



Scottish Information
Commissioner
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Decision Notice 283/2024

Research seminar on Schools and Gender Diversity

Applicant: The Applicant

Authority: The University of Edinburgh

Case Ref: 202200476

Summary

The Applicant asked the Authority for information relating to a specified research seminar on Schools and Gender Diversity. The Authority issued the Applicant with a fees notice, which she paid. During the investigation, the Authority concluded that it would cost more than £600 to provide the information requested. Following an investigation, the Commissioner accepted this, but found that the Authority failed to comply with Part 1 of FOISA in responding to the request. He required the Authority to refund the fees notice paid by the Applicant and to provide her with advice and assistance on how she might make a new, refined request, within the cost limit, should she wish to do so.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 9(1), (3) and (4) (Fees); 12(1) (Excessive cost of compliance); 47(1) and (2) (Application for decision by Commissioner)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs); 4 (Fee payable); 5 (Excessive cost – prescribed amount)

Background

1. On 4 September 2021, the Applicant made a request for information to the Authority. She asked for information relating to a specified research seminar on Schools and Gender Diversity, the decision to cancel or postpone it and any steps taken subsequently to reorganise or cancel it.

2. The Applicant referred to a previous request that she had made to the Authority, which it had refused because it would have cost more than £600 to respond to. The Authority's refusal included a costed list of tasks. The Applicant asked the Authority, when responding to this request, to exclude certain tasks to bring the cost of complying with her request under the upper cost limit.
3. The Authority responded on 8 September 2021, issuing the Applicant with a fees notice of £48.50 to provide the information requested.
4. On 18 September 2021, the Applicant wrote to the Authority requesting a review of its decision. She stated that she had paid the fees notice and expected the information requested to be provided timeously. She also raised the following matters of dissatisfaction:
 - she believed the fees notice was issued to delay the provision of the information or in the hope she would decline to pay. She asked the Authority to review the "reasonableness" of the fees notice
 - if the Authority did not refund the fee in full, she asked it to review the details of the charges in its cost calculation as some of the costs were "clearly over-estimates" (which she provided examples of)
 - she raised concern with the extent of the redactions that the Authority indicated were likely and asked that the information requested be provided in a format that enabled her to follow the information
 - she clarified that she wanted all information up to and including 20 September 2021.
5. The Authority notified the Applicant of the outcome of its review on 11 October 2021. It upheld its decision to issue a fees notice, but advised the Applicant that the time required to comply with her request was likely to be considerably more than estimated in the fees notice. Due to the volume of information and the need to consider the rights of third parties, the Authority advised the Applicant that it would not be able to respond by the statutory deadline.
6. Following intervening correspondence where the Applicant expressed further dissatisfaction and the Authority advised her of her right to appeal its review outcome of 11 October 2021 to the Commissioner, the Applicant wrote to the Authority on 6 January 2022, requesting a further review on the basis that she had paid the fees notice but the Authority had not provided her with the information requested.
7. The Authority notified the Applicant of the outcome of its further review on 3 February 2022. It disclosed some information in response to the Applicant's request, subject to redactions under the exemptions in sections 30(b)(ii), 30(c) and 38(1)(b) of FOISA. It explained that it had a significant volume of information to work through, but that it hoped to provide more information by May 2022.
8. On 26 April 2024, following further intervening correspondence where she repeatedly asked the Authority to provide her with the outstanding information, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. She stated she was dissatisfied with the outcome of the Authority's review for the following primary reasons:
 - it had failed to provide her all the information she had paid for
 - the lengthy delay in providing the limited information she had received
 - the extent of the redactions in the limited information she had received

- the extent of information deemed out of the scope of her request that was apparent from the limited information she had received.

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 21 June 2022, the Authority was notified in writing that the Applicant had made a valid application.
11. During the investigation, the Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions.
13. During the investigation, it became apparent to the Commissioner that the cost to the Authority of responding to the request was highly likely to have exceeded the £600 limit set out in the Fees Regulations. In such circumstances, section 12(1) of FOISA applies and the Commissioner cannot require the public authority to disclose the information. The Commissioner therefore sought comments from the Authority on the application of section 12(1) of FOISA, which it provided.

