

Decision Notice



Decision 176/2010 Mr Tom Gordon and the Scottish Ministers

Accommodation costs for the Government Car Service

Reference No: 200900987

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Scottish Information Commissioner

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Summary

Mr Gordon requested from the Scottish Ministers (the Ministers) information relating to accommodation expenses incurred by drivers from the Government Car Service (the GCS) when driving the First Minister or his wife to and from their home address. The Ministers responded by advising Mr Gordon that some of the information he had requested was not held by them, and the remainder was considered exempt from disclosure in terms of section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Gordon remained dissatisfied and applied to the Commissioner for a decision. During the investigation, the Ministers came to the view that the cost of complying with the request would exceed the sum of £600, which meant that they were not obliged to comply with the request under section 12(1) of FOISA.

Following an investigation, the Commissioner concluded that the cost of complying with the request would exceed £600 and that the Ministers were not obliged to comply with the request. He did, however, conclude that the Ministers had failed to provide reasonable advice and assistance to Mr Gordon as to what relevant information might be available within the cost limit.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 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 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

Background

1. On 13 January 2009, Mr Gordon wrote to the Ministers requesting the following information:
“A copy of all documents relating to the provision of overnight accommodation for drivers from the Government Car Service when they are required to drive First Minister Alex Salmond or his wife to and from their home in Strichen.



This should include, but not be limited to, a list of all hotel or guest house bills, details of any accommodation purchased outright or in part by the Government to fulfil this duty, any financial support and government payments towards rent or mortgages required for driver accommodation.”

2. The Ministers responded on 13 March 2009. They advised him that information about overnight accommodation for Government Car Service (GCS) drivers when they have driven the First Minister or his wife was not collected by the Scottish Government. They explained further that this was because the system used by drivers to submit travel and subsistence claims does not identify the Minister they were driving for.
3. The Ministers noted that the Scottish Government had not purchased any accommodation outright or in part in relation to the provision of a driver service for the First Minister. They provided further details of arrangements made in relation to the First Minister’s designated driver. However, they indicated that further details were considered exempt from disclosure under section 38(1)(b) of FOISA on the basis that this information was personal data and its disclosure would contravene the data protection principles contained in the Data Protection Act 1998.
4. On 7 July 2009, Mr Gordon wrote to the Ministers requesting a review of their decision on the basis that he disagreed with their application of the exemption in section 38(1)(b). Additionally, he queried the Ministers’ claim that trips to and from Strichen for the First Minister or his wife could not be identified because GCS drivers do not identify which Minister they are working for when claiming expenses. Mr Gordon indicated that this seemed less credible when a designated driver had been in place for some time.
5. The Ministers notified Mr Gordon of the outcome of their review on 5 August 2009, upholding their previous decision in full.
6. On 1 December 2009, Mr Gordon 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.
7. The application was validated by establishing that Mr Gordon 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

8. On 9 December 2009, the Ministers were notified in writing that an application had been received from Mr Gordon and were asked to provide the Commissioner with any information withheld from him. On 27 January 2010, the Ministers responded by providing some relevant information which related to expenses incurred by the First Minister’s designated GCS driver. 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 Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested. The Ministers were also asked to clarify whether the withheld information which had been provided to the Commissioner encompassed all of the information requested by Mr Gordon and whether the Ministers considered that Mr Gordon's request could be met by extracting and collating relevant information from various sources.
10. During ongoing discussions with the investigating officer, the Ministers indicated that they had reconsidered their previous responses to Mr Gordon; they believed they may have underestimated the scope of the request and were now considering the application of section 12(1) of FOISA on the basis that the cost of complying with the request would exceed £600.
11. On 14 May 2010, the Ministers wrote to the Commissioner confirming that they now considered that the cost of complying with the 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, that they were not obliged to comply with the request by virtue of section 12(1) of FOISA. The Ministers also supplied submissions explaining their reasoning when concluding that the cost of complying with Mr Gordon's information request would exceed £600.
12. Mr Gordon was advised of this change of position by the Ministers and informed that the investigation would need to consider whether section 12(1) of FOISA was applicable in this case. Mr Gordon commented on this point, indicating that the previous application of an exemption suggested that the Ministers had identified and assessed all relevant information. He expressed the view that the initial use of the exemption excluded a later resort to section 12.
13. The Ministers subsequently agreed to meet with the investigating officer to explain in more detail the processes and searches which would require to be undertaken in order to find and collate the information sought by Mr Gordon. The meeting was held on 29 July 2010. In addition to the investigating officer, four officers of the Scottish Government attended the meeting to provide an overview of the information gathering processes that would require to be undertaken in order to comply with the request.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Gordon and the Ministers and is satisfied that no matter of relevance has been overlooked.



