

Decision Notice



Decision 211/2013 Mr Martyn McLaughlin and the Scottish Ministers

“If asked” media statements

Reference No: 201301314

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www.itspublicknowledge.info

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Summary

On 20 May 2013, Mr McLaughlin asked the Scottish Ministers (the Ministers) for information relating to media statements prepared in anticipation of questions being asked, but not published. The Ministers responded by stating that any information held was exempt from disclosure in terms of section 30(b)(i) and (ii) of FOISA (Prejudice to effective conduct of public affairs).

Following an investigation, the Commissioner found that the Ministers were entitled to rely upon section 14(1) of FOISA, on the basis that the request was vexatious.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 14(1) (Vexatious or repeated requests).

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 20 May 2013, Mr McLaughlin wrote to the Ministers with the following request:
I would like all and any correspondence, documentation, and electric communications relating to “if asked” media statements prepared between 1 January 2013 and 1 May 2013. To clarify, these “if asked” statements are statements prepared for publication and/or dissemination, but then withheld unless a member of the media asks for them.
2. The Ministers responded on 22 May 2013. They informed Mr McLaughlin that the information requested was exempt from disclosure under section 30(b)(i) (substantial inhibition to free and frank provision of advice) and 30(b)(ii) (substantial inhibition to free and frank exchange of views for the purposes of deliberation).
3. On 22 May 2013, Mr McLaughlin wrote to the Ministers requesting a review of their decision. He disagreed with the Ministers' application of the above exemptions. Mr McLaughlin also reduced the scope of his request, to cover the media statements only and not any related information.



4. The Ministers notified Mr McLaughlin of the outcome of their review on 31 May 2013. They upheld the original decision without modification.
5. On 1 June 2013, Mr McLaughlin wrote to the Commissioner, stating that he 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. The application was validated by establishing that Mr McLaughlin made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 6 June 2013, the Ministers were notified in writing that an application had been received from Mr McLaughlin and were asked to provide the Commissioner with any information withheld from him. The Ministers responded to the effect that the cost of complying with Mr McLaughlin's request for information would exceed the limit prescribed for the purposes of section 12(1) of FOISA. They confirmed this to Mr McLaughlin.
8. The case was then allocated to an investigating officer.
9. On 17 June 2013, having received the Ministers' further response, Mr McLaughlin wrote to the Commissioner stating (with reasons) that he did not agree with the Ministers' application of section 12(1).
10. The investigating officer subsequently contacted the Ministers, giving them 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. The Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
11. The Ministers then submitted that they considered Mr McLaughlin's request to be vexatious, with the result that section 14(1) of FOISA applied and they were not obliged to comply with the request.
12. Mr McLaughlin was given the opportunity to comment on the Ministers' application of section 14(1). He did not respond.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to her by both Mr McLaughlin and the Ministers. She is satisfied that no matter of relevance has been overlooked.



Section 14(1) – vexatious requests

14. Under section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information made under section 1(1) if the request is vexatious.
15. FOISA does not define the word “vexatious”. The Commissioner has published guidance on section 14 of FOISA¹ where she sets out her views on factors she considers relevant to finding that a request is vexatious. These are:
 - it would impose a significant burden on the public authority;
 - it does not have a serious purpose or value;
 - it is designed to cause disruption or annoyance to the public authority;
 - it has the effect of harassing the public authority;
 - it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

This is not an exhaustive list. Depending on the circumstances, and provided the impact on the authority can be supported by evidence, other factors may be relevant.

16. The term “vexatious” must be applied to the request, not the requester. It is not the identity of the applicant that determines whether a request is vexatious, but the nature and effect of the request made, considered in the light of the surrounding circumstances.

Submissions by the Ministers

17. The Ministers submitted that complying with the terms of the request would impose a significant burden on them. Additionally, the Ministers considered that the request was manifestly unreasonable.

Significant burden

18. The Ministers submitted that complying with the request would impose a significant burden because Mr McLaughlin had not identified any specific information they could readily locate and retrieve. They explained that given the absence of any topic or indication of the intended recipient of the statements, a very large volume of material would come under the scope of the request and need to be reviewed in detail before information could be disclosed.
19. The Ministers explained that on deciding the cost limit might apply to this request, a test team within its Communications Office was selected to establish what work would be required to respond to Mr McLaughlin’s request. This involved calculating the likely cost over a one month period. The Ministers explained that the members of the test team were particularly rigorous in managing their records. On average, they would get around 17 requests for media lines on a Friday alone, varying in size and content and each potentially containing an “if asked” element.

¹ <http://www.itspublicknowledge.