

Decision Notice



Decision 086/2008 Unison and the Scottish Ministers

Full Business Case and final contract for all PFI/PPP contracts undertaken in Scotland

Reference No: 200701551
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Summary

Unison requested from the Scottish Ministers (the Ministers) copies of the Full Business Case (FBC) and final contract for each PFI/PPP contract undertaken in Scotland. The Ministers responded by providing some of the documents requested in a redacted form, but also informing Unison that it did not hold some of the information sought and explaining that it was accessible elsewhere. Following a review, Unison remained dissatisfied and applied to the Commissioner for a decision. During the course of the investigation, the Ministers informed the Commissioner that they considered the estimated cost of complying with the request would exceed the prescribed limit.

Following an investigation, the Commissioner found that the Ministers were entitled to refuse the request on cost grounds.

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)

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 19 July 2006, Unison wrote to the Ministers requesting the following information:

“...a copy of both the Full Business Case and the final contract from each and every one of the PFI/PPP contracts undertaken in Scotland, dating back to the start of the Private Finance Initiative.”



In explaining its request, it referred to the PFI/PPP projects listed on the Scottish Executive (as it then was) Financial Partnerships Unit (FPU) website.

2. The Ministers responded on 16 August 2006. They identified 95 projects which fell within the scope of Unison's request. The Ministers explained that they did not hold some of the documents requested: of those that they did hold, they supplied some with redactions under section 33 (Commercial interests and the economy) of FOISA. With respect to the remaining documents, the Ministers explained that these were reasonably obtainable elsewhere and as such applied section 25 of FOISA. The Ministers supplied Unison with a schedule detailing which documents were not held and where Unison could access the otherwise accessible documents.
3. On 11 October 2006 (following further correspondence in the intervening period), Unison wrote to the Ministers requesting a review of their decision. In particular, Unison was dissatisfied with the Ministers' application of exemptions to the redacted information and also their contention that they did not hold some of the information requested, while reserving the right to approach the Ministers again if they could not obtain elsewhere any of the information to which section 25 had been applied.
4. The Ministers notified Unison of the outcome of their review on 16 January 2007. The Ministers upheld their original response to Unison, but provided it with further reasoning behind that response.
5. On 21 November 2007, Unison wrote to the Commissioner, stating that it 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.
6. Although the application was submitted outwith the 6 month time limit laid down in section 47(4) of FOISA, the Commissioner considered it appropriate in the circumstances to exercise his discretion under section 47(5) of FOISA and accept the application.
7. The application was validated by establishing that Unison 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 24 January 2008, the Ministers were notified in writing that an application had been received from Unison and asked to provide the Commissioner with any information withheld from Unison. The Ministers responded with the information requested and the case was then allocated to an investigating officer.



9. The investigating officer subsequently contacted the Ministers, providing them with 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.
10. Given the amount of information involved, the investigating officer also asked the Ministers to confirm that the cost of dealing with this request did not exceed the cost threshold set out in the Fee Regulations.
11. In their response, the Ministers reassessed their position and considered that although they had attempted to be as helpful as possible to Unison, given the volume of information involved, it would be appropriate to apply section 12(1) of FOISA on the basis of excessive cost of compliance. The Ministers also outlined a settlement proposal which would require Unison to identify the specific information sought which would satisfy its request.
12. In light of this, the investigating officer provided Unison with the opportunity to comment on the Ministers' application of section 12(1) and their settlement proposal.
13. In responding, Unison expressed its dissatisfaction with the Ministers' application of section 12 of FOISA (not considering a refusal on this basis to be in the spirit of FOISA) and did not wish to take forward the Ministers' settlement option.

Commissioner's analysis and findings

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

Background

15. Unison requested copies of the FBCs and final contracts for all PFI/PPP projects listed on the FPU website. The Ministers submitted that they had attempted to be as helpful as possible in providing information and, where information was not held, directing Unison to potential sources of that information. The Ministers highlighted that although they held some documentation within the scope of Unison's request, much of the material originated from other parties – predominately local authorities – and therefore an approach to these bodies might have proved more likely to yield more complete and comprehensive information than they held.



