



Scottish Information
Commissioner
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Decision Notice 237/2024

Information concerning the early release of Abdelbaset Al-Megrahi

Authority: Scottish Prison Service
Case Ref: 202201351

Summary

The Applicant asked the Authority for information relating to the preparation for the release of Abdelbaset Al-Megrahi in 2009. The Authority stated that complying with the request would exceed the £600 cost limit, so it was not obliged to comply. The Commissioner investigated and found that the Authority was not entitled to refuse to comply with the request on the basis of excessive cost.

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)

Background

1. On 12 July 2022, the Applicant made a request for information concerning the preparation for Abdelbaset Al Megrahi's release, covering the period of April 2009 to August 2009.

2. The Authority responded on 10 August 2022, refusing the request in terms of section 12(1) of FOISA as it considered the cost of complying would exceed the specified limit of £600. The Authority explained that the average search of a file took 12 minutes and, with over 250 files to search through, this would take a minimum of 50 hours which would cost a minimum of £750.
3. On the same day, the Applicant made a new request for information. His new request sought the same information but covered a shortened period of July 2009 to August 2009.
4. Shortly after receiving the new request, the Authority responded (again on 10 August 2022) to explain that the relevant files were not stored chronologically and that, despite the Applicant shortening the period covered by his request, it would still have to conduct a full search of all the files.
5. On the same day, 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 consider that the Authority's filing of the relevant documents was an acceptable reason to refuse to comply with his request.
6. The Authority notified the Applicant of the outcome of its review on 16 November 2022, which fully upheld its original decision for the reasons previously stated.
7. On 27 November 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 did not believe it would cost the Authority more than £600 to comply with his request, particularly since it had complied with previous requests of his that required a review of the same files.

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 28 November 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
10. The Authority provided its submissions to the Commissioner and the case was subsequently allocated to an investigating officer.
11. During the investigation, the Commissioner requested further submissions from the Authority, which it provided.

Commissioner's analysis and findings

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

Section 12(1) (Excessive cost of compliance)

13. Under section 12(1) of FOISA, a public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the amount prescribed for that purpose in the Fees Regulations. This amount is currently £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 a public 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. An authority may not charge for the cost of determining whether it:
 - (i) holds the information requested, or
 - (ii) should provide the information.
16. The maximum hourly rate a public authority can charge for staff time is £15 per hour.

The Applicant's submissions

17. The Applicant explained that he did not believe it would cost the Authority more than £600 to comply with his request, particularly since it had complied with previous requests of his.
18. The Applicant also submitted that he was concerned about the Authority's filing arrangements, which meant that, despite him reducing the period covered by his request, the Authority would still have to manually review all of the archived files relating to Mr Al-Megrahi.

The Authority's submissions

19. In its submissions of 20 December 2022, the Authority explained that:
 - the files were several years old, stored in archive off site and were not in chronological order. A manual search of all the files would therefore be required to locate the information requested.
 - it had previously responded to other similar requests from the Applicant relating to Mr Al-Megrahi, including in one case where it could have refused the request in terms of section 12(1) of FOISA
 - for this request, the relevant files were archived in seven boxes with each box containing in excess of 100 files in each box and each file holding between 10 and 40 documents.
20. The Authority explained that it could not continue to provide time and resource to comply with requests from the Applicant where to comply would exceed the £600 cost limit. The Authority noted that it appeared the Applicant was attempting to circumvent the cost limit by asking for searches of the same records but applying different criteria each time.
21. The Authority therefore concluded that it was appropriate to refuse the Applicant's request, in terms of section 12(1) of FOISA, in this case.
22. In its submissions of 7 June 2024, the Authority explained that:
 - it could not explain why it had been possible to respond to previous similar requests of 16 February 2021 from the Applicant without exceeding the £600 cost limit because those involved in responding to the request were no longer employed by the Authority
 - it had no record of any cost calculations created in response to the three previous similar requests from the Applicant relating to Mr Al-Megrahi's which it had highlighted in its

submissions of 20 December 2022, to which it had either applied section 12(1) of FOISA or stated that it was close to being engaged

- the staff who worked on this request at the time it was received and who were involved in the submissions of 20 December 2022 to the Commissioner were no longer employed by the Authority so it could not advise what searches were carried out in response to the request.

23. However, the Authority explained that a sample search had been carried out in response to a previous request concerning the same files. The Authority confirmed that the sample search projected that:

- it would take an average of 12 minutes to review each file
- there was “conflicting information” that there were between 250 and 700 files that would have to be searched
- the searches would take between 50 hours to 140 hours to complete
- at £15 per hour, this would amount to a cost of between £750 to £2100 to comply with the request.

24. The Authority confirmed that it still wished to rely on section 12(1) of FOISA.

The Commissioner’s findings

25. The Commissioner acknowledges that the Applicant believes the Authority should be capable of providing the information he requested without exceeding the £600 cost limit under FOISA and that the Applicant is concerned about how the Authority has filed information relevant to his request.

26. However, the Commissioner is required to consider whether section 12(1) of FOISA applies in this case, with regard to the filing system in use by the Authority, and not with regard to what filing system the Applicant might wish to be in place.

27. The Commissioner accepts from the Authority’s submissions that information relevant to the request is held in boxes, in an archive off site and that it is not in chronological order.

28. In view of this, the Commissioner accepts that the Authority would have to search all files within those boxes for information relevant to the request (notwithstanding any shortening of the time period covered by the request).

29. However, the Commissioner is not satisfied that the Authority has provided him with a robust cost calculation for the request in question.

30. The Authority has not provided the Commissioner with evidence of it conducting a search at the time the request in question was received (or since then). Instead, the Authority’s cost calculation is based on a sample search for a previous request.

31. In its submissions of 20 December 2022, the Authority explained that the files were held in seven boxes with each box containing in excess of 100 files in each box and each file holding between 10 and 40 documents.

32. However, in its submissions of 7 June 2024, the Authority acknowledged that there was “conflicting information” that there were between 250 and 700 files that would have to be searched.

33. During the investigation, the Commissioner asked the Authority to provide evidence of cost calculations undertaken for the three previous requests made to it by the Applicant which it highlighted in its submissions because the requests either engaged the cost exemption or were close to. The Authority was unable to provide evidence of those cost calculations.
34. In view of all the above, the Commissioner is not satisfied that the Authority knows how many files it would have to search to respond to the request in question. He therefore cannot accept, on the basis of the submissions he has received, that the Authority's cost calculation is accurate or robust – particularly since it has been unable to evidence searches undertaken in response to the request in question.
35. In all the circumstances, on the basis of the submissions he has received in this case, the Commissioner concludes, on balance, that the Authority has failed to justify its application of section 12(1) of FOISA.
36. The Commissioner therefore requires the Authority to respond anew to the Applicant's requirement for review in accordance with Part 1 of FOISA (other than in terms of section 12(1)).

Decision

The Commissioner finds 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.

The Commissioner finds that the Authority was not entitled to rely on section 12(1) of FOISA in responding to the request.

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, by **12 December 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

28 October 2024