

Decision Notice



Decision 030/2011 Mr Tom Gordon of the Sunday Herald and City Building
(Glasgow) LLP

Hospitality expenditure

Reference No: 201001182
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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr Gordon requested from City Building (Glasgow) LLP (CBG) information pertaining to its expenditure on hospitality. CBG withheld all the information under section 33(1)(b) of Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, CBG advised Mr Gordon that it did not hold information for the full period covered by the request. In relation to the information held, it disclosed a list of events involving the provision of hospitality while otherwise upholding its decision to withhold information under section 33(1)(b) of FOISA. It also withheld certain personal data under section 38 of FOISA. Mr Gordon remained dissatisfied and applied to the Commissioner for a decision.

During the Commissioner's investigation, CBG submitted that the cost of responding to Mr Gordon's request for the full period he had specified would exceed £600, which meant that it was not obliged to comply with the request under section 12(1) of FOISA. Following an investigation, the Commissioner accepted CBG's submissions on the cost of compliance and therefore concluded that CBG was not obliged to comply with the request. He did, however, find that CBG had failed to provide Mr Gordon with reasonable advice and assistance on how his request might have been brought 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)

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 25 March 2010, Mr Gordon emailed City Building (Glasgow) LLP (CBG) requesting the following information:
A breakdown of all hospitality expenditure by CBG in each financial year since its inception. This should [sic] hospitality bestowed on the managing director, staff, chair and board of CBG, as well as hospitality bestowed on outside parties. This should include the name of the recipients of the hospitality; the nature of the hospitality. eg concert, dinner; the dates of the hospitality; the reason for the hospitality; and the venue of the hospitality.
I understand there may be a charge for this information.
2. CBG responded on 26 April 2010. It advised Mr Gordon that it secured most of its turnover from commercial tenders and used hospitality as part of its marketing strategy. It advised Mr Gordon of the proportion of turnover it spent on marketing, and submitted that if the requested information was disclosed, competitors would gain an unfair commercial advantage in relation to how it carried out such marketing activities. Consequently, the requested information was being withheld under section 33(1)(b) of FOISA.
3. On 3 May 2010, Mr Gordon emailed CBG, requesting a review of its decision. In particular, Mr Gordon commented that the response had completely ignored the first part of his request (on hospitality bestowed on staff and board members). Given the level of CBG's expenditure on marketing, which he described as considerable, he was of the view that there was a clear public interest in knowing how this money was spent and on whom.
4. CBG notified Mr Gordon of the outcome of its review on 26 May 2010. It supplied a list of events involving the provision of hospitality, with dates and some details of attendees. However, it upheld its earlier application of section 33(1)(b) of FOISA in relation to the remainder of the information requested, arguing in addition that the personal data of certain attendees were exempt under section 38 of FOISA. CBG also provided Mr Gordon with an explanation of the purposes of its hospitality. Finally, it explained that it did not hold the requested information for years prior to 2008.
5. On 8 June 2010, Mr Gordon wrote to the Commissioner, stating that he was dissatisfied with the outcome of CBG's 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 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

