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Commissioner  
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# Decision Notice 194/2024

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## Gender breakdown of employees

**Applicant: The Applicant**

**Authority: Orkney Islands Council**

**Case Ref: 202400516**

### Summary

The Applicant asked the Authority for information relating to employee numbers (split by gender), the number with multiple contracts (split by gender), number of hours to qualify for overtime payment, and how this works for those with multiple contracts. The Authority provided some of the information requested but refused to disclose the remainder as the cost of doing so would be more than £600. During the investigation the Authority concluded that it could provide the remaining information within the cost limit and did so.

The Commissioner investigated and found that the Authority was not entitled to refuse to comply with parts of the request on the grounds of excessive cost.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (3) 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)

### Background

1. On 20 October 2023, the Applicant made a request for information to the Authority. They asked:

- (i) How many employees are directly employed by the Council? Please also provide a breakdown of employees by gender split.
  - (ii) How many employees within the Authority have multiple contracts? Of those employees who do hold multiple contracts, please provide the gender split.
  - (iii) What are the full-time hours: the hours which employees must exceed to begin receiving payment for overtime?
  - (iv) For those who work multiple contracts, do they receive overtime when they exceed the full-time hours across their contracts?
2. The Authority responded on 1 November 2023. It provided the Applicant with some of the information they had requested in relation to parts (i) and (ii) of their request, reporting that the information regarding gender had not been provided for a large proportion of the employees. It provided all the information for parts (iii) and (iv) of the Applicants request.
3. On 4 January 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision because they believed the information had not been provided but that it was held by the Authority. They stated that accurate data regarding gender was not provided for thousands of employees but believed that the Authority must hold the information for HMRC purposes, possibly on their HR/payroll system, and asked for the information to be provided.
4. The Authority notified the Applicant of the outcome of its review on 29 January 2024. The Authority confirmed that it did hold the information but that to extract the data would require Microsoft SQL queries to be written, and that the data would then have to be processed via another reporting tool to allow the production of results. The Authority estimated that this work would require two system developers and take at least half a day of work by each to provide the information requested. The Authority stated that it was therefore unable to provide the information requested, as the estimated cost of compliance exceeded £600 (the amount prescribed in [The Freedom of Information \(Fees for required Disclosure\) \(Scotland\) Regulations 2004](#))<sup>1</sup>.
5. On 10 April 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated they were dissatisfied with the outcome of the Authority's review because they did not agree that providing the information would exceed the cost limit.

## Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 20 May 2024, the Authority was notified in writing that the Applicant had made a valid application, and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 13 June 2024 the Authority was

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<sup>1</sup> <https://www.legislation.gov.uk/ssi/2004/467/regulation/5/made>

invited to comment on this application and to answer specific questions about its cost calculations.

9. The Authority revised its position and provided the Applicant with all the remaining information falling within the scope of parts 1 and 2 of their request on 30 June 2024.
10. After some consideration the Applicant determined that they still required a decision, as they believed that the Authority should have provided the requested information at the time of its initial response and review response.
11. The Authority subsequently confirmed to the Commissioner that it had wrongly applied section 12(1) in its review response to the Applicant.

## **Commissioner's analysis and findings**

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

### ***Section 12(1) – Excessive cost of compliance***

13. Section 12(1) of FOSA 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 regulation. 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.
14. The projected costs the authority can consider 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.
15. The authority may not charge for the cost of determining whether it:
  - (i) actually holds the information requested; or
  - (ii) should provide the information.
16. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
17. The Authority explained that there had been some confusion with terminology. It submitted that the department that held the information considered the terms sex and gender to be different things but were of the view that the terms had been conflated by the Applicant in their information request.
18. Section 1(3) of FOSA does make provision for a Scottish public authority to seek clarification from a requester following receipt of a request if they are unsure what the requester is seeking.
19. The Authority acknowledged that it may have been beneficial to have sought clarification, but also that the Applicant did clarify that they were looking for the breakdown by sex.
20. Given that the Authority has stated that it wrongly applied section 12(1) in response to the Applicant's request at review stage, the Commissioner must find that the Authority failed to comply with Part 1 of FOISA.

21. As the Authority has now provided the Applicant with all the information falling within the scope of parts 1 and 2 of their request, the Commissioner does not require it to take any further action.

## **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 request made by the Applicant by wrongly relying on section 12(1).

Given that the Authority has provided the Applicant with the information falling within the scope of parts 1 and 2 of their request, the Commissioner does not require the Authority to take any action in response to this failure in response to the Applicant's application.

## **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.

**Jill Walker**  
**Deputy Head of Enforcement**

**9 September 2024**