



Decision Notice 244/2024

Identikit e-fits

Authority: Police Service of Scotland

Case Ref: 202400912

Summary

The Applicant asked the Authority for copies of identikit e-fits relating to a specific investigation. The Authority said the cost of finding and retrieving the information would be excessive. The Commissioner investigated and found that the Authority had failed to provide adequate submissions to justify its position.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15(1) (Duty to provide advice and assistance); 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 22 August 2023, the Applicant made a request for information to the Authority. Referring to the investigation into the murder of Shamsuddin Mahmood at the Mumutaz Restaurant in Kirkwall on 2 June 1994, he asked for high resolution copies of;
 - (i) the identikit e-fits that were made of two people who witnesses saw threatening Mr Mahmood on the evening of 31 May 1994,
 - (ii) identikit e-fits of a “man” seen acting suspiciously in Papdale Woods on 19 May 1994,

- (iii) the identikit e-fit made of a man seen in the lane next to the Mumutaz Restaurant around 5.10 on 2 June 1994, and
 - (iv) any other e-fits which were created in connection with this case (along with a description of the sighting they represented).
2. The Authority responded on 31 October 2023. The Authority refused the request under section 12(1) of FOISA, arguing that compliance would exceed the £600 cost threshold set out in Act. The Authority explained that it would have to manually check every paper document within more than forty paper storage boxes, as there were no inventory lists to clearly identify what the boxes contained.
 3. On 9 November 2023, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant highlighted his deep concerns that the Authority did not appear to have an inventory list to clearly identify the contents of each box, and he referred to the Authority's obligations on record keeping under the [Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information \(Scotland\) Act 2002 and the Environmental Information \(Scotland\) Regulations 2004](#)¹.
 4. The Authority notified the Applicant of the outcome of its review on 14 January 2024. The Authority upheld its original response in full.
 5. On 3 July 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he understood that it was not just paper documents that were available, and that there was a wealth of documentation (about the case) that could be accessed via the HOLMES computer system. He commented that the document reference numbers for the information he was seeking, and that was held on HOLMES, were D51, D52, D53, D119 and D302. The Applicant stated that he did not accept that section 12(1) of FOISA applied to the electronic records held on HOLMES.

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 14 August 2024, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently 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. The Authority was invited to comment on this application and to answer specific questions. These related to the searches of physical and electronic records carried out by the Authority, and its reasons for applying section 12(1) of FOISA.

Commissioner's analysis and findings

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

¹ <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/12/foi-eir-section-60-code-of-practice/documents/foi-section-60-code-practice-pdf/foi-section-60-code-practice-pdf/govscot%3Adocument/FOI%2B-%2Bsection%2B60%2Bcode%2Bof%2Bpractice.pdf>

10. During the investigation, the Authority changed its position. It maintained that it was correct to apply section 12(1) of FOISA at the time the request was received but, given the passage of time, it wanted to provide the Applicant with a modified response. The Authority explained that it had now finished cataloguing the contents of all of the boxes and as a result, it was able to revise its position.
11. The Authority provided the Applicant with the information he had asked for in part (iii) of his request, and it gave him notice, under section 17(1) of FOISA, that it did not hold any information regarding parts (i), (ii) and (iv) of the request.

Section 12(1) – Excessive cost of compliance

12. The Commissioner must consider whether the Authority was correct to refuse the request under section 12(1) of FOISA, at the time the request was received (or, at the latest, the time of its review).
13. Under section 12(1) of FOISA, 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 for that purpose in the Fees Regulations. This amount is currently £600 (regulation 5). The Commissioner has no power to order a public authority to disclose information should he find that the cost of responding to a request for that information exceeds this sum.
14. The Authority claimed that it was not obliged to comply with the request as the cost of doing so would be more than £600. It stated that it would have to search through more than 44 boxes of information that was not indexed, because the subject of the request and the related information predated FOISA and current records management obligations.
15. In all cases, it falls to the public authority to persuade the Commissioner, with reference to adequate, relevant descriptions and evidence, that the cost of complying with the request would exceed the £600 cost limit.
16. In this case, despite having had the opportunity given to provide comments regarding its cost estimations and in relation to the searches of its paper records management systems and electronic records management systems, the Authority did not provide any comments that would allow the Commissioner to accept the original cost estimation was reasonable or justified. The Commissioner cannot, therefore, find that the Authority was entitled to rely on section 12(1) of FOISA.
17. The Commissioner notes that the Authority, given the passage of time since the request was made, has changed its position regarding the request, and has informed the Applicant (essentially with a view to resolution, but not to the Applicant's satisfaction: the application has not been withdrawn) that it does not hold information for parts (i), (ii) and (iv) of the request, along with disclosing some information in relation to part (iii) of the request.
18. In all the circumstances, the Commissioner cannot uphold the Authority's claim that it would be too costly to comply with the request. He requires the Authority to reconsider the request and to carry out fresh searches for the information requested by the Applicant, kept in whatever form, giving particular attention to the reference numbers (quoted in paragraph 5, above) for the specified e-fits on the HOLMES computer system.

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.

The Commissioner is not satisfied that the Authority was entitled to inform the Applicant that it would incur excessive costs in line with section 12(1) of FOISA to respond to his request.

The Commissioner requires the Authority to:

- carry out new searches for the information requested by the Applicant (paying particular attention to the information described in paragraph 5) either disclosing the information or notifying the Applicant why the information cannot be provided under a provision in Part 1 or 2 of FOISA, and
- provide the Applicant with a new review response (other than in line with section 12(1) of FOISA).

The Authority must carry out these steps and notify the Applicant of the outcome of its review by **16 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.

Euan McCulloch
Head of Enforcement

31 October 2024