

Decision Notice



Decision 032/2011 Mr David Rule and Scottish Ministers

Correspondence with First Minister's Office

Reference No: 201001612

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Summary

Mr Rule requested from the Scottish Ministers (the Ministers) information contained within certain correspondence between eight named individuals and the First Minister's Office. The Ministers responded by indicating they considered the request to be vexatious in terms of section 14(1) of FOISA. Following a review, which concluded that the cost of providing the information would exceed the £600 upper cost limit prescribed under section 12(1) of FOISA, Mr Rule remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner did not accept that the cost of complying with Mr Rule's request (on a reasonable interpretation of the scope of the request) would exceed the £600 limit. In addition, he rejected the Minister's arguments, raised again during the investigation, that the request was vexatious. He required the Ministers to comply with the request.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 14(1) (Vexatious or repeated requests) and 15 (Duty to provide advice and assistance)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount) .

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

Background

1. On 18 June 2010, Mr Rule wrote to the Ministers requesting the information contained in any correspondence held by the First Minister's Office with eight named individuals, received or sent since 3 November 2008. He also asked for all information contained in documents held by the First Minister's Office produced since that date, making reference to any of the listed individuals. He recognised that some of the requested information would have been considered in responding to a request he had made on 9 March 2009 and, to avoid making a repeat request, confirmed that he did not wish any such information to be considered again.



2. The Ministers responded on 6 July 2010, advising that they considered his request to be vexatious in terms of section 14(1) of FOISA. They considered the request to impose a significant burden because of the cost of providing the information, as demonstrated in relation to previous similar requests. As they had explained the cost of compliance in relation to those previous requests and he had not (as suggested) reduced the scope of this request to bring it within the cost limit, they considered the request to be manifestly unreasonable and to have the effect of harassing them.
3. On 7 July 2010, Mr Rule wrote to the Ministers requesting a review of their decision. He noted that he had restricted the scope of this request to information held in the First Minister's Office, the records of which he understood to be readily searchable by reference to any given individual's name. Consequently, he did not accept that the request was manifestly unreasonable. He also disagreed with the Ministers' contention that the request had the effect of harassing them, given that he believed his requests to have been modified on each occasion taking account of advice they had provided.
4. The Ministers notified Mr Rule of the outcome of their review on 3 August 2010, advising that the request was no longer considered vexatious. They also confirmed, however, that the cost of providing the information would exceed the £600 upper cost limit prescribed for the purposes of section 12(1) of FOISA, and therefore they were not obliged to comply with the request. In this connection, they noted that, in the absence of any indication of the subject matter he was interested in, a search would be required across every area of the Scottish Government.
5. On 11 August 2010, Mr Rule wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Scottish Minister's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. He challenged what he understood to be the basis of the Ministers' calculations and reiterated that his request was limited to the First Minister's Office.
6. The application was validated by establishing that Mr Rule had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

7. On 19 August 2010, the investigating officer contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. The Ministers were asked to justify their reliance on section 12(1) of FOISA in relation to the estimated costs of providing information to Mr Rule, and in particular to provide more detailed calculations of the projected cost of compliance. They were also asked to explain what advice had been given to Mr Rule as to what information the Ministers considered could be provided within the £600 limit.



8. The Ministers responded on 17 September 2010, with arguments as to why a Government-wide search would be required and details of the costs they considered would be incurred in carrying this out. They also advised that they had reverted to the view that the request was vexatious under section 14(1) of FOISA, providing arguments in support of this position.
9. During the investigation, the Ministers were asked to clarify whether information covered by Mr Rule's previous requests had been discounted in their cost estimates, and also to what extent relevant information could be located by searching against the names of the individuals cited in Mr Rule's request in the Ministers' electronic records management system (eRDM). Further information was provided by the Ministers in response to these queries.
10. The submissions provided by the Ministers and Mr Rule, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Rule and the Ministers and is satisfied that no matter of relevance has been overlooked.

