

Decision Notice

Decision 043/2016: Mr Tommy Kane and the Scottish Ministers

Meetings between Scottish Government and Edinburgh Airport

Reference No: 201502223

Decision Date: 25 February 2016



Scottish Information
Commissioner

Summary

On 2 September 2015, Mr Kane asked the Scottish Ministers (the Ministers) for a list of all meetings between any Scottish Government Minister or official and any representative of Edinburgh Airport, including details of participants and the reason for meeting, from 10 May 2011 until 1 September 2015. Transport Scotland, on behalf of the Ministers, informed Mr Kane that it would cost in excess of £600 to respond to his request and so, by virtue of section 12 of FOISA, the Ministers were not required to comply with it. After review, Mr Kane remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Ministers had properly responded to Mr Kane's request for information in accordance with Part 1 of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) (1), (4) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 2 September 2015, Mr Kane made a request for information to the Ministers for a list of all meetings between any Scottish Government Minister and/or any Scottish Government official and any representative of Edinburgh Airport, from 10 May 2011 until 1 September 2015. He asked the Ministers to include details of participants and reason for the meeting, and asked for the information in digital format.
2. Transport Scotland, an Executive Agency of the Scottish Government, responded on behalf of the Ministers on 17 September 2015. The Ministers informed Mr Kane that it would cost in excess of £600 to respond to his request and so, by virtue of section 12 of FOISA, they were not required to comply with it. They suggested that Mr Kane might wish to reduce the scope of his request to bring the cost below £600 by, for example, specifying the subject matter(s) of the meetings or the specific business area of the Scottish Government.
3. On 17 September 2015, Mr Kane requested a review of the Ministers' response on the basis that they had provided "identical information" to him earlier that year in response to a similar request about another company, without raising the issue of excessive cost. Mr Kane suggested that his request went to the heart of whether the Scottish Government was willing to act in accordance with "open government". He believed that disclosure of this information would be good practice and a good example.
4. Mr Kane told the Ministers that he was prepared to reduce the scope of his request to discussions over the expansion of Edinburgh airport and the current flight path trial at Edinburgh airport.

5. The Ministers notified Mr Kane of the outcome of their review on 6 October 2015. They said that the cost of complying with the initial request would exceed £600 and section 12(1) of FOISA applied explaining that the information that had previously been provided to him had been done so at “significant cost” and telling him that to respond to such a broad request would be a burden on resources.
6. The Ministers said that they would treat Mr Kane’s narrowed request (for information about discussions over the expansion of Edinburgh Airport and the current flight path trial at Edinburgh Airport) as a new request.
7. On 24 November 2015, Mr Kane applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Kane was dissatisfied with the outcome of the Ministers’ review because he had received similar information from the Ministers before; had modified his request; and believed in the importance of transparency in the area of lobbying. Mr Kane queried whether the data collection systems used by the Ministers were being conveniently used as justification not to provide information under FOISA.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Kane made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were notified on 15 December 2015 that an application had been received from Mr Kane. The Ministers were invited to comment on this application and answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.
10. The Ministers responded on 4 February 2016.

Commissioner’s analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to her by both Mr Kane and the Ministers. She is satisfied that no matter of relevance has been overlooked.

FOISA or the EIRs?

12. "Environmental information" is defined in regulation 2(1) of the Environmental Information (Scotland) Regulations 2004 (the EIRs). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various qualifications and exceptions contained in the EIRs.
13. The Ministers were asked if they had considered whether the request should be dealt with under the EIRs and if they had, to explain why they decided that the request should be dealt with under FOISA.
14. The Ministers submitted that, as Mr Kane had asked for details of meetings and participants, but did not specify a subject matter, the Ministers considered him to be seeking administrative information. Accordingly, the request could be dealt with under the FOISA rather than the EIRs.

15. It is Mr Kane's original request of 2 September 2015 and not the narrowed request he made on 17 September 2015 which is the subject of this decision.
16. It is important that authorities take a view about whether information is environmental at the outset of responding to a request, as the type of information covered by the request will determine how it should be handled. At the outset, an authority may have only limited information on which to base its view, but as a request progresses, its view may change. For example, an authority may locate information which, on examination, turns out to be environmental, even though this was not evident at the outset. In cases like the one under consideration here, the Commissioner would expect to see evidence that the authority considered whether the request involved environmental information, and that its conclusions were reasonable in the circumstances.
17. The Ministers explained why they handled the request and review under FOISA, and in all the circumstances of this case the Commissioner accepts that their conclusion is reasonable. Although the narrowed request submitted on 17 September 2015 was likely to have covered environmental information, this was not apparent in relation to the request made on 2 September 2015 (which is the request under consideration in this decision).

