

Decision Notice



Decision 048/2013 Mr Peter Cherbi and the Scottish Ministers

Payments made to staff and consultants via limited companies

Reference No: 201202290
Decision Date: 14 March 2013

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Rosemary Agnew
Scottish Information Commissioner

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Summary

On 29 June 2012, Mr Cherbi asked the Scottish Ministers (the Ministers) to inform him how many members of staff and consultants they had paid via limited companies in the last two years, with the amounts of those payments. After the Ministers failed to respond and he requested a review, he was provided with some information. Following an investigation, the Commissioner accepted that although the Ministers' response failed to directly address all of the points in his request, they did not hold the information requested by Mr Cherbi.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1) (Time for compliance); 17(1) (Notice that information is not held); 21(1) (Review by Scottish public authority)

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 29 June 2012, Mr Cherbi wrote to the Ministers requesting the following information:
“... how many members of staff and consultants have been paid by the Scottish Government via limited companies in the last two financial years and to the present date and the amounts of those payments.”
2. The Ministers did not respond to Mr Cherbi's request.
3. On 24 August 2012, Mr Cherbi wrote to the Ministers, requesting a review on the basis that they had failed to respond to his request.
4. Following an application to the Commissioner in relation to the failure to respond, the Ministers notified Mr Cherbi of the outcome of their review on 31 October 2012. They apologised for the delay and stated that “[A]ll Scottish Government staff are paid via payroll”. The Ministers also stated that:



“The Core Scottish Government spending recorded on the accountancy system in accordance with internal procedures was £5,240,237 in 2010-11 and £3,747,396 in 2011-12. This means our consultancy spend from 2010-2012 has had an overall reduction of 28%.”

5. On 1 November 2012, Mr Cherbi wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers’ review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Cherbi made a request for information to a Scottish public authority and 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. In his application to the Commissioner, Mr Cherbi stated he did not believe he had received a response to his request, namely the number of staff/consultants paid via limited companies and the amounts of those payments. Mr Cherbi also remained dissatisfied with the time taken to respond to his request. While the Commissioner notes that Mr Cherbi has since made a related request, Mr Cherbi’s application is limited to consideration of his request of 29 June 2012.
8. The investigating officer contacted the Ministers on 23 November 2012, 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. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. The relevant submissions received from both the Ministers and Mr Cherbi will be considered fully in the Commissioner’s analysis and findings below.

Commissioner’s analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr Cherbi and the Ministers and is satisfied that no matter of relevance has been overlooked.
11. Mr Cherbi was not satisfied that he had been provided with an adequate response to his request. Specifically, he did not believe he had been provided with the numbers of staff and consultants who had been paid via limited companies and the amounts of these payments. Mr Cherbi explained further why he believed relevant information would be held.



12. In response to the investigating officer's questions, the Ministers stated that they were not seeking to withhold information with regard to this request. They explained that all employees were paid through the payroll, with tax and National Insurance deducted at source. They stated that no members of staff had been paid via limited companies and therefore the amount of any such payments was nil.
13. The Ministers explained that a review had been undertaken of payment arrangements for employees and public appointees, covering the 143 organisations in the published list of National Devolved Public Bodies in Scotland. This identified 20 public appointments not paid via payroll¹.
14. When questioned further about these 20 public appointments, the Ministers explained that the individuals in question were *public appointees*. The review conducted covered employees and public appointments, no distinction being made between the two.
15. With the exception of the 20 individuals, the Ministers explained, the review found that all employees and public appointments were paid through payroll, with tax deducted at source. The Ministers emphasised that this did not mean that the 20 public appointees were paid through limited companies, simply that they were not paid through payroll.
16. The Ministers also asserted that these 20 individuals, being public appointees, did not fall within the scope of the original FOI request, being neither staff nor consultants (the subject of Mr Cherbi's request).
17. In relation to consultancy, the Ministers explained that they kept records of the amount paid on consultancy contracts to companies, private service companies or individuals (this, they stated, was the consultancy spend quoted to Mr Cherbi in their response of 31 October 2012). The Ministers stated that guidance required those companies, private service companies and individuals to confirm that they were paying appropriate tax, but they were unable to comment on how the contractors chose to make payments to their staff. The Ministers also explained that they did not hold records identifying the number of individuals covered by contracts with limited companies.
18. The Ministers considered that the response issued to Mr Cherbi on 31 October 2012 was correct, but acknowledged that the way it was drafted did not make it sufficiently clear that no members of staff or directly paid contractors/companies were paid via limited companies and therefore no such amount had been paid out in such a way.
19. Given the explanations detailed above and the terms of Mr Cherbi's request, the Commissioner is satisfied that the Ministers hold no further information that would satisfy those terms. Having reached this conclusion, the Commissioner notes that the Ministers' response to Mr Cherbi's requirement for review, while providing some information and explanation, did not directly address all aspects of his request. She agrees with the Ministers' own assessment that the response to review did not offer sufficient explanation and was drafted in ambiguous terms.

¹ <http://www.heraldscotland.com/politics/political-news/snp-closes-public-sector-tax-loophole.17824767>



20. Given that no relevant information was held by the authority, to comply with the terms of section 17(1) of FOISA, the Ministers had a duty to issue a notice in writing stating that they did not hold the information. As the Ministers failed to provide the requisite notice to Mr Cherbi, the Commissioner finds that they failed to comply with the requirements of section 17(1).

Technical requirements of FOISA

21. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the receipt of the request to comply with a request for information.
22. As the Ministers did not provide a response to Mr Cherbi within 20 working days, the Commissioner finds that the Ministers failed to comply with section 10(1) of FOISA.
23. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following receipt of the requirement to comply with a requirement for review.
24. As the Ministers did not provide a response to Mr Cherbi within 20 working days, the Commissioner finds that the Ministers failed to comply with section 21(1) of FOISA.
25. By way of explanation, the Ministers advised that, at the time of receipt of this request, there were number of similar requests sent to the Scottish Government central enquiries unit. The Ministers apologised for misplacing Mr Cherbi's original request and confirmed that they sought to ensure that all requests are registered in the FOI tracker as soon as they were received by the policy areas.

DECISION

The Commissioner finds that the Scottish Ministers partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Cherbi.

In failing to respond to Mr Cherbi's request and requirement for review in the relevant timescales laid down in sections 10(1) and 21(1) of FOISA, and by failing to provide a notice in terms of section 17(1) of FOISA that certain information was not held, the Ministers failed to comply with Part 1.

As she is satisfied that the Ministers did not hold the information requested by Mr Cherbi, the Commissioner does not require them to take any action in respect of these failures in response to Mr Cherbi's application.



Appeal

Should either Mr Cherbi 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
14 March 2013



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.
- ...
- (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.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request ...

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),
- if it held the information to which the request relates; but
- (b) the authority does not hold that information,
- it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.



21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.