

Decision Notice



Decision 085/2010 Mr Matthew McPherson and the Scottish Ministers

Correspondence with a former BBC journalist

Reference No: 200901727
Decision Date: 3 June 2010

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Matthew McPherson requested from the Scottish Ministers (the Ministers) all correspondence between the Ministers and a named former BBC journalist. The Ministers responded by stating that the cost of complying with the request would exceed the cost limit for the purposes of section 12(1) of FOISA. Following a review, Mr McPherson remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Ministers advised the Commissioner that they considered Mr McPherson's information request to be invalid. The Commissioner disagreed with this.

However, following the investigation, the Commissioner accepted that the cost of complying with the request would exceed the specified cost limit and that the Ministers were therefore not obliged 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); 8(1)(c) (Requesting information); 12(1) (Excessive cost of compliance) and 15 (Duty to provide advice and assistance)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 2 (Interpretation); 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 14 July 2009, Mr McPherson wrote to the Ministers requesting information in the following terms:

“I wish to know of all correspondence, including all notes and transcripts, between the Scottish Government and [a named] former BBC journalist.



The information should include as much detail as possible of each correspondence with Special Advisors to the Scottish Government and its members, and Ministers, including its date and time of occurrence.”

2. The Ministers responded on 21 July 2009, stating that the cost of responding to Mr McPherson’s request would exceed the £600 limit set out in the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) and therefore it was not obliged to comply with the request by virtue of section 12(1) of FOISA. The Ministers advised Mr McPherson that he may wish to consider reducing the scope of his request in order that the costs could be brought below £600. They suggested that this could be done by specifying a particular subject and stating a specific period in time for the correspondence
3. On 28 July 2009, Mr McPherson wrote to the Ministers, requesting a review of their decision. In particular, Mr McPherson challenged the Ministers’ claim that the cost of compliance with his request would exceed £600.
4. The Ministers notified Mr McPherson of the outcome of their review on 26 August 2009. The Ministers upheld their original decision without amendment, but provided further explanation as to the process that would need to be followed in order to locate the information sought in Mr McPherson’s request.
5. On 2 October 2009, Mr McPherson 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 McPherson 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 14 October 2009, the Ministers were notified in writing that an application had been received from Mr McPherson. The Ministers were given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked 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.
8. The Ministers responded on 13 November 2009, providing submissions explaining their reasoning when concluding that the cost of complying with Mr Rule’s information request would exceed £600.



9. However, the Ministers also submitted that, having considered the Court of Session ruling in the case of *Glasgow City Council v Scottish Information Commissioner* (issued on 30 September 2009) (the Court of Session Opinion)¹, they now regarded Mr McPherson's information request to be invalid.
10. Further submissions with respect to the validity of this request were received from the Ministers on 14 and 29 December 2009 and 12 February 2010. (The Ministers' arguments on validity are addressed in more detail 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 McPherson and the Ministers and is satisfied that no matter of relevance has been overlooked.

Validity of Request

12. As noted above, the Ministers indicated during the investigation that they considered Mr McPherson's information request to be invalid. This was on the basis of the Ministers' interpretation of the Court of Session Opinion.
13. The Ministers maintained the Mr McPherson's request was invalid because he had not described the information sought as required under section 8(1)(c) of FOISA, instead characterising the request as broadly framed and unfocused. The Ministers noted that the request sought all correspondence, including notes and transcripts, and indicated that in their view, the request did nothing more than indicate where the information Mr McPherson might be interested in might be found, which could not be equated with describing the information requested.
14. The Ministers also indicated that (given what they knew regarding his occupation), they believed that Mr McPherson should be able to formulate a clear request, while they considered the request to be rather ineptly expressed. In making this argument, the Ministers referred to comments contained in the Court of Session Opinion, indicating that there will be cases where a request will be made by persons who can be expected to describe precisely what it is that they wish to receive (and the case under consideration therein, which involved a firm of solicitors, was identified as a paradigm case).
15. The Commissioner has considered Mr McPherson's request in the light of all of the Ministers' submissions and the Court of Session Opinion. He has also referred to the guidance which he has subsequently issued on the validity of requests, in the light of the Court of Session Opinion².