Section 12(1) - excessive cost of compliance

18. Section 12(1) 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 relevant amount prescribed in the Fees Regulations. This amount is currently set at £600 (regulation 5 of the Fees Regulations). Consequently, the Commissioner has no power to require the disclosure of information should she find that the cost of responding to a request for that information would exceed this sum.
19. The projected costs the authority can take into account 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. 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 £15 per hour.
20. The Ministers submitted that section 12(1) applied to Mr Kane's request, as it would cost more than £600 to comply.
21. The Ministers noted that information regarding meetings involving Ministers is routinely published on the Scottish Government website, and that a link to this information had been given to Mr Kane. The Ministers explained that, given the numbers of civil servants in the Scottish Government, it was much harder to locate all information regarding their meetings. The information might in some cases be identified relatively easily by asking all staff or by someone in each team carrying out a search of all team calendars. However, to do so would significantly exceed the cost limit.
22. The Ministers referred to the information previously provided to Mr Kane in response to a similar request and said that this had shown them that meetings involving representatives of companies may not be set up as meetings with these particular companies: instead they were often meetings with a particular organisation or individual and the company representatives would attend alongside. The Ministers thought this was likely to be the case in relation to meetings with representatives of Edinburgh Airport. Consequently, it became

even more time consuming and challenging to locate all the relevant meetings as the calendar entry might not have referred to Edinburgh Airport, if it was not the “primary” organisation officials were meeting.

23. The Ministers stated that, when answering Mr Kane’s previous request, every Scottish Government Team had been involved. This took up a lot of combined staff time, and the Ministers commented that, even so, the searches of calendars and inboxes or other electronic systems would not necessarily have located all of the meetings.
24. The Ministers were asked if they were able to identify the department most likely to hold relevant information and focus the search there. The Ministers replied that they could focus specifically on information held by Transport Scotland. However, this would not identify “all meetings between any Scottish Government Minister and/or Scottish Government officials”, as requested by Mr Kane. Transport Scotland could limit the search further to the Aviation, Maritime, Freight and Canals Directorate but, again, this would considerably limit the potential of identifying the information that Mr Kane originally requested. Each individual Scottish Government Directorate and their composite teams would have no way of knowing who in any other team had held meetings or had any necessity to be in contact with a particular company.
25. The Ministers explained that Scottish Government officials attend many thousands of meetings with external organisations each week and there is no central record of who has requested or attended meetings. To locate and retrieve the information requested by Mr Kane, the Ministers would need to conduct a search of not only the Scottish Government’s electronic documents management (eRDM) system but a wide range of records across the Scottish Government including the calendars of past and present officials, over a period of over four years. The Ministers warned that this would not necessarily identify every meeting in cases where the meeting was primarily with a different company or individual and a representative of Edinburgh Airport had attended.
26. The Ministers provided a breakdown of the likely costs of responding to Mr Kane’s request. They explained that there are approximately 5,000 staff in the Scottish Government (excluding agencies, which - if included – took the total staff to around 14,000). The Ministers assumed that Mr Kane was not intending the Ministers to consider all Agency staff, although if he was, the cost of locating information would be higher. (The Commissioner notes that Transport Scotland is an Agency of the Scottish Government, and would have to be included in any reasonable search, increasing the cost.)
27. Assuming an average team size of five, the Ministers estimated that there are approximately 500-600 teams in the Scottish Government.
28. The cost per hour of staff time for a Band A3 member of staff would be approximately £11.71. However, not all teams have access to administrative staff and the most junior member in a team may be at Band B1 level, with an hourly rate of £15. Also, if a person at Band A3 was asked to carry out the searches, their work would need to be reviewed and checked by their line manager and this would inevitably lead to further costs. The Ministers commented that it was likely that the hourly rate for all the staff attending any meetings with the organisations named in Mr Kane’s requests would be at least £15.
29. Therefore, the Ministers estimated that if one official from each team took approximately 5-10 minutes to ask each team member if they had held meetings involving the company, the minimum cost would significantly exceed the £600 threshold.

