

Decision Notice



Decision 154/2008 Mr Rob Edwards and the Scottish Ministers

Abolition of tolls on the Forth and Tay bridges

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Summary

Mr Edwards made two requests to the Scottish Ministers (the Ministers) for information relating to the abolition of tolls on the Forth and Tay bridges. The Ministers responded by providing Mr Edwards with some of the information falling within the scope of his requests. However, the Ministers withheld certain documentation under various exemptions in FOISA. Following a review, Mr Edwards remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Ministers notified the Commissioner that on further consideration of the requests, they now considered that the costs of compliance with each request would exceed £600 (and therefore that they were not obliged to comply with the requests in terms of section 12(1) of FOISA). The Ministers subsequently provided the Commissioner with an estimate of the projected costs of compliance.

As a result of the investigation, the Commissioner found that the projected costs of compliance in each case would exceed £600 and that the Ministers were not required to respond to the requests.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (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 the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.



Background

1. On 26 September 2007, Mr Edwards wrote to Transport Scotland (an executive agency of the Scottish Ministers) requesting information relating to the abolition of tolls on the Forth and Tay bridges. Transport Scotland responded by confirming that it did not hold any of the information requested by Mr Edwards. Transport Scotland did, however, propose that with Mr Edwards' agreement, it would pass the requests over to the relevant area within the Scottish Government for consideration. Mr Edwards agreed to this proposal and on 17 December 2007 the requests were passed to the Transport Directorate within the Scottish Government (hereinafter referred to as the Ministers) to deal with. Various exchanges of correspondence subsequently took place between Mr Edwards and the Ministers with respect to the scope of the requests. Discussions regarding the amended scope of the requests were finalised on 7 January 2008, the outcome of these discussions being confirmed to the Ministers by Mr Edwards on that date. The amended requests were for the following information:
 1. "All unpublished correspondence, memos, reports or other information, whether draft or final, between 1 January 2007 and 3 May 2007 relating to the impact of abolishing tolls on the Forth and Tay road bridges"
 2. "All unpublished correspondence, memos, reports or other information, whether draft or final, relating to the [work to implement the] decision by Ministers to abolish tolls on the Forth and Tay road bridges from 3 May 2007 to receipt of request (17 December 2007)"
2. The Ministers responded on 11 February 2008. In their response, the Ministers disclosed a range of documents which fell within the scope of Mr Edwards' requests, while withholding other information in terms of sections 25, 29, 30, 33, 36 and 38 of FOISA.
3. On 14 February 2008, Mr Edwards wrote to the Ministers requesting a review of their decision. In particular, he suggested that it was difficult for him to judge the public interest without having seen the information. Mr Edwards confirmed that he was not requesting a review of the Ministers' decision to withhold information under sections 25 and 38.
4. The Ministers notified Mr Edwards of the outcome of their review on 16 April 2008, upholding their original decision without modification.
5. On 22 April 2008, Mr Edwards 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. In his application, Mr Edwards queried whether his requests should in fact have been dealt with under the Environmental Information (Scotland) Regulations 2004 (EIRs).
6. The application was validated by establishing that Mr Edwards 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.