Commissioner's analysis and findings

14. The Commissioner has considered all the submissions made to him by the Applicant and the Authority.

Section 12(1) – Excessive cost of compliance

15. As noted above, during the investigation, the Authority advised that the cost of compliance with the Applicant's request would exceed the £600 limit laid down in the Fees Regulations.
16. Section 12(1) of FOISA, read in conjunction with regulation 5 of the Fees Regulations, states that public authorities are under no obligation to comply with requests for information where the cost of doing so would exceed this figure of £600. Consequently, the Commissioner has no power to require the release of information should he find that the cost of responding to any single request for information exceeds this amount.
17. Taking into account the fact that a Scottish public authority can, at any point (including during the course of an investigation), submit that the cost of supplying information that has been requested would exceed the £600 limit set out in the Fees Regulations, the Commissioner is obliged to consider whether section 12(1) of FOISA would prevent him from ordering disclosure of the information in this case.
18. The projected costs an authority can consider 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.

19. An authority may not charge for the cost of determining whether it:
 - (i) actually holds the information requested or
 - (ii) should provide the information.
20. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.

The Authority's submissions

21. As rehearsed earlier, the Commissioner sought comments from the Authority on the application of section 12(1) of FOISA because it was apparent to him that the cost to the Authority of responding to the request was highly likely to have exceeded the £600 limit set out in the Fees Regulations.
22. The Authority explained that, because the Applicant had paid the fees notice it issued, it took the view that it was obliged to respond to her request despite finding that the work (and cost) in complying with the request significantly exceeded the estimate that informed the fees notice.
23. The Authority provided estimates of the chargeable costs incurred in responding to the request, including the actual cost of the initial location and retrieval of information by local areas and an estimate of the cost of processing the information by the Records Management Section.
24. Because the Authority had issued the Applicant with a fees notice, it had retained a record of the cost (£408.75) incurred in locating and retrieving information by local areas. This cost included Records Management Section staff passing the request to the local area and the time spent by the staff asked to search for information and collate it.
25. The Authority explained that the Records Management Section received a total of 625 individual files back from the initial searches, most of which were emails (often chain emails containing multiple emails). By converting these documents to pdf, the Authority confirmed there were 2,187 pages of emails in total:
 - Emails from senior staff members - 1055 pages
 - Emails from seminar organiser - 980 pages
 - Emails from other Moray House staff members - 152 pages
26. The Authority also stated there were also twenty-five documents that were not emails. In each case, the Authority had to:
 - confirm the information fell within the scope of the request, as a small amount returned was not about the seminar
 - convert files into an appropriate format so that it could process it (the information was provided in different formats)
 - identify if information was duplicated. Most email chains were duplicated in some way, as different individuals involved in the request were often included in the same chains. This often involved searching previously processed information to check, which was complicated by the fact that many chains branched off in different ways
 - physically mark redactions where exemptions applied or where information was duplicated, and record the reasons for redactions

- ensure the information was appropriately presented for disclosure to the Applicant
 - identify and process attachments to emails.
27. The Authority explained that the time taken varied considerably as some information took longer and was considerably more complex. For example, in some cases it was a simple matter of confirming that information was a duplicate and removing it, but in other cases after checking information was not duplicated, the Authority had to format it and mark several redactions.
 28. The Authority further explained that it had followed an “iterative process” where it sought to remove obvious duplication and mark more obvious exemptions first and then consider the remaining information in more detail. It stated that it considered whether exemptions applied to information at the same time as processing the information.
 29. The Authority concluded that it was hard to estimate the cost of solely the manual parts of processing which FOISA allows to be included in cost estimates. However, it noted that the Commissioner’s guidance on section 12 of FOISA suggested that it should make a reasonable estimate.
 30. The Authority estimated that it took at least three minutes per page of information, which did not include the time spent considering whether exemptions applied, or the time spent liaising with Authority staff over disclosure of information. It also explained that it had spent some time trialling different methods of processing the information, to try to process it more efficiently, which it had not included in its calculation.
 31. In summary, the Authority submitted the following total estimate of chargeable costs:
 - Location and retrieval of requested information by local areas: £408.75
 - Costs of processing information by the Records Management Section (chargeable amounts only): £1,640.50 (based on 2187 pages at 3 minutes per page at £15 per hour)
 32. This resulted in a total estimate of chargeable costs of £2049.25
 33. The Authority also submitted that the schedule of withheld information it provided to the Commissioner, alongside the withheld information itself, evidenced the volume of information involved. It noted that it provided 640 emails and 29 documents other than email to the Commissioner, the majority of which were partially redacted with the number of redactions in each document visible.

