



Scottish Information
Commissioner

Decision 007/2006 Mr F and the Scottish Executive

Request for the names of anyone who contacted or lobbied either an MSP, Parliamentary Group or Committee or Civil Servant in relation to the Scottish Executive's sexual health strategy

Applicant: Mr F
Authority: Scottish Executive
Case No: 200502345
Decision Date: 23 January 2006

Kevin Dunion
Scottish Information Commissioner

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Decision 007/2006 – Mr F and the Scottish Executive

Request for the names of anyone who contacted or lobbied either an MSP, Parliamentary Group or Committee or Civil Servant in relation to the Scottish Executive’s sexual health strategy – section 12 excessive cost of compliance – section 15 advice and assistance

Facts

Mr F requested the names of anyone who contacted or lobbied either an MSP, Parliamentary Group or Committee or Civil Servant in relation to the Scottish Executive’s (the Executive) sexual health strategy.

The Executive replied that the cost of supplying this information would exceed the £600 cost threshold, principally because it would involve examining 85 files. Mr F responded that he would be happy to inspect the files himself. The Executive replied that the files were closed; that some of the information might be exempt information and accordingly that the files were not open for inspection by members of the public.

Mr F then sought a review of this decision indicating that the first refusal had been based solely on cost. However, when he sought to mitigate this cost he was given “new” reasons for not being supplied with the information requested. On review the Executive confirmed that the cost of supplying the information requested would exceed £600.

Mr F was dissatisfied with this decision and applied to the Scottish Information Commissioner for a decision.

Outcome

The Commissioner found that the Executive did not change its reasons for providing the information requested by Mr F.

He also found that the Executive applied section 12 (1) of the Freedom of Information (Scotland) Act 2002 (FOISA) correctly in withholding the information on the grounds of excessive cost, and complied with Part 1 of FOISA.



However, the Commissioner found that the Executive did not carry out its duty to advise and assist Mr F under section 15 of FOISA, in that it failed to contact him to discuss whether it would be possible to narrow his request further in order to bring the cost under the £600 limit established by section 12 of FOISA for complying with a request for information.

Appeal

Should either Mr F or the Executive 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 of receipt of this notice.

Background

1. Mr F e-mailed the Executive on 5 May 2005 to ask for the names of anyone who contacted or lobbied either an MSP, Parliamentary Group or Committee or Civil Servant in relation to the Scottish Executive's Sexual Health Strategy.
2. The Executive asked Mr F for clarification of his request and established on 11 May 2005 that he was only interested in the names of those people and bodies who had made contact since the formation of the Scottish Parliament.
3. The Executive responded on 3 June 2005 that locating specific documents containing this information would involve searching the entire contents of over 85 files. In its estimation, this would cost £637.50, excluding the cost of any photocopying that might be required. It provided a breakdown of the projected costs involved. It therefore refused to comply with the request under section 12 of FOISA.
4. On 21 June 2005 Mr F offered to save the Executive the time and expense of searching through the files, by travelling to Edinburgh to do this himself.
5. The Executive responded to this on 22 June 2005, saying that this would not be possible as the files might contain information which was subject to one or more of the exemptions in FOISA, and were therefore not available for inspection by the public.



6. Mr F then requested a review of the Executive's decision on 23 June 2005 on the basis that it had added new reasons for refusing to provide the information requested when he offered to search the files concerned.
7. The Executive upheld its initial decision on 21 July 2005, stating that the initial decision was based upon the projected costs derived from careful consideration of the extent, nature and scope of Mr F's request.
8. On 21 July 2005, Mr F applied to me for a decision regarding the handling of his request for information. In it, he stated he was dissatisfied at the way the Executive changed the reasons for refusing access to the information requested, and that the response to the request for review had not addressed this issue.
9. The case was allocated to an Investigating Officer.

The Investigation

10. Mr F's application was validated by establishing that he had made a valid information request to a Scottish public authority (the Executive) and that he had appealed to me only after asking the public authority to review its response to his request.
11. I invited comments from the Executive as I am required to do under section 49(3)(a) of FOISA, and requested a detailed breakdown of the projected costs of supplying the information requested and information about how the review was carried out.
12. The Executive responded on 25 August 2005, providing this information, and providing additional information concerning Mr F's statement that he was given "new" reasons for not being supplied with information upon making his offer to inspect the files himself.
13. The detailed breakdown of costs provided by the Executive stated that 85 paper files would need to be searched to locate the requested information. The time estimated for this would be 30 minutes per file, totalling 42.5 hours of Grade B (Executive or Higher Executive Officer) staff time at the maximum allowable rate of £15 per hour. In addition, any photocopying would be charged at 10p per page.



14. The Executive also stated that the review decision included considerations of issues relating to justifications for the cost stated, such as what information was held by the Executive relating to the request, grading of staff for the exercise and the estimate of the time involved.
15. It also addressed the refusal of Mr F's offer to inspect the files himself. It stated that this was due to the fact that facilitating this would still require the information falling within the scope of his request to be located and separated from that which did not.
16. It did not mention, however, any consideration of whether part of the information could be provided to Mr F free of charge, or at a cost within the £600 limit provided for in section 12 of FOISA.