16. The Ministers explained that the FPU endeavoured to provide as much information as possible on PP/PFI projects on its website. While most of the projects were not procured by the Ministers, FPU obtained information from public sector bodies involved in PPP/PFI projects in order to have a central point for collating some key pieces of information. This information was then a starting point for anyone wishing to contact a particular body for further detail. The Ministers suggested that because they made available a significant amount of information in one place, even though relatively little related to their own projects, Unison may have been led (erroneously) to expect FPU to hold comprehensive information on all such projects.
17. The Ministers explained that the FPU was the policy area within the Scottish Government that dealt with PPP/PFI and so if any relevant documents were received by the Government from other public bodies, it would be the FPU that would receive them. To ensure that all relevant information was located, officials had undertaken a physical search of filing cabinets and a store room as well as electronic searches on eRDM (the Government's electronic records management system) and its shared drive predecessor. Given that much of this information was held because it had been provided by other public sector bodies, rather than because the Ministers were required to hold it, it was not kept in a specific order in one place. For Scottish Government PPP/PFI projects, the appropriate policy area within the Government responsible from managing the contract was contacted for the relevant information.
18. The Ministers also highlighted that there was neither an expectation nor any legal duty to hold such information from other public sector bodies. The majority of the projects had not been procured by them. They submitted that it was the procuring bodies, such as local authorities, health bodies etc, which procured the projects and were responsible for managing them. The Ministers submitted that this applied even where they might have provided some part funding.

Section 12(1) – Excessive cost of compliance

19. 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 complying with an information request would exceed the relevant cost limit contained 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 requested in this case.
20. Section 12(1) of FOISA provides that a Scottish public authority need not comply with a request for information if the authority estimates that the cost of complying with the request would exceed the amount prescribed in the Fees Regulations for that purpose (currently £600). The authority's estimate should be a reasonable one. Where the Commissioner is satisfied that the costs of complying with a request exceed the amount prescribed in the Fees Regulations, he cannot order the public authority to comply with the request.



21. The projected costs which the public authority can take into account in relation to the request for information are, according to regulation 3 of the Fees Regulations, the total costs (whether direct or indirect) which it 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 or (ii) whether or not it should provide the information. The maximum hourly rate a public authority can charge for staff time is £15 an hour.
22. In response to Unison's request, the Ministers stated that it encompassed 95 projects and thus 190 documents (FBCs and contracts). Of the 33 project documents provided to Unison (i.e. those which the Ministers did not claim were either not held or reasonably obtainable elsewhere), 17 were provided in full and 16 with redactions.
23. The Ministers submitted that the relevant information held, variously in hard copy and electronically, predominantly neither being produced nor required to be held by them, was not contained within any easily accessible or structured filing system. Therefore, the Ministers' estimate for location and retrieval, which they submitted erred on the low side, reflected in their view both the volume of the material involved and the manner in which it was held.
24. The Ministers went on to state that the estimate supplied was based on the cost of supplying the information electronically – the form requested by Unison – and included charges for copying and then scanning documents once redactions had been made.
25. For comparison, the Ministers also calculated the cost of supplying the information in the form in which it was actually held by them, i.e. if they were not supplying the information electronically as requested by Unison. They noted that the total calculated on this basis proved to be significantly higher than the estimated cost of issuing the information electronically, many of the documents being in hard copy.
26. The Ministers submit that they would require 10 minutes to locate and retrieve each of the 33 documents. This would amount to a staff charge of £82.50 (charged at £15/hr). The relevant member of staff used would be a Project Advisor employed at B2 level who, the Ministers explained, was of an appropriate grade to understand the content of the information contained within the project documentation. For the documents which would require redaction, the Ministers submitted that a copy would be required to carry out those redactions, which would then require to be scanned. The total cost of copying estimated by the Ministers (at 10p per page) was £380.30. The total cost of applying redactions (at the same hourly staff rate as detailed above) was estimated at £136.13. The cost of scanning the documents, at 1.5 minutes per 10 pages, amounted to £240.90 and the cost of providing the documents (at 5 minutes per document) was estimated at £41.25. The total estimated cost of supplying the documents therefore amounted to £881.08.
27. Having considered the nature and volume of information in this case, which is of some complexity and ranges in size from 33 pages to 528 pages, the Commissioner is satisfied that the costs identified in this case are reasonable in the circumstances.



28. Having taken due account of the submissions have been made by the Ministers, together with the terms of the Fees Regulations, the Commissioner is satisfied that the Ministers were correct to rely on section 12(1) of FOISA in this case and were under no obligation to comply with the information request from Unison.

DECISION

The Commissioner finds that the Ministers acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Unison, section 12(1) of FOISA constituting appropriate grounds for refusal in the circumstances of the case.

Appeal

Should either Unison 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 Investigations
21 July 2008



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.

...

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.