7. On 14 June 2010, CBG was notified in writing that an application had been received from Mr Gordon and was asked to provide the Commissioner with any information withheld from him. CBG responded with the information requested for the period from April 2008, together with comments on that information, advising that earlier records were not of the same quality or in the same format. The case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted CBG, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. CBG was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested. In addition, CBG was asked to provide copies of its records prior to 2008 with any non-hospitality items blanked out, and was asked detailed questions about the searches it had undertaken to identify and locate the information falling within scope of the request.
9. CBG responded, and provided details of the searches it had undertaken and its submissions as to why it considered sections 33(1)(b) and 38(1)(b) of FOISA to apply to the withheld information. CBG also advised that, after considering the way in which it held information for the period prior to April 2008, it now considered that the cost of complying with Mr Gordon's request would exceed the £600 limit prescribed in the Fees Regulations, and therefore that it was not obliged to comply with the request by virtue of section 12(1) of FOISA.
10. CBG explained that, prior to April 2008, it did not have a separate marketing budget under which hospitality expenditure could be allocated and all invoices were paid in batches, which were then scanned onto disks with the paper copy being destroyed: it outlined the difficulties in locating and retrieving information from these disks. For the period 6 October 2006 (when CBG was established) to 26 October 2006, however, batches were saved and stored off-site in paper format only and would have to be retrieved and searched manually; consequently the cost of complying with Mr Gordon's information request would exceed £600.
11. CBG provided a detailed explanation of the steps involved in narrowing the number of invoices to be searched for the hospitality expenditure. To assist with the consideration of the steps involved, the investigating officer arranged a telephone discussion with a Financial Controller at CBG. The Financial Controller provided further details of the cost codes that the relevant expenditure could be allocated to, and advised that the only way to ensure all hospitality expenditure pre-April 2008 was identified was to search all the invoices for the time period in question. The investigating officer requested and received further details of how the payments were recorded in CBG's financial systems and a copy of a batch of invoices.
12. Mr Gordon was advised that CBG was now relying on section 12(1) of FOISA in relation to hospitality expenditure prior to 2008 and its submissions on this provision would need to be considered by the Commissioner. Mr Gordon was concerned about the apparent state of CBG's records for the period in question and suggested that CBG should provide what it could within the £600 limit for the post-April 2008 period.



13. The investigating officer requested, and CBG provided, a revised calculation of its costs associated with the provision of information for the period prior to April 2008. The submissions received from both parties, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.

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 CBG 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 its submissions, CBG stated that, in order to provide the information Mr Gordon sought for the period prior to April 2008, all its invoices for the period concerned would have to be searched for the requested information. The Commissioner acknowledges that in this case it would be unreasonable to interpret Mr Gordon's request other than as a single request for information in terms of section 1(1) of FOISA: accordingly, it would be wholly artificial (and therefore inappropriate) to attempt to split it into constituent parts for any reason.
18. CBG explained that a separate marketing budget was not in place until 1 April 2008 (i.e. there was no single cost code under which a list of all relevant hospitality payments would be assigned), which meant that no simple report of relevant spending could be obtained. CBG commented that its accounting systems had evolved from those of the former Building Services department of Glasgow City Council, which did not have any need for a "business development" cost code, and consequently it took time for one to be established.



19. CBG also advised that invoices for the period 6 October 2006 (the date of its establishment) to 26 October 2006 were saved on paper only and stored in an off-site location: consequently there would be a charge to retrieve this information. Invoices processed from 26 October 2006 to April 2008 were scanned onto a disk in batches, with each disk containing a number of different batches of invoices (scanned in pdf format and labelled by batch number). It explained that the disks were poorly labelled (and in particular did not say which batches are on the disk), there was no external indication as to what was contained on each disk and the batches were not always saved in a sequential format. The search functionality on the disks was also extremely limited, and consequently every invoice would have to be searched for relevant expenditure.
20. During the investigation, discussion ensued as to whether every invoice had to be searched for the requested information, or whether the number requiring to be searched could be reduced. While initially it had appeared that a number of sub-codes of the "Supplies and Services" cost code should cover all the relevant records, it became apparent in the discussion with the Financial Controller that this cost code would be unlikely to contain all relevant invoices. It was also noted in this discussion that, even if a single code was identified as containing the most relevant invoices, the majority of the invoices saved on the disks would have to be searched as invoices were not saved within batches in any particular order.
21. CBG estimated that the disks contained 135,000 invoices, covering a period of 18 months. This estimate was based on its data indicating that it carried out approximately 90,000 transactions (which would relate to at least one invoice, more if a number were paid together) in a year. The Commissioner does consider 135,000 invoices to be more than he might have expected, but not unreasonably so based on CBG's turnover of £180 million and the type of work CBG undertakes.
22. CBG also advised that it would take 30 seconds on average to look at each invoice, and that an administrator could undertake the work: this would still, however, incur the maximum hourly rate of £15. It would therefore, CBG submitted, take approximately 1,125 hours to consider all the invoices, at a total cost of £16,875.
23. Having considered the estimates provided by CBG to calculate the cost of searching for the requested information, and taking account of the volume of information involved, the Commissioner is satisfied that CBG's projected cost of compliance with the request is reasonable in the circumstances. In any event, the time required to examine the invoices would have to be reduced to a wholly unrealistic level before compliance could be achieved within the prescribed amount of £600.
24. The Commissioner therefore accepts that the cost of complying with Mr Gordon's information request would exceed the £600 limit prescribed in the Fees Regulations. Therefore, the Commissioner concludes that CBG was entitled to apply section 12(1) of FOISA and was under no obligation to comply with the information request made by Mr Gordon.