Section 12(1) – excessive cost of compliance

12. Section 12(1) provides that a Scottish public authority is not obliged to comply with a request for information where the cost of doing so (on a reasonable estimate) would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently set at £600 in regulation 5 of the Fees Regulations. Consequently, the Commissioner has no power to require the release of information should he find that the cost of responding to the relevant request exceeds this amount.
13. The costs that the public authority can take into account in relation to compliance with a request for information are the projected costs defined in regulation 3 of the Fees Regulations. These are the total costs, whether direct or indirect, which the public authority reasonably estimates it is likely to incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA. The authority may not charge for the cost of determining (i) whether it actually holds the information requested or (ii) whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is set at £15 per hour per member of staff.



14. In their submissions, the Ministers explained that in considering this request they had taken note of the fact that Mr Rule had reduced the scope of his request solely to information held by the First Minister's office. However, they believed Mr Rule should be aware, following previous requests made, that the First Minister's office did not retain documents after a 3-month period, following which information was determined to be the responsibility of the particular policy area for filing into the eRDM system. On this basis, they considered it likely that, if they interpreted Mr Rule's request as narrowly as it appeared, there would be minimal or no information available to him on the individuals identified in his request. They had therefore concluded that it would be disingenuous to interpret the request so narrowly, given that there was likely to be relevant information held in other parts of the Government. They went on to comment in more detail on the steps required to locate and retrieve relevant information, explaining that a Government wide trawl would be required, given the considerable number of subjects dealt with by the Ministers which had involved international interests (given the names cited, the request was believed to relate to the First Minister's visit to the US Secretary of State).
15. The Commissioner has some difficulty with this approach. It appears on the face of Mr Rule's request that its scope is limited to information held by the First Minister's Office. In both his request for review and his application to the Commissioner, he states this quite specifically. There is no suggestion in his correspondence that he intends his request to cover information which was held by the First Minister's Office at some point in the past, but was no longer held there by the time the Ministers received his request. In the circumstances, while noting the Ministers' concerns that restricting the request to the First Minister's Office would be unlikely to produce much relevant information, the Commissioner can see no basis for interpreting the request more widely when that is clearly not what Mr Rule wants.
16. The Ministers acknowledge in their submissions to the Commissioner that a search of the relevant resources in the First Minister's Office would be unlikely to exceed the £600 cost limit. They estimate that the work involved would cost approximately £225. On the basis of the submissions he has received, therefore, the Commissioner does not consider it possible to accept that compliance with Mr Rule's request, on a reasonable interpretation of the scope of that request, would cost in excess of the £600 limit prescribed for the purposes of section 12(1) of FOISA. Accordingly, he is unable to accept the application of section 12(1) to Mr Rule's request.



Section 14(1) – vexatious requests

17. Section 14(1) of FOISA states that the general right of access to information in section 1(1) of FOISA "does not oblige a Scottish public authority to comply with a request for information if the request is vexatious". The Commissioner has published guidance¹ on the application of section 14(1) of FOISA. His general approach is that a request (which may be the latest in a series of requests) is vexatious where it would impose a significant burden on the public authority and:
- it does not have a serious purpose or value; and/or
 - it is designed to cause disruption or annoyance to the public authority; and/or
 - it has the effect of harassing the public authority; and/or
 - it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate
18. The Ministers considered Mr Rule's request to constitute a significant burden because a Government-wide trawl would be required and therefore the cost limit would be exceeded. They submitted that, while a request did not have to breach the cost limit to be a significant burden, where it did breach the limit there could be no doubt that it was such a burden. The Commissioner does not, however, consider this to be a reasonable approach in this case, particularly given that he has not found the Minister's interpretation of the scope of the request to be sustainable. The Commissioner would also be concerned at any suggestion that a request for information which cost more than £600 to comply with should be considered to be "vexatious", given that an applicant will not always be aware of the extent of information covered by their request.
19. The Ministers did not argue that the request should be considered vexatious in the absence of a significant burden, an approach with which the Commissioner would generally concur. He will, however, go on to consider whether the Ministers were right to describe the request either as manifestly unreasonable or as having the effect of harassing them. The Ministers justified their reliance on both of these criteria on the basis that Mr Rule had submitted what they considered to be substantially the same request on four occasions. On each of these, they contended, he had been told how (i.e. by reference to a specific subject matter) he could reduce the scope of his request to bring it within the cost limit. His persistence in making what they considered to be the same request, without applying their suggestions but instead making other changes, was manifestly unreasonable and had the effect of harassing the Ministers.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.asp>