30. The Ministers considered that to identify participants at meetings, and the topic discussed at meetings, would require further searches. Any teams who identified relevant meetings would need to check calendars and eRDM/inboxes to locate the dates, reasons for meetings, etc. requested by Mr Kane. The Ministers commented that a significant number of officials may have moved jobs or left the government and therefore it would take considerably more time to identify those officials and seek a response to answer the requests.
31. The Ministers said that the fact that Mr Kane asked for the information in digital format would not affect the cost estimate at all.
32. The Ministers explained that a search of their eRDM using the keywords “Edinburgh Airport” would retrieve any documents relating to the airport, not just records of meetings. They had attempted such a search but found that the system timed out before all relevant information was identified. The Ministers commented that even had the system been able to provide potentially thousands of documents containing the words “Edinburgh Airport”, this would not be an exhaustive search (in terms of Mr Kane’s request). It would not retrieve information about individuals working for Edinburgh Airport, and might not identify meetings where Edinburgh Airport was not the key player or instigator.
33. The Ministers commented that if meetings were held without any agenda or notes of the meetings kept for the record, the eRDM would not retrieve details of such meetings: these could only be identified either by asking officials or teams individually or by conducting a search of calendars (again, this would rely upon Edinburgh Airport being mentioned in the calendar request).
34. The Ministers said that the fact that Mr Kane asked for the information in digital format would not affect the cost estimate at all.
35. The Ministers were asked to comment on Mr Kane’s criticism of the Scottish Government’s records management systems. The Ministers referred to the Scottish Ministers’ Code of Practice on Records Management by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 (“the Section 61 Code”¹), which states that “records systems should be designed to meet the authority’s operational needs and using them should be an integral part of business operations and processes”.
36. The Ministers also quoted section 3 of Part 1 of the Section 61 Code which states that “Authorities should ensure they keep the records they will need for business, regulatory, legal and accountability purposes” and (at section 3.1) expands on this that “Authorities should consider what records they are likely to need to document their activities...”.
37. The Ministers emphasised that there is nothing in the Section 61 Code or in FOISA which requires an authority to keep records specifically to answer information requests, nor to require authorities to anticipate requests and create new records or systems just to answer those requests. For the purposes of the Scottish Government’s business, operational and accountability needs, the Ministers said that:

“...it is simply not necessary for us to be able to identify centrally all meetings that have been held with any particular company or individual. Our current system meets our business needs and is sufficient for us to answer the vast majority of FOISA/EIRs requests.”

¹ <http://www.gov.scot/Resource/Doc/933/0124124.pdf> (Part 4, paragraph 4.3)

38. While the Commissioner accepts that in this case the nature and range of the information requested would have been challenging to any records management system, she does not accept the Ministers' general point. She would point out to the Ministers that responding to FOI requests (along with other provisions in FOISA) is part of their business in that FOISA imposes on them statutory duties which they are obliged to carry out. The Commissioner understands that records management (including eRDM) systems cannot foresee every eventuality, but that is true of the need to find information for a range of business needs, not just FOI, and she would expect the Ministers to take reasonable steps to ensure that systems are designed recognising the need to search for, locate and retrieve information efficiently.
39. Taking account of all the circumstances, the Commissioner is satisfied that the Ministers provided a reasonable estimate of the cost of complying with Mr Kane's request for information. The cost estimate is probably, as the Ministers indicate, less than the actual cost, should the Ministers to comply with request, as the figure provided does not take account of all agency staff, while in all likelihood the searches would extend to Transport Scotland's staff too. Given the nature of the work required, the Commissioner accepts that it would cost more than £600 to comply with the request. Consequently, the Commissioner is satisfied that the Ministers were entitled to rely on section 12(1) of FOISA in relation to Mr Kane's information request, and were under no obligation to comply with the request.

Section 15 - duty to provide advice and assistance

40. Section 15 of FOISA requires a public authority to provide reasonable advice and assistance to someone making an information request. Where the cost of complying with a request is likely to exceed the £600 limit, the Commissioner's view is that the public authority should consider what information could be disclosed free of charge or within the cost limit, in order to comply with section.
41. The Ministers considered that their responses to Mr Kane at request and review stage explained why his requests would breach the cost limit and had suggested ways he could limit that cost (e.g. by focusing on meetings about particular subjects or policy areas). The Ministers had also drawn his attention to published information about Ministerial engagements.
42. The Commissioner accepts that the Ministers provided Mr Kane with reasonable advice and assistance on how he could make an information request which would not be refused on grounds of excessive cost. Consequently, the Commissioner is satisfied that the Ministers complied with their duties under section 15(1) of FOISA.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) complied fully with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Kane.

Appeal

Should either Mr Kane or the Scottish Ministers (the Ministers) 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.

Rosemary Agnew
Scottish Information Commissioner

25 February 2016

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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

- (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.

...

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.

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