divert legal, financial and other staff across the Authority from their core functions.
38. The Commissioner acknowledges that the Applicant clearly believes that the Authority's systems should allow it to easily retrieve the information requested. However, the Commissioner is required to consider whether section 14(1) of FOISA applies in this case, with regard to the recording systems in use by the Authority, and not with regard to what an applicant might wish them to be capable of.

39. In this case, having considered all relevant submissions, the Commissioner accepts that a reasonable person would consider the request to be manifestly unreasonable and disproportionate, given the significant burden it would impose, and so is satisfied the Authority was entitled to refuse to comply with the requests by virtue of section 14(1) of FOISA.

Decision

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

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.

David Hamilton
Scottish Information Commissioner

19 June 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.

...

14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

...

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).

...