20. The Commissioner notes that in this case the Ministers have argued that Mr Rule's request was vexatious (in terms of section 14(1) of FOISA), rather than being repeated in terms of section 14(2). In any event, having considered the submissions he has received from both parties and the terms of the request itself, the Commissioner cannot accept that either of the criteria referred to in the previous paragraph could be met in this case. It is apparent that Mr Rule has understood himself to be following advice received from the Ministers in modifying his requests on this matter, even if they have not been modified by reference to subject matter as the Ministers would prefer. It does not appear to the Commissioner that failure to follow and authority's advice should, in the absence of other factors, be deemed to constitute either manifestly unreasonable behaviour or harassment. No other factors have been argued by the Ministers in this case and the Commissioner cannot regard it as inherently unreasonable for an applicant to modify his requests in ways other than those suggested by the public authority, particularly where he has reasons for believing that his own modifications are more likely to result in the location of the information he is seeking.
21. In conclusion, in all the circumstances of this case, the Commissioner is not persuaded that section 14(1) of FOISA is engaged here.

Section 15 – duty to provide advice and assistance

22. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it. Examples of such advice and assistance given in the Scottish Ministers' Code of Practice on the discharge of functions by public authorities under FOISA include, in cases where section 12(1) applies, "an indication of what information could be provided within the cost ceiling".
23. On this point, the Ministers contended that (as explained to Mr Rule on a number of occasions) the only guaranteed way of bringing the request within the £600 limit would be to identify a subject matter. The Scottish Government generally stored its records by subject matter and therefore identification, location and retrieval of any relevant documentation would be made simpler were one to be identified. They submitted that any changes made by Mr Rule to his requests with a view to reducing their scope bore no resemblance to this advice. In the circumstances, they could identify no further advice they could have provided which would have had the appropriate effect.
24. During the investigation, the Ministers were asked to carry out a search of their eRDM system by reference to each of the names listed in Mr Rule's request. This located some relevant information, although the information in question had already been considered by the Ministers in the context of Mr Rule's earlier request and therefore did not fall within the scope of the request under consideration here (see paragraph 1 above). The search also confirmed that the information was held within the Directorate previously identified as most likely to hold the requested information.



25. From the outcome of the searches described above, it appears clear that information can be located within the Ministers' eRDM system other than by reference to subject matter. It may be that a more comprehensive search can be carried out if a particular subject matter is identified, but it can hardly follow that searches by reference to other criteria will be of no value to the applicant. The Commissioner also acknowledges the value of focusing searches on the places the authority considers most likely to hold the requested information, even if these searches might not be entirely comprehensive: in this context, he acknowledges the Ministers' concern that a search of the First Minister's Office might have been unlikely to locate all of the information Mr Rule was interested in. In the Commissioner's view it would have been appropriate for the Ministers to provide Mr Rule with advice on all of these matters, and as a result perhaps encourage a dialogue, with a view to producing a request with which the Ministers were more likely to be able to comply.
26. For the reasons set out above, the Commissioner has concluded that the Ministers did not comply fully with the requirements of section 15(1) of FOISA in dealing with Mr Rule's request. Given the terms of this decision, however, and the outcome of the search referred to in paragraph 24 above, the Commissioner does not consider it necessary for further advice or assistance to be provided to Mr Rule in this particular case.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to deal with Mr Rule's request for information in accordance with Part 1 (and in particular section 1(1)) of FOISA, by claiming that they were not obliged to comply with the request by virtue of section 12(1) and 14(1) of FOISA. He now requires the Ministers to comply with the request in accordance with Part 1 (other than in terms of section 12(1) or section 14(1)), by 6 April 2011.

The Commissioner also finds that, by failing to provide Mr Rule with reasonable advice and assistance under section 15(1) of FOISA, the Ministers failed to deal with his request in accordance with Part 1 of FOISA. For the reasons set out in paragraph 26 of this decision, the Commissioner does not require any further action to be taken in response to this failure.



Appeal

Should either Mr Rule or the Scottish Ministers 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 after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
18 February 2011



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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

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.

...

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.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).



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

3 Projected costs

- (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.

5 Excessive cost - prescribed amount

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