



Scottish Information  
Commissioner

## **Decision 035/2008 Mr Martin Wilson and the Scottish Ministers**

*Contract or financial relationship between Tribunals and two named insurance companies*

**Applicant: Mr Martin Wilson**  
**Authority: The Scottish Ministers**  
**Case No: 200700678**  
**Decision Date: 25 February 2008**

**Kevin Dunion**  
**Scottish Information Commissioner**

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## Decision 035/2008 Mr Martin Wilson and the Scottish Ministers

***Request for information concerning any business contract or financial relationship between Tribunals and two named insurance companies – section 12 (Excessive cost of compliance) applied – not upheld by Commissioner***

### Relevant Statutory Provisions and Other Sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement) and 12(1) (Excessive cost of compliance)

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 these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

### Facts

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Mr Wilson requested copies of all information concerning any business contract or financial relationship between the Civil Courts and Tribunals, its Officers, employees and departments with two named insurance companies. Mr Wilson requested this information from the Justice Department of the Scottish Ministers (the Ministers).

The Scottish Court Service dealt with that part of Mr Wilson's request relating to the Civil Courts. In relation to that part concerning Tribunals, the Ministers responded by refusing his request citing section 12 of FOISA, as the cost to Ministers in providing the information would be in excess of the £600 maximum set out in the Fees Regulations. Following a review, as a result of which the Ministers upheld their initial refusal, Mr Wilson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had not been entitled to refuse Mr Wilson's request on cost grounds. He required the Ministers to consider Mr Wilson's request again and to respond to it in line with Part 1 of FOISA.



## Background

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1. On 14 January 2007, Mr Wilson wrote to the Ministers requesting the following information:

*“Further to question number S2W/30261 submitted by Mr John Swinney MSP..., I would be grateful if you will please identify and forward paper copies of all information within 20 working days concerning any business contract or financial relationship between the Civil Courts and Tribunals, its Officers, employees and departments with;*

  1. *The insurer Marsh UK*
  2. *The Royal & Sun Alliance insurance company.”*
2. Following a request from the Ministers for clarification, Mr Wilson wrote to them again on 23 January 2007, confirming that he wished paper copies of the relevant documents from 1987 onwards.
3. On 14 February 2007, the Ministers wrote to Mr Wilson in response to his request for information. In their response, the Ministers advised that they could not address the part of his request regarding the Civil Courts as this was a matter for the Scottish Court Service (which was contacting him separately), and therefore their response only related to information held by them in respect of Tribunals. They advised that as Marsh UK had been in existence since 1999 only, and Royal & Sun Alliance since 1996 only, any searches would be restricted to papers from 1996 onwards. They explained that due to the extensive searches that would need to be carried out across departments to locate and provide the information requested, they were relying on section 12 of FOISA as justification for not responding to Mr Wilson’s request. The Ministers also advised Mr Wilson in this response that they believed it to be highly unlikely that they would hold any papers which were relevant to his request in any event.
4. On 16 February 2007, Mr Wilson wrote to the Ministers requesting a review of their decision. In particular, Mr Wilson drew the Ministers’ attention to the terms of “article 4, subsection 4 and section 9” of FOISA.



5. On 13 March 2007, the Ministers wrote to notify Mr Wilson of the outcome of their review. They upheld their original decision to rely on section 12 of FOISA. The Ministers explained that they felt that it was unlikely that they held any information relevant to his request, but confirmed that they had reconsidered all the projected costings to establish whether the request could be met within the cost limit. This had resulted in a reduction of the overall cost estimate, but they still considered that the projected cost of compliance was in excess of the £600 limit prescribed for the purposes of section 12. The Ministers did invite Mr Wilson to submit a new, more narrowly focussed request (by, for example, reducing the relevant time period or specifying particular tribunals), which might come within the £600 limit. They noted his reference to article 4 (which they understood to be a reference to the relative provision of the Fees Regulations) and section 9 of FOISA, but pointed out that these provisions applied only in the event that a fee required to be paid to comply with the request.
6. On 5 May 2007, Mr Wilson wrote to my Office, stating that he was dissatisfied with the outcome of the Ministers' review and applying to me for a decision in terms of section 47(1) of FOISA. He noted that the Ministers had failed to provide him with an itemised analysis of the "alleged costs" and provided background information relating to investigations of Marsh and others in the United States.
7. The application was validated by establishing that Mr Wilson had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## The Investigation

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8. On 19 June 2007, the Ministers were notified in writing that an application had been received from Mr Wilson and were asked to provide my Office with their comments on the application, as required by section 49(3)(a) of FOISA. In particular, they were asked to provide detailed calculations supporting their cost estimates and further information as to the measures taken to establish whether the information in question was in fact held.
9. A response was provided by the Ministers on 9 July 2007. In this response, the Ministers provided justification for their reliance on section 12 of FOISA.



10. Further communication was entered into with the Ministers in connection with the investigation and further comments were received from Mr Wilson. I will consider the arguments presented to me in further detail in my analysis and findings below.

## The Commissioner's Analysis and Findings

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11. In coming to a decision on this matter, I have considered all of the submissions that have been presented to me by both the Ministers and Mr Wilson and am satisfied that no matter of relevance has been overlooked.

