

Decision Notice 154/2019

Complaints pertaining to disability in further/higher education

Applicant: The Applicant

Public authority: Scottish Public Services Ombudsman

Case Ref: 201900933



Scottish Information
Commissioner

Summary

The SPSO was asked for statistics about complaints relating to reasonable adjustment or/and discrimination or prejudice complaints pertaining to disability in further/higher education.

The SPSO explained that providing a response to the request would exceed £600 and so it was not obliged to comply with the request. Following an investigation, the Commissioner agreed.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) 1(1), (4) 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 11 December 2018, the Applicant made a request for information to the Scottish Public Services Ombudsman (the SPSO). He asked for the number of:
 - complaints of reasonable adjustment or/and discrimination or prejudice complaints pertaining to disability in further/higher education
 - investigations regarding reasonable adjustment or/and discrimination or prejudice complaints pertaining to disability in further/higher education
 - complaints fully upheld
 - complaints partially upheld
 - complaints dismissed
 - communication/enquiries pre-complaint regarding reasonable adjustment or/and discrimination or prejudice complaints pertaining to disability in further/higher education.
2. The SPSO responded on 14 January 2019. It explained that it reports its findings on its website¹ and in its annual complaints statistics², but does not categorise complaints by “reasonable adjustment and discrimination or prejudice complaints pertaining to disability” as a subject. From a search of its published findings, the SPSO listed the published decision reports that may fall within the scope of the Applicant’s request. To identify accurately all relevant complaints in its system, the SPSO said it would need to review individual complaint records, and that would likely exceed £600. Therefore, under section 12 of FOISA, it would not be required to provide the information to the Applicant.

¹ <https://www.spsso.org.uk/our-findings>

² <https://www.spsso.org.uk/statistics>

3. The SPSO added that section 19 of the Scottish Public Services Ombudsman Act 2002 (the SPSO Act) strictly prohibited the SPSO from disclosing information obtained in connection with a complaint, except for specified purposes, such as for the purpose of the investigation (which includes reporting on the investigation). Disclosing information under FOISA was not one of those specified purposes and information about the subject of a complaint will be exempt information under section 26(a) (Prohibitions on disclosure) of FOISA.
4. On the same day, the Applicant wrote to the SPSO requesting a review of its decision on the basis that he was not requesting information about individual complaints, but wanted evidence of the SPSO's effectiveness to uphold complaints within these fields. The Applicant asked the SPSO to explain why it could not disclose data that illustrated the ability of the SPSO.
5. The SPSO notified the Applicant of the outcome of its review on 7 February 2019. The SPSO's review upheld its initial response that section 19 of the SPSO Act applied and that to provide the information would exceed £600.
6. On 6 June 2019, the Applicant wrote to the Commissioner, applying to the Commissioner for a decision in terms of section 47(1) of FOISA. He stated that he was dissatisfied with the outcome of the SPSO's review because he believed the information should be disclosed to increase transparency.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SPSO was invited to comment on this application and to answer specific questions. These related to the estimated cost and the application of section 26(a) of FOISA to the requested information.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to him by both the Applicant and the SPSO. He is satisfied that no matter of relevance has been overlooked.

Section 12(1) - Excessive cost of compliance

10. The SPSO submitted that the information requested by the Applicant is exempt from disclosure under section 26(a) of FOISA and that, in any event, the excessive costs provision in section 12(1) of FOISA applied.
11. The Commissioner will consider section 12(1) first: this provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently set at £600 (regulation 5 of the Fees Regulations). Consequently, the Commissioner has no power to require the disclosure of information should he find that the cost of responding to a request for information exceeds this sum.

12. The projected costs 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 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 whether it actually holds the information requested, or whether it should provide the information. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
13. The SPSO explained that, as it does not categorise complaints by the subject in the way the Applicant had specified, it could not easily identify all the relevant complaints in its handling system. The SPSO was able to conduct a limited search of its case handling system (database and documents) for the further/higher education sector with key words (“disability”, “prejudice”, “discrimination”, “adjustment”). However, its database would not contain complete data on a complaint as many documents are not stored electronically on the case handling system, or are scanned documents which would not return hits (but still may be relevant).
14. The SPSO said there were more than 600 further/higher education cases in its case handling system that were received before the Applicant’s request and had not yet been destroyed. The SPSO explained that complaints could form part of a wider complaint and therefore it could not narrow down the number of cases from its existing subject headings. The SPSO also confirmed that it was not able to exclude cases where decisions were published, as there may be further aspects of a complaint that had not been taken forward or published.
15. The implication was, as stated in its review, that the SPSO would need to review each case file to assess and locate information relevant to the Applicant’s request.
16. On the basis that it could retrieve and review about six cases per hour, at £15 per hour, the SPSO estimated that it would exceed £600 – the limit for complying with a request – and section 12 therefore applied.
17. Taking account of all the above circumstances, the Commissioner is satisfied that the cost of complying with the Applicant’s request would exceed £600. He therefore finds that, in line with section 12(1) of FOISA, the SPSO was not obliged to comply with the Applicant’s request.
18. In reaching this conclusion, the Commissioner notes that the Applicant’s request is narrowed by subject, but does not stipulate a time frame. The request is therefore unbounded and would involve all information held at the time of the request that falls within the subject.
19. The Commissioner accepts that the SPSO would need to search its actual records to assess the information held and decide if the information falls within the request. The SPSO would not be able to exclude certain information related to higher/further education sector without looking at individual files.
20. Having accepted that section 12 was correctly applied by the SPSO, the Commissioner will not go on to decide if section 26(a) of FOISA applied to the request.

Decision

The Commissioner finds that the Scottish Public Services Ombudsman complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the

Applicant.

Appeal

Should either the Applicant or the SPSO 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.

Margaret Keyse
Head of Enforcement

24 October 2019

Appendix 1: 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.
...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
...
- (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.

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