The Commissioner’s view

34. Having fully considered the Authority’s submissions, the Commissioner accepts that the cost of providing the information requested by the Applicant would significantly exceed the £600 cost limit laid down in the Fees Regulations. This would remain the case even on the basis of a far more conservative estimate of the total chargeable costs.
35. Consequently, the Commissioner accepts that section 12(1) of FOISA applies to the Applicant’s request, that the Authority was under no obligation to comply with it and that he has no power to require the release of the information requested.
36. The Commissioner, therefore, will not consider in this decision notice whether the exemptions cited by the Authority should be upheld.

37. The Applicant expressed dissatisfaction that, despite her asking the Authority to exclude certain tasks to bring her request under the upper cost limit of £600 and the Authority issuing her with a fees notice (which she paid in good faith), the Authority was now seeking to rely on section 12(1) of FOISA and that the Commissioner appeared willing to accept that.
38. The Commissioner fully understands the Applicant's frustration in this regard. Ultimately, however, he does not, as stated above, have the power to require the release of the information where he accepts that section 12(1) of FOISA applies to the request under consideration.

Section 9 – Fees

39. Prior to the Authority concluding that the cost of providing the information requested by the Applicant would exceed the £600 limit, the Authority issued the Applicant with a fees notice of £48.50 to provide the information requested (which she paid).
40. Section 9 of FOISA states that a Scottish public authority receiving a request which requires it to comply with section 1(1) may, within the time allowed by section 10 for so complying, give the applicant a notice in writing (a "fees notice") stating that a fee of an amount specified in the notice is to be charged by the authority.
41. There are strict rules on what can and cannot be charged for, and how much an authority can charge. These rules are set out in the Fees Regulations.
42. Under the Fees Regulations, any fee a Scottish public authority may charge must be based on "projected costs". These are defined (regulation 3) as the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates that it is likely to incur in locating, retrieving and providing the requested information in accordance with FOISA. The projected costs cannot include the costs of determining whether the authority holds the requested information, or (if it does) whether that information should be provided. The regulation sets a maximum of £15 per hour for charging for staff time.
43. Regulation 4 goes on to specify what may be charged. The authority cannot charge any fee where the projected costs do not exceed £100. Where the projected costs exceed £100 but do not exceed the "prescribed amount" (£600, in terms of regulation 5 - over that cost, the authority may refuse the request as excessively costly under section 12 of FOISA), the authority may charge a fee. That fee shall not exceed 10% of the difference between the projected costs and £100. Finally, regulation 4(4) requires that the fees notice shall set out the manner in which the fee has been calculated.
44. The fee charged must be derived from a reasonable estimate of the projected costs but, unlike fees charged under the Environmental Information (Scotland) Regulations 2004 (the EIRs), the fee is not subject to any wider test of reasonableness. On the other hand, unlike fees charged under the EIRs, the maximum fee which might be charged under the Fees Regulations is £50. The information need not be provided by an authority until the fee has been paid (section 9(3) of FOISA).

The Commissioner's view

45. Given the cost calculations provided by the Authority during the investigation, it is clear that the Authority failed to make a reasonable estimate of the work involved to respond to the request and the time required to carry it out.
46. Had the Authority made a reasonable estimate, it would not have issued the Applicant with a fees notice. While public authorities may choose to respond to requests that exceed the

upper cost limit of £600, they are not obliged to. Given how significantly complying with the Applicant's request would exceed the upper cost limit of £600, the Commissioner considers it highly likely that the Authority would have, if it had made a reasonable estimate, applied section 12(1) of FOISA to the request.