Investigation

7. On 28 April 2008 the Ministers were notified in writing that an application had been received from Mr Edwards.
8. On 9 May 2008 the Ministers were asked to provide the Commissioner with any information withheld from the applicant. The Ministers responded on 12 June 2008. In their response, the Ministers advised that the cost of responding to Mr Edwards' request (sic) was not considered when it was first dealt with. The Ministers went on to explain that when their team began to gather all the withheld documents for the purposes of Mr Edwards' application, it became clear that there was a very large volume of information and that cost might be an issue. Further consideration of this matter led the Ministers to conclude that the cost of responding to the request would exceed the prescribed cost limit of £600 and that consequently they now wished to rely on section 12(1) of FOISA instead of the exemptions originally applied. A breakdown of the costs was supplied by the Ministers. The case was then allocated to an investigating officer.
9. The investigating officer subsequently 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. In particular, the investigating officer noted that while Mr Edwards had made two distinct requests for information, the Ministers' initial projected costs of compliance were based on one request only. The investigating officer sought clarification from the Ministers as to why the requests had been treated as one and were asked to provide projected costs for each request separately. The Ministers were also asked to consider whether any of the information requested might be considered environmental and if so to outline their reliance on any relevant exceptions under the EIRs.
10. In response to this, the Ministers provided further submissions detailing why they considered Mr Edwards' requests as one request. Notwithstanding this, they provided revised cost of compliance projections, based on two distinct requests, confirming that they would accept the Commissioner's conclusion as to whether there was a single request or two. The revised cost projections concluded that the cost of responding to each of the two requests individually would still exceed the prescribed cost limit and as such continued to rely on section 12(1) of FOISA to both requests. The Ministers also confirmed that they had considered whether any of the information was environmental. Their view was that the information requested in this case was not environmental, on the basis that it did not relate directly to any impact on the elements and factors listed in the definition of environmental information in the EIRs. The Ministers confirmed, however, that if the Commissioner concluded that the information was environmental then they would wish to apply regulation 10(4)(b) of the EIRs.



11. In their submission, the Ministers confirmed that all information pertaining to Mr Edwards' requests are contained in the Scottish Government's eRDM (electronic records management) system. As such, all information connected to the abolition of tolls on the Forth and Tay bridges was kept electronically within this resource. Due to the volume of information contained within the relevant eRDM files, it was considered appropriate that representatives from the Commissioner's Office visit the Ministers with a view to scrutinising the eRDM system and assessing a representative sample of the information. This exercise gave the Commissioner the opportunity to consider how robust the cost projections provided by the Ministers were and to establish if the information request should be considered under the terms of the EIRs. Details of the cost projections are outlined in the analysis and findings section below.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Edwards and the Ministers and is satisfied that no matter of relevance has been overlooked.
13. With respect to whether the requests for information should have been considered under the terms of the EIRs, the Commissioner's view following the exercise described at paragraph 11 above is that the information is very substantially non-environmental in character (relating almost entirely to traffic figures and the financial, employment and other practical consequences of the removal of tolls) and as such should be dealt with under the terms of FOISA.
14. The Commissioner also considers that the only reasonable interpretation of Mr Edwards' requests for information is as two separate and distinct requests.

Section 12(1) – Excessive cost of compliance

15. During the course of the investigation the Ministers decided to amend their position in relation to Mr Edwards' request for information, citing section 12(1) of FOISA (Excessive cost of compliance). A Scottish public authority can at any point prior to the issue of a decision notice by the Commissioner submit that the cost of complying with an information request would exceed the relevant cost limit contained in the Fees Regulations, and the Commissioner is then obliged to consider whether section 12(1) of FOISA would prevent him from requiring disclosure of the information requested in the case in question.
16. 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 terms of regulation 5 of the Fees Regulations.



17. Consequently, the Commissioner has no power to require the release of information should he find that the cost of responding to a request for information exceeds this amount.
18. 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.
19. The Ministers advised the Commissioner that it estimated the cost of complying with Mr Edwards' first request at £750.00. In relation to the second request, the Ministers estimated a cost of £1,990.00.
20. In calculating the estimated costs involved in providing the information requested by Mr Edwards, the Ministers stated that they had taken into account the staff time involved in locating and retrieving relevant information from the eRDM system. The Ministers also confirmed that most of this work would need to be undertaken at staff grade B3 level because it required specialist knowledge to identify the relevant documents. The costs of providing the information (printing and making necessary redactions) were also given, using estimates of the average document size due to the large volume of information. In doing this, the Ministers asserted that they had taken a "very conservative approach" to calculating the costs associated with compliance, stating that they had tended to underestimate them.
21. Consideration of both Mr Edwards' requests required interrogation of the Scottish Government's eRDM system. The Ministers confirmed in their submissions that the Bridge Tolls Team had been "very assiduous" in storing all information into the eRDM system, so no information was held on paper files or on any personal files. This appeared to be confirmed by the on-site inspection, which also demonstrated the substantial volume of information involved. It was noted that the Ministers' cost estimates had not included any allowance for the location, retrieval or provision of the substantial quantity of information supplied to Mr Edwards in response to his requests.