Section 15 of FOISA – Duty to provide advice and assistance

25. 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" – in the version applicable at the time CBG dealt with the request) include, in cases where section 12(1) applies, "an indication of what information could be provided within the cost ceiling".
26. In this case, CBG responded to Mr Gordon's request for information and requirement for review by providing him with some information, advising him that information for the period prior to 2008 was not held and that the remainder was being withheld under the exemptions in sections 33(1)(b) and 38 of FOISA. It was only after the Commissioner's investigation had commenced that CBG confirmed that it did hold information prior to 2008 (but that the cost of providing this information would exceed the prescribed amount).
27. Paragraph 14 of Annex 3 of the Section 60 Code (in the version applicable at the time CBG dealt with the request) 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.
28. In this case, CBG did provide Mr Gordon with some information, but advised him that it did not hold information prior to 2008. CBG explained in its submissions that it had provided this response based on a previous decision issued by the Commissioner (*Decision 021/2006 Mr Gordon Ross and Caledonian MacBrayne Limited*), in which it was concluded that the information was not held because the limitations of the authority's financial records would not allow the identification of the information requested (it being impossible in that case to distinguish the information in question from spending on other activities). Initially, it had considered itself to be in a similar position to Caledonian MacBrayne in the absence of a single hospitality cost code, although in the course of the investigation it became clear that the relevant information could be extracted from invoices and therefore was held.
29. The Commissioner acknowledges that an authority can cite additional exemptions or other relevant provisions of Part 1 of FOISA, or withdraw exemptions or other provisions previously relied upon, at any point prior to the issue of his decision, and that he must consider any such provisions the authority continues to rely upon at the time he reaches that decision. However, he must also consider the way in which the authority dealt with the request prior to an application being made to him, with particular reference to any matters raised in that application. In this particular case, Mr Gordon was clearly unhappy with what he considered to be a failure to explain the absence of any information for the period prior to 2008. He also notes Mr Gordon's anticipation in his request that there might be a charge for the information he had requested.



30. In all the circumstances of this case, therefore, the Commissioner would have expected CBG to have explained to Mr Gordon that it held the information for the period prior to April 2008 and why that information could not be provided within the £600 limit, thus enabling him to submit a new request for the remaining information. In failing to do so, the Commissioner considers that that CBG did not comply fully with the requirements of section 15 of FOISA in dealing with Mr Gordon's request. Given that the relevant advice is in essence conveyed in this decision, the Commissioner does not require any action in response to this failure, although clearly CBG should deal with any further request Mr Gordon submits for the remaining information in accordance with Part 1 of FOISA.

DECISION

The Commissioner finds that City Building (Glasgow) LLP (CBG) 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 Mr Gordon with reasonable advice and assistance under section 15 of FOISA (by advising him how his request might be modified so as not to exceed the prescribed amount), CBG failed to deal with Mr Gordon's request in accordance with Part 1 of FOISA. The Commissioner does not require CBG to take any action in respect of this failure in response to Mr Gordon's application, given that the relevant advice is in essence conveyed in this decision.

Appeal

Should either Mr Gordon or City Building (Glasgow) LLP 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
16 February 2011



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.