Section 12(1) of FOISA – Excessive cost of compliance

15. Section 12(1) of FOISA 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. 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.
16. 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.
17. In their submissions, the Ministers stated that, in order to answer Mr Gordon's request fully, the information would need to be gathered from several different business areas and, to ensure accuracy, a significant amount of cross referencing and quality assurance would need to be undertaken.
18. The Ministers advised that in order to locate all information falling within the scope of Mr Gordon's request concerning overnight accommodation, records would require to be searched and checked in the GCS itself, in Human Resources/Travel and Subsistence (T&S) and in the First Minister's Private Office. This process would be necessary to identify any relevant claims for accommodation costs associated with journeys transporting either the First Minister or his wife to or from their home in Strichen.
19. The starting point for identifying relevant expenditure would be the GCS job records. Thereafter, individual claim records for CGS drivers would have to be checked. Finally, the First Minister's Private Office diary would have to be checked to confirm whether the journey prompting the expenditure had involved taking the First Minister or his wife to or from their home.
20. However, the Ministers stated that the GCS no longer holds a database for journey detail records for 2007 as this was purged due to regular housekeeping of the system prior to the receipt of Mr Gordon's information request. Consequently, a manual check of hard copy T&S records for all GCS drivers from May to December 2007 would have to be undertaken to identify expenditure potentially falling within the scope of the request. The Ministers estimated that approximately 140 claims would have to be checked and verified to identify any expenditure that may potentially fall within the scope of the request.



21. The Ministers described how the GCS records of journeys undertaken during 2008 are kept on a spreadsheet. In order to identify any relevant jobs (i.e. those either to or from the First Minister's home in Strichen), the Ministers explained that it would be necessary to collate the information held and identify which drivers carried out the jobs. The Ministers explained that records for 2009 were held on the scheduling system and to identify relevant jobs, a report would have to be run to transfer the data to a spreadsheet, from which relevant jobs could be identified along with the drivers who carried them out.
22. Once the relevant jobs and associated drivers had been identified from the CGS data, approximately 180 manual claim forms would have to be checked in order to identify any expenditure that may fall within the scope of the request.
23. The Ministers pointed out, however, that GCS job records and individual claims made by GCS drivers would not necessarily state if the journey involved transporting a specific Minister. They highlighted, for example, that a driver may have driven the First Minister home then stayed overnight at a guest house in order to pick up a different Minister the next morning from another location. Additionally, accommodation costs may have been incurred where a driver had been required to deliver boxes of papers to a Minister's home address.
24. The Ministers also indicated that, as the request had asked for information about hotel or guest house bills, each claim would have to be checked against individual receipts from the hotel or guest house and consequent expenses.
25. The Ministers have estimated that, due to the volume of claims and the nature of the work involved in checking and verifying that only relevant claims falling within the scope of the request were identified, the cost of this work would be approximately £770.
26. In view of the limited information contained in the travel and subsistence records concerning the reason(s) for the journey, the Ministers explained that these records would need to be searched and matched against the First Minister's Private Office records in order to establish relevant journeys within the scope of the request that involved the First Minister or Mrs Salmond as opposed to those for other Ministers' journeys or those involving the delivery of boxes of papers. The Ministers explained that a search of the Private Office diary would have to be undertaken in order to check whether a car journey had taken the First Minister to his home; however, the diary would not hold any details of whether drivers had required overnight accommodation in the area. The Ministers estimated that the cost of searching the Private Office diary to establish whether a journey falling within the scope of the request had taken place and comparing this against the claims which may potentially fall within the scope of the request would be £555.
27. The Ministers also explained that there are occasions where drivers who are out on a job are required to amend their schedules at short notice due to a change of events. On such occasions, they would not phone in and ask for the First Minister's diary to be changed. The Ministers contended that this reinforces the need for cross-referencing to ensure that records are correct as any one source would be inadequate.