Cost of compliance considerations relating to Mr Edwards' first request

22. The Ministers submitted that they would require 10 hours to identify and retrieve the relevant documents from the eRDM system. This would result in staff costs of £75.00 (charged at £15/hr for staff grade B3) and £45.00 (rounded up and charged at £8.98/hr for staff grade A2). The Ministers provided an estimate of the number of documents that would require to be redacted. For the documents which would require redaction (which included draft reports), the Ministers submitted that a copy would be required to carry out those redactions. The total cost of copying, at a rate of 10p per sheet, was estimated at £195.00. The total cost of applying redactions (based on an hourly rate applicable to staff grade B3) was estimated at £120.00. The Ministers also confirmed that the cost of providing the information, based on their volume projections and a printing cost of 10p per sheet, was estimated at £315.00. Therefore, the total cost of complying with Mr Edwards' first request was estimated at £750.00.



Cost of compliance considerations relating to Mr Edwards' second request

23. The Ministers submitted that they would require 12 hours to identify and retrieve the relevant documents from the eRDM system. This would give staff costs of £105.00 (charged at £15/hr for staff grade B3) and £45.00 (rounded up and charged at £8.98/hr for staff grade A2). The Ministers provided an estimate of the number of documents that would require to be redacted. For the documents which would require redaction (which included draft reports), the Ministers submitted that a copy would be required to carry out those redactions. The total cost of copying, estimated by the Ministers at 10p per sheet, was £480.00. The total cost of applying redactions (based on an hourly rate applicable to staff grade B3) was estimated at £390.00. The Ministers also confirmed that the cost of providing the information, based on their volume projections and a printing cost of 10p per sheet, was estimated at £970.00. Therefore, the total cost of complying with Mr Edwards' second request was estimated at £1,990.00.

Are the cost estimates reasonable?

24. Having considered the volume of information applicable to this request, the Commissioner is satisfied that the costs identified by the Ministers in this case are reasonable. He notes that the Ministers did not (as they could have done) take any account of the costs of locating, retrieving and providing the substantial amount of information they actually supplied to Mr Edwards.
25. The Commissioner accepts that Mr Edwards' requests were very broad in scope, asking for all unpublished correspondence, memos, reports or other information, whether draft or final, within a specified time-frame in each case. The volume of work involved in each of the policy exercises to which the requests related was clearly substantial, leading to a large volume of information being held in each case. The Ministers confirmed that due to the volume of information applicable to these requests, they had to apply estimates relating to the number of relevant documents. The Commissioner has had the benefit of accessing the eRDM system, considering the relevant file indices and sampling the information during the investigation, and accepts that the projections provided by the Ministers were realistic and reasonable in the circumstances.
26. Having taken due account of the submissions made by the Ministers and Mr Edwards, together with the terms of the Fees Regulations and the results of the on-site inspection carried out during the investigation, the Commissioner is satisfied that the Ministers were correct to rely on section 12(1) of FOISA in relation to both of Mr Edwards' information requests, and therefore were under no obligation to comply with these requests.



DECISION

The Commissioner finds that the Scottish Ministers were entitled to refuse to respond to Mr Edwards' information requests under section 12(1) of the Freedom of Information (Scotland) Act 2002, i.e. on the basis that the cost of complying with each request exceeds the amount prescribed in regulation 5 of the Freedom of information (Fees for Required Disclosure) (Scotland) Regulations 2004.

Appeal

Should either Mr Edwards or the 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 Investigations
08 December 2008



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.

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.