

Decision Notice



Decision 002/2009 Mr X and the Scottish Court Service

Solemn criminal appeals

Reference No: 200800940

Decision Date: 12 January 2009

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Scottish Information Commissioner

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Summary

Mr X requested from the Scottish Court Service (the SCS) information relating to solemn criminal appeals. The SCS responded by confirming that the information requested by Mr X was not held. Following a review, as a result of which the SCS retracted its assertion that the information was not held, Mr X was provided with the information the SCS believed at the time fell within the scope of his request. Mr X remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner was notified that on further consideration the SCS now took the view that the information provided to Mr X represented only part of the request. However, the SCS also submitted, with supporting calculations, that the cost of full compliance would exceed £600. As a result of the investigation, the Commissioner accepted that the cost of compliance in this case would exceed £600 and consequently that (by virtue of section 12(1) of FOISA) the SCS was not obliged to comply with the request. He also found, however, that the SCS had failed to provide Mr X with adequate advice and assistance in responding to his request.

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(1) (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)

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 11 January 2008, Mr X wrote to the SCS requesting the following information:



Request 1

Please provide the details specified hereunder in relation to all solemn criminal Appeals in respect of which leave to appeal against conviction was granted in part at the “first sift” pursuant to section 107 of the Criminal Procedure (Scotland) Act 1995 since the coming into effect of that provision and in relation to which the Justiciary Office accepted a subsequent Appeal against the partial refusal (purportedly) by application pursuant to section 107(4) of the 1995 Act irrespective of the subsequent disposal by the Court of that application.

Details to include:

- (a) Name of the Appellant*
- (b) Date of the “first sift” decision*
- (c) Date of the “second sift” application (purportedly) made pursuant to section 107(4) of the 1995 Act*
- (d) Date of the “second sift” decision (purportedly) made pursuant to section 107(4) of the 1995 Act*
- (e) Outcome of the “second sift” decision in terms of the application having been wholly successful, partially successful, or wholly unsuccessful*
- (f) Names of Judges determining applications (purportedly) made to the “second sift” pursuant to section 107(4) of the 1995 Act in the aforementioned circumstances.*

Request 2

Please provide a copy of any written (including electronic) guidance issued within the Justiciary Office since 8 December 2004 as to the management of solemn Appeals against conviction and /or sentence in respect of which leave was granted in part at the “first sift” pursuant to section 107 of the 1995 Act.

In relation to each of these requests leave granted “in part” refers to leave having been granted in relation to specified or otherwise restricted Grounds of Appeal.

2. The SCS responded on 30 January 2008, confirming that the information sought was not held.
3. On 4 February 2008, Mr X wrote to the SCS, noting his right to seek a review in relation to the SCS’s response to his request. Mr X advised that in order to assist him in considering the terms of any such review request he would like certain particulars of the manner in which records relating to solemn criminal appeals were managed.



4. The SCS responded to Mr X's request for clarification on 22 February 2008, enclosing a copy of a form used in the management of appeals. On the basis of this response, which suggested that the information requested was in fact held by the SCS, Mr X wrote to the SCS requesting a review on 27 March 2008. The SCS notified Mr X of the outcome of its review on 3 June 2008. The SCS firstly confirmed that it held the information requested. It went on to explain that it had been required to commission external IT support to extract the information: it had gone ahead with this as the cost of doing so was under £600. A copy of the information produced as a consequence of this exercise was attached to the response. It was highlighted, however, that it had not been possible to extract the date of the "second sift" application in every case.
5. On 26 June 2008, Mr X wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SCS's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. In particular, Mr X pointed out that in his view the information provided to him did not cover the entire period he was interested in and that appropriate exemptions for withholding the missing information were not provided in the SCS's review response. Mr X also argued that the SCS had breached FOISA by failing to respond to the request for review timeously.
6. The application was validated by establishing that Mr X 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. Because the SCS is an executive agency of the Scottish Ministers (the Ministers), on 23 July 2008 (in accordance with agreed arrangements) the Ministers were notified in writing that an application had been received from Mr X and asked to provide comments on behalf of the SCS, all in terms of section 49(3)(a) of FOISA. They were asked to respond to specific points raised by the investigating officer, in particular in relation to the assertions made by Mr X in his application to the Commissioner.
8. The Ministers responded on 21 August 2008. In their response, the Ministers provided background information to explain how Mr X's request for information had been handled. The Ministers also now submitted that section 12(1) of FOISA applied to the request, providing details of their projected costs of compliance to support this contention. They advised that the information provided to Mr X represented a partial response to his information request, with data from 2002 (when the relevant information had first been held electronically) onwards. This, they submitted, was all the information which was available at reasonable cost, the extraction of pre-2002 information requiring an extensive search of manual records. The Ministers accepted that this should have been made clear to Mr X in the SCS's earlier correspondence with him. The Commissioner considers these arguments in more detail in the analysis and findings section below.