The Commissioner's Analysis and Findings

17. In his application to me, Mr F stated his dissatisfaction that the grounds for refusing his request changed after he offered to locate the information himself, and that the Executive had not addressed this in its review of its decision, despite this being the basis of his appeal.
18. The basis of the Executive's refusal of Mr F's initial request was that it estimated the cost of locating the information requested would exceed £600, meaning it did not have to comply with the request under section 12 of FOISA.
19. Mr F's subsequent offer to travel to Edinburgh to search the files himself did not state any dissatisfaction with the Executive's handling of his initial request, and it was therefore not a request for review under section 20(3) of FOISA. It also did not make any further requests for information, and so could not be treated as a separate request. Rather, since it was a proposal of an alternative means of providing the information requested in Mr F's original e-mails of 5 and 11 May 2005, it represented an additional part of that initial request.
20. In responding to Mr F's offer, it is clear to me that the Executive meant by the statement that the files concerned "are not open for inspection by members of the public", that it would not be able to allow Mr F to inspect the files in person. This was due to the possibility of the files containing exempt information that was not relevant to his request. In this, having considered the Executive's submissions, I am satisfied that the Executive was only addressing the matter of exempt information that did not relate to Mr F's request and was not citing other exemptions to deny access to the information of interest to him.



21. Nevertheless, it would have been good practice for the Scottish Executive to address the dissatisfaction that Mr F raised in his request for review. Indeed, the review response that it sent to Mr F made no attempt to address or correct the impression he had that new reasons had been given for not providing access to the information requested. Had the Executive done this, it would have provided Mr F with a better understanding of the reasons for refusing his offer to search the files himself, and would have been entirely within the spirit of the requirement to provide advice and assistance under section 15 of the Act.
22. However, it is clear from the Executive's review of its handling of the initial request that it did not consider any new reasons for withholding the information. Rather, it upheld its initial decision in its entirety and did not change its position with regard to the information requested. I am therefore satisfied that the Executive handled this aspect of the review correctly.

Did the Executive apply section 12 correctly?

23. The Executive has managed to establish, through its clarification of Mr F's requirements, that it would have to search through 85 paper files to comply with his request for information.
24. The process of locating the information would involve reading through each paper file for names relevant to Mr F's request. The files would vary in size, and the information contained within them would include a variety of documentation such as correspondence, memoranda, reports and drafts of the strategy document, all of which would vary in complexity, considering the subject matter involved (the development of the Sexual Health Strategy for Scotland). I am therefore satisfied that the member of staff searching the files would need to exercise a degree of judgement in locating the names relevant to Mr F's request. The Executive identified that this kind of work would be carried out by an Executive or Higher Executive Officer, which equates to a B Grade member of staff.
25. Whilst there is no accurate amount of time that could be identified in advance for searching through these files, I am satisfied that 30 minutes per file is a reasonable estimate of the time for the work outlined above, given the amount of reading that would be involved.



26. In a subsequent phone call to the Executive about the staff grading required for the task, the Investigating Officer was informed that the search could be conducted by either a B1 or B2 member of staff. The minimum and maximum pay scales that were provided for these grades were £18,000 - £26,000 equating to hourly rates of £9.35 - £14.95, based on a standard 37 hour working week.
27. Using this information, 85 files would take 42.5 hours to search. At the maximum rate of £14.95 per hour, this search would cost £635.38, but using the lowest rate of £9.35 would cost £397.38 which would be well below the £600 threshold.
28. The Executive stated in its response to me that the maximum cost per hour of B Grade staff time had been selected due to the “level of working knowledge of the policy context required together with a full understanding of the scope of the request”. Due to the nature of the documentation that would be involved, I am satisfied that it would be justifiable to charge at the top of the relevant salary scale, assuming that rate did not exceed the maximum rate of £15 prescribed by The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004.
29. In this case, I note that the hourly rate quoted to Mr F (and to me initially) was the maximum of £15. On the basis of the evidence provided above, it is clear that the maximum hourly cost the Executive could actually consider is £14.95, not £15. Whilst in this case, this would still amount to a cost which exceeded the £600 threshold specified in section 12 of FOISA, in another instance a broad application of costs might mean the difference between providing and withholding information.
30. I also note that the Executive made no effort to establish whether part of the information could be made available to Mr F for free, or for a charge within the £600 threshold specified in section 12 of FOISA. Under paragraph 14 of the Guidance to Scottish Public Authorities on Charging Fees for Providing Information (which forms Annex 3 of the Scottish Ministers’ Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002), an authority should consider such alternatives where the cost of providing all the information would exceed £600. I would regard this as good practice in all cases, and would particularly expect such action to be taken where the £600 limit is only marginally exceeded, such as in this case.



31. More generally, section 15 of FOISA requires authorities, in discharging their duty to provide advice and assistance, to advise the applicant what information might be provided, for example, if they narrowed their request. Whilst it is clear that the Executive invited Mr F to narrow his initial request, they did not contact him again to see if he would be prepared to narrow it further after they had established that his amended request would cost over £600.
32. Therefore, whilst I accept that the cost of providing the information would still exceed the £600 threshold specified in section 12 of FOISA for complying with an information request, the Executive failed to advise and assist Mr F properly under section 15 of the Act, by not contacting him to see if it would be possible to narrow his request further in order to bring the cost below that limit. I would expect that this should be done as a matter of course when similar circumstances arise in future.

Decision

I find that the Scottish Executive (the Executive) did not change its reasons for providing the information requested by Mr F, and complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in carrying out the review of its original decision to withhold the information requested by Mr F.

I also find that the Executive applied section 12(1) of FOISA correctly in withholding the information on the grounds of excessive cost, and complied with Part 1 of FOISA in this respect.

However, I also find that the Executive failed to advise and assist Mr F properly under section 15 of FOISA, by failing to contact him to discuss if it would be possible to narrow his request further in order to bring the cost under the £600 limit established by section 12 of FOISA for complying with a request for information. I require the Executive to take steps to do this.



I cannot require the Executive to take any action until the time allowed for an appeal to be made to the Court of Session has elapsed. I therefore require the Executive to take steps to ascertain whether it would be possible to narrow Mr F's request further in order to bring the cost under the £600 limit within 45 days of the date of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
23 January 2006