47. Notwithstanding the serious deficiencies in the Authority's estimate, the Commissioner notes that the Applicant paid the fees notice on time. Despite this, she did not receive any of the information she had paid for until during the Commissioner's investigation. This is unacceptable.
48. In the circumstances, the Commissioner finds that the Authority failed to comply with Part 1 of FOISA in responding to the Applicant's request.
49. The Authority noted that the Applicant had indicated that she believed the fee she paid should be refunded. While it considered that it was entitled to charge the fee for the information it provided, the Authority said it was willing to refund the fee given the significant delays in providing the information it charged the Applicant for.
50. In the circumstances, given the serious deficiencies in the Authority's estimate and the significant delays in providing her with the information it charged her for, the Commissioner agrees that the fee should be refunded. He requires the Authority to refund the Applicant the fees notice she paid.
51. The Commissioner notes that the Authority does not hold contact details for the Applicant as she made her request through WhatDoTheyKnow. He will ask the Applicant for her consent to share her contact details, to allow the Authority to refund her the fees notice she paid.

Handling of the request

52. In the circumstances, the Commissioner must comment on the Authority's handling of the request.
53. Plainly, the Authority's failure to make a reasonable estimate of the work involved to respond to the request and the time required to carry it out has caused the Applicant significant frustration. Clearly, it has also resulted in a significant amount of work for the Authority that, by virtue of section 12(1) of FOISA, it was not obliged to carry out.
54. This has resulted in an appeal being submitted to the Commissioner, the substance of which (i.e. whether the exempted information was properly withheld) he cannot consider because he has no power to require disclosure of the information requested as the cost of responding to the request exceeds the upper cost limit.
55. In all, this is an unsatisfactory situation that could have been avoided. The Commissioner notes that the Authority has apologised to the Applicant for its handling of her request.
56. The Applicant also expressed dissatisfaction with the presentation of the information the Authority disclosed to her and submitted that information should be disclosed in a way that allowed the reader to follow the chronology of the information.
57. In this case, the Commissioner has not (for the reasons set out in his decision) substantively considered the content of the withheld information. In general terms, however, given the fundamental purpose of FOI law is to promote the public's "right to know", he would urge authorities to take reasonable steps to ensure that, when disclosing information in response to information requests, they present it in a manner that does not inhibit understanding of that information.

Next steps

58. Where section 12(1) of FOISA is engaged, the Commissioner considers the duty to provide advice and assistance, in terms of section 15, particularly important in order to enable a requester to effectively narrow the scope of their request.
59. During the investigation, the Applicant indicated to the Commissioner that there was information she was particularly interested in. For example, she noted that, had the Authority been honest with her about what it was going to provide, she would have requested the first year of emails since later emails related more to administrative issues rather than the policy or attitude toward the seminar in question.
60. The Commissioner, therefore, requires the Authority to engage with, and provide advice and assistance to, the Applicant on how she might (should she wish to do so) make a new, refined request, within the cost limit, in order to receive the information that she is particularly interested in receiving. He will ask the Applicant for her consent to share her contact details to allow this to happen.
61. In the spirit of providing advice and assistance, the Commissioner notes that the Authority expressed willingness to reconsider, given the passage of time, information it withheld under section 30 of FOISA and specific documents or emails that the Applicant was concerned about, to see if it could provide more information. However, the Authority noted that it had released a considerable amount of information to the Applicant and that it considered, in most cases, that there was a strong public interest in release of information about the seminar.
62. The Commissioner welcomes the Authority's commitment to engage further with the Applicant in this regard. He would encourage it to do so when engaging with, and providing advice and assistance to, the Applicant in the terms he required earlier in his decision.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

While the Commissioner finds that section 12(1) of FOISA constitutes appropriate grounds for refusal of the Applicant's request, he considers that the Authority should have refused the request on this basis at an earlier stage. Instead, the Authority issued the Applicant with a fees notice. In doing so, the Commissioner finds that the Authority failed to comply with Part 1 (and, in particular, section 9) of FOISA.

In the circumstances, the Commissioner requires the Authority to:

- to refund the Applicant the fees notice she paid
- provide advice and assistance to the Applicant on how she might make a new, refined request, within the cost limit, should she wish to do so.

The Commissioner requires the Authority to take these steps, by 20 January 2025.

Appeal

Should either the Applicant or the Authority 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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Euan McCulloch
Head of Enforcement

5 December 2024