28. As noted above, in his review request, Mr Gordon had queried the position adopted by the Ministers when the First Minister had a “designated driver” in post. The Commissioner notes however, that this driver was only transferred from Edinburgh to the north east of Scotland in July 2008. Additionally, the Commissioner is aware that any of the other drivers within the GCS may be, and may have been, required to carry out jobs involving the First Minister, for example when the designated driver is unavailable due to (for example) sickness or annual leave.
29. The Commissioner has considered the submissions made by the Ministers and overall is satisfied with the Ministers’ arguments regarding the nature of the work which is required in order to locate, retrieve and provide the requested information to Mr Gordon. Having considered their submissions, acknowledging that both manual and electronic records would have to be searched to locate any potentially relevant information, before cross referencing to ensure that information actually falling within the scope of the request, the Commissioner is satisfied that the cost of complying with the request would exceed the prescribed sum of £600.
30. The Commissioner notes the comment made by Mr Gordon (referred to in paragraph 12 above), that the initial use of an exemption meant that the Ministers could not, at a later stage, argue that they were not obliged to respond to the request on cost grounds. While it is unfortunate that the issue of excessive costs was not raised by the Ministers at an earlier stage, the fact remains that where the cost of complying would exceed £600, a public authority is not obliged to comply with the request and the Commissioner has no power to require an authority to do so.

Section 15 of FOISA – 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 (“the Section 60 Code”) 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 Ministers responded to Mr Gordon’s request for information and requirement for review by advising him that the information was being withheld under the exemption in section 38(1)(b) of FOISA. It was only after the Commissioner’s investigation had commenced that they concluded that the cost of complying with the request would exceed the prescribed amount.
33. Paragraph 14 of Annex 3 of the Section 60 Code states that, although a public authority is under no obligation to comply with a request for information where the cost of doing so would exceed £600, it should consider what information could be released free of charge or below the prescribed amount.



34. In this case, the Ministers have not previously advised Mr Gordon directly that they do not consider they are obliged to comply with his request. Consequently, the Ministers have not explained whether any more limited information could be provided which might be of assistance to Mr Gordon.
35. The Commissioner notes that, in their review response of 5 August 2009, the Ministers advised Mr Gordon that the information sought was held in various systems and was not held in a way that would make it quick or easy to see. It is clear from this letter that the task of locating all information falling within the scope of Mr Gordon's request was a significant one. The Ministers did not however suggest to Mr Gordon that he may (for example) wish to limit his request to a narrower timescale or to the First Minister's designated driver only.
36. For this reason, the Commissioner has concluded that the Ministers did not comply fully with the requirements of section 15 of FOISA in dealing with Mr Gordon's request. He requires the Ministers to consider whether any of the requested information (or any related information) can be provided within the £600 limit and to advise Mr Gordon accordingly (with reasons if no information can be provided).

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) were not obliged to comply with Mr Gordon's information request given that the cost of doing so would exceed the amount prescribed by virtue of section 12(1) of the Freedom of Information (Scotland) Act 2002 (FOISA).

However, the Commissioner also finds that, by failing to provide him with reasonable advice and assistance under section 15 of FOISA, the Ministers failed to deal with Mr Gordon's request in accordance with Part 1 of FOISA. Therefore, the Commissioner requires the Ministers to consider whether any of the requested information (or related information) could be located, retrieved and provided (subject to such exemptions under FOISA as might be applicable) within the cost limit and to advise Mr Gordon accordingly by 26 November 2010.



Appeal

Should either Mr Gordon 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
12 October 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.

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.