¹ <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/CourtofSessionGuidance2010/Validrequests.asp>



16. He notes that the statutory requirement, under section 8(1)(c) of FOISA, is confined to a description of the information requested. He takes the view that the purpose of the description is to allow the public authority to identify and locate the information and that the purpose of the reference in FOISA to “information” is to relieve the applicant from specifying particular documents, since he or she cannot be expected to know in what form information is held. The principal objective of the whole FOISA regime is to make information accessible, provided it can be identified and located at a cost that is not excessive, and provided it does not fall within one of the statutory provisions (such as that in section 14) or statutory exemptions.
17. Where an applicant has made a request for a copy of a document, and it is reasonably clear in the circumstances that it is the information recorded in the document which the applicant wants, the public authority should respond to the request as a request properly made under FOISA.
18. While Mr McPherson’s request refers to “all correspondence, including all notes and transcripts” between the Scottish Government the former BBC journalist, the Commissioner considers the description of the requested information provided by Mr McPherson to have been sufficiently clear to enable its identification and location. By naming the person who was either sender or recipient of correspondence that was of interest to him, Mr McPherson’s request provided information that enabled the Ministers to easily establish for any particular information, whether it did or did not fall within its scope.
19. Since the description is sufficient to enable identification (and thereby location) of the information, the Commissioner does not consider the specification of any subject matter to have been necessary in the circumstances, as the Ministers appear to suggest. He would also note that this will not be something the applicant is necessarily in a position to know.
20. Given that the Commissioner is satisfied that Mr McPherson adequately described the information he was seeking, it has not been necessary for him to consider whether his occupation (with respect to which the Commissioner himself has no direct evidence) means that he should be expected to describe the information he wishes to access with particular precision.
21. The Commissioner therefore considers that the request is valid in terms of section 8(1)(c) of FOISA. The Commissioner will now go on to consider the specifics of Mr McPherson’s application.

Section 12(1) – Excessive cost of compliance

22. 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 amount prescribed in the Fees Regulations. This amount is currently prescribed as £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 a request for information exceeds this amount.



23. The projected costs that the public 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 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 public 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.
24. Within their response to Mr McPherson's request for review, the Ministers explained that the only search criteria available for locating information falling within the scope of this request was the name of the former BBC journalist. They indicated that, since no time period was specified, a pan-governmental trawl through every record would be required.
25. The Ministers commented in their submissions to the Commissioner that it was recognised immediately that the remit of Mr McPherson's request for information was very wide, and in effect would require a complete trawl of all Scottish Government records to locate any relevant information. The Ministers noted that, given the size of the Scottish Government, it was difficult to estimate the total cost involved in handling this request as they were unable to easily identify how many teams there are.
26. The Ministers stated that (in line with previous calculation of costs where a Scottish Government wide trawl has been required), given the approximately 5,000 staff in the Scottish Government (excluding agencies) and assuming that the average team size is 20, they estimated a total of 250 teams. The Ministers then calculated projected costs on the basis of one official at A3 grade searching on behalf of each team for average for an hour in the Ministers' electronic document and records management system and locally held records e.g. personal mailboxes.
27. The Ministers stated that an hour of staff time at A3 grade costs £9.50 an hour, and so (using the average time of 1 hour per team), this would result in a total cost of £2,375. The Ministers submitted that an official at this grade would be considered suitable to undertake the necessary searches under relevant file headings and key words. However, any potentially relevant information thus located would be required to be checked by an official at B2 grade which would result in additional costs.
28. The Commissioner had considered the submissions made by both parties in this case and he is satisfied, given the wide-ranging nature of Mr McPherson's request and the scale of the task that would be required to search records across the entire Scottish Government in order to locate relevant information, that in order to fully comply with Mr McPherson's request, the Minister's would incur a cost in excess of £600.
29. The Commissioner is satisfied that the Ministers' submissions in this case provided a reasonable estimate of costs. He notes that an estimate of 1 hour searching per team of 20 staff is small, but even if the task could be undertaken in one third of the time assumed by the Ministers, the cost of complying with the request would remain in excess of £600.



30. The Commissioner is therefore satisfied that the cost of complying with Mr McPherson's information request would exceed the £600 prescribed limit set out in the Fees Regulations. Therefore, the Commissioner concludes that the Ministers were correct in their application of section 12(1) of FOISA and were under no obligation to comply with the information request made by Mr McPherson.

Section 15 – duty to provide advice and assistance

31. Section 15 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".
32. In this case, the Commissioner has noted that the Ministers advised Mr McPherson that it would be possible to bring the cost of complying with his information request within the £600 threshold if he were revise his information request to also specify a subject matter and timescale. Mr McPherson chose not to do so in this case.
33. The Commissioner is satisfied that the Ministers fulfilled their obligations in terms of section 15(1) in this case.
34. However, he has noted the comments from the Ministers, which indicated that they had conducted some limited searches to establish whether any relevant correspondence could be located. The Ministers indicated that they might have gone further and explained to Mr McPherson that these searches had been undertaken, and that no relevant correspondence had been identified. The Commissioner agrees that it would have been good practice to share this information with Mr McPherson, as it may have assisted him in deciding whether and how to proceed with this case.

DECISION

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



Appeal

Should either Mr McPherson 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 Enforcement
3 June 2010



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.

8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which-

...

- (c) describes the information requested.

....

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

2 Interpretation

In these Regulations –

"the Act" means the Freedom of Information (Scotland) Act 2002;

"prescribed amount" means the amount prescribed in regulation 5; and

"projected costs" has the meaning set out in regulation 3.

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.