9. The investigating officer wrote to Mr X with a summary of the Ministers' response, seeking his views on the explanation provided by the Ministers as to why certain information had not been provided, and on the Ministers' application of section 12(1) of FOISA.
10. Mr X responded on 17 September 2008, providing comments on the Ministers' application of section 12(1). He also took the opportunity to question the accuracy and completeness of the post-2002 information provided, offering to provide further information in support of these concerns should this be required as part of the investigation. There was further correspondence with both Mr X and the Ministers following this letter, in the course of which the Ministers accepted shortcomings in the information provided to Mr X and provided revised cost estimates.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all the information and submissions made to him by both Mr X and the Ministers and is satisfied that no matter of relevance has been overlooked.
12. Having examined Mr X's correspondence, the Commissioner is of the view that he considers Request 2 to have been met. As a consequence this decision considers the SCS's handling of Request 1 only.

Section 12(1) – Excessive cost of compliance

13. 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 prescribed in the Fees Regulations, and the Commissioner is then obliged to consider whether section 12(1) of FOISA would prevent him from requiring the authority to comply with the request.
14. 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.
15. 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 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 requested or (ii) whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.

Cost of compliance with respect to Mr X' request

17. The Ministers advised the Commissioner that the estimated cost of complying with Mr X's request would be in excess of £4,395. This was on the basis that there were 3,522 files to be searched manually for the period 1998-2001, requiring an experienced clerk of court (at the maximum rate of £15 per hour) in view of the nature of the information requested. At 5 minutes per file for searching and data extraction, the estimated time required was 293 hours. The Ministers advised that this projected figure did **not** include costs involved in considering pre-1998 files, retained at the National Archives. The Ministers also explained that the cost of adjusting the software which extracted the post-2002 information provided to Mr X, together with the manual checks required to ensure an accurate response in relation to this information, would itself be in excess of £600. These cost combined would take the cost of compliance considerably over the £600 figure currently stipulated under the Fees Regulations.
18. Having taken due account of the submissions made by the Ministers and Mr X, together with the terms of section 12(1) and the Fees Regulations, the Commissioner is satisfied that the costs identified in this case represent a reasonable estimate of the cost of complying with Mr X's requests. Given the nature of the work required, the Commissioner does not consider that the request could be complied with within the £600 limit. Consequently, the Commissioner is satisfied that the SCS was entitled to rely on section 12(1) of FOISA in relation to Mr X's information request, and therefore was under no obligation to comply with the request.

Section 15 of FOISA – the duty to provide advice and assistance

19. The Commissioner notes that the SCS went to considerable lengths to provide Mr X with some of the information he requested. It is unfortunate that in the process of commissioning the external IT support necessary to provide the post-2002 information an error was made in interpreting the necessary instructions, resulting in the information being partially inaccurate. It is also clear that in providing information to Mr X the SCS should have made it clear that what was being provided related only to post-2002 cases. In the circumstances, the Commissioner cannot accept that the SCS fully discharged its duty (under section 15(1) of FOISA) to provide Mr X with reasonable advice and assistance in responding to his request. While he cannot (in view of the application of section 12(1)) require the provision of any further recorded information falling within the scope of the request, he does require the SCS to provide Mr X with an explanation (in the same general terms as that provided to the investigating officer) of what he has been provided with.



Technical breach of FOISA

20. In his application to the Commissioner, Mr X highlighted that the SCS had failed to respond to his request for review timeously. The request for review was made on 27 March 2008 and a response was not provided until 3 June 2008.
21. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days from receipt of the requirement to comply with a requirement for review, subject to exceptions which are not relevant here.
22. Accordingly, the Commissioner finds that the SCS did not comply with section 21(1) of FOISA in dealing with Mr X's request for review. While the period specified in section 21(1) is absolute and is not susceptible to extension, the Commissioner notes that the SCS apologised for the delay (with a brief explanation of the processes it was carrying out) in a letter sent to Mr X on 13 May 2008. In the circumstances of this case, the Commissioner does not require the Ministers to take any action in relation to this particular breach in response to Mr X's application.

DECISION

The Commissioner finds that the Scottish Court Service (the SCS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr X, section 12(1) of FOISA providing appropriate grounds for refusing to comply with the request in the circumstances.

However, the Commissioner also finds that the SCS failed to comply with Part 1 of FOISA in dealing with Mr X's request, by failing to provide Mr X with an adequate explanation of the information which was provided to him (and thereby failing fully to discharge its duty under section 15(1) of FOISA) and by failing to respond to his requirement for review within the relevant timescale laid down by section 21(1) of FOISA. The Commissioner does not require the SCS to take any action in response to this particular application in relation to the failure to comply with section 21(1), but does require the SCS to rectify its failure in respect of section 15(1) by providing Mr X with an adequate explanation of the information supplied to him. That explanation must be provided within 45 days after the date of intimation of this decision notice.



Appeal

Should either Mr X or the Scottish Court Service 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 January 2009



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.

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.