### Section 12 – Excessive cost of compliance

12. Section 12(1) of FOISA provides that a Scottish public authority need not comply with a request for information if the authority estimates that the cost of complying with the request will exceed the amount set out in the Fees Regulations for that purpose (currently £600). The authority's estimate should be a reasonable one.
13. The projected costs that the public authority can take into account in relation to the request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, which the public authority reasonably estimates it will incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA. The public authority may not charge for the cost of determining (i) whether it actually holds the information or (ii) whether or not it should provide the information. The maximum hourly rate a public authority can charge for staff time is £15 an hour.
14. The Ministers have advised me that the cost of locating and providing information which would address Mr Wilson's request would be in excess of £600. They reached this conclusion on the basis that "there was no central record of the requested information and therefore a trawl would be required across all departments". They explained that an initial investigation of their computer database Information Management Processing and Retrieval System (IMPreS) using the keywords "Tribunal" and "Tribunals" had identified a large number of potentially relevant files: this search would not have identified other potentially relevant files with alternative keywords in their titles. A search by individual policy areas of the Ministers' eRDM system was also carried out, using a variety of keywords which were considered relevant.



15. The Ministers explained that on receiving the request from Mr Wilson, a copy was circulated to all staff with policy responsibility for Tribunals (Mr Wilson having confirmed in the course of his correspondence with the Ministers that he was only concerned about information held by those staff and not by the individual Tribunals). In circulating this request, the Ministers asked the relevant departments to detail the number of files that would require to be checked, the grades of the members of staff who would carry out the checking, an estimate of the time needed to locate and produce the information and an estimate of the cost of providing that information to Mr Wilson. My investigating officer was also advised that the Scottish Procurement Directorate had been unable to provide any relevant information when asked.
16. Nineteen areas where they had policy responsibility in respect of Tribunals were identified by the Ministers. From these, the Ministers have provided me with submissions to demonstrate that the cost of locating and retrieving relevant information from five areas would collectively cost in excess of £600. The Ministers submitted that the remaining fourteen areas had responded to indicate that they did not hold any information which was relevant to Mr Wilson's request. They advised that the estimate had been reconsidered as part of the review, leading to additional costs being identified but also others being removed.
17. The Ministers have been unable to provide a clear response as to whether they do actually hold any information which would address Mr Wilson's request. However, they do assert that in terms of the quantity of potentially relevant files it is likely that some relevant information is held, although they do not know where. They do consider, however, that they have identified files where relevant information is most likely to be located. The Ministers assert that the projected costs they have quoted are based on the costs of locating and retrieving information from these files and not on any assessment to determine whether they actually hold the information.
18. The Ministers have provided me with a breakdown of the costs that they consider the five policy areas which may hold relevant information would incur in locating and retrieving that information. It is clear from their submissions, however, that they do not consider they can establish what they do in fact hold without undertaking those same searches, although in the circumstances (noting that the relevant dealings are generally carried out by the Tribunals' own administrations rather than the policy areas) they consider it unlikely that any relevant information would be held. On the basis that the costs of the searches would exceed the £600 limit, they argue that they are in any event not obliged to carry them out.
19. Having taken into account the submissions that have been made by the Ministers, together with the terms of the Fees Regulations, I am not satisfied that the Ministers can rely on section 12(1) of FOISA in this case.



20. It is not clear from the submissions made by the Ministers that they do actually hold any information which would be relevant to Mr Wilson's request. I appreciate that the Ministers maintain that the only way they will be able to give a definitive answer to this is by carrying out an exercise to "locate and retrieve" relevant information, and they argue that this would exceed £600 in cost. However, it appears to me that the exercise that the Ministers describe as one to "locate and retrieve" relevant information is actually one to determine whether any relevant information is held.
21. In any event, it is quite clear to me that section 12(1) of FOISA can be applied only in relation to information the Scottish public authority in question is satisfied it holds. The Fees Regulations are quite specific at regulation 3 where they state that the projected costs taken into account by public authorities shall not include the cost of determining whether the information is held. In the circumstances of this case, therefore, I cannot accept the Ministers' reliance on section 12(1).
22. I would observe that I find it difficult to accept that the task of taking reasonable steps to determine whether any relevant information is held (which is, after all, what I would require) would be as complex as the Ministers suggest. Mr Wilson's request relates to arrangements with external insurers, something which is not generally done within central government. Any contract or other arrangement with an external insurer would be a rare (and I would have thought notable) occurrence, certainly something likely to be recalled. It would surprise me if any related payments were not readily traceable. The Ministers have advised (and I am inclined to accept) that the taking out of insurance would generally be a matter for the relevant Tribunal's own administration rather than their own policy staff. I should be most surprised, therefore, if the Tribunals themselves did not have ready access to records of any relevant arrangements, which would (even if it were true that contact with the relevant companies could, in theory, have been made by any member of staff in the relevant policy area) provide a reasonable guide as to where it might be appropriate for policy staff to check their own records.



## **Decision**

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I find that the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Wilson, by claiming incorrectly that section 12(1) of FOISA applied to the request.

I therefore require the Ministers to consider and respond to Mr Wilson's request again in line with Part 1 of FOISA, other than by relying on section 12(1). I require the Scottish Ministers to do this within 45 days after the date of intimation of this decision notice.

## **Appeal**

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Should either Mr Wilson 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.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**25 February 2008**





## Appendix

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### 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.

##### 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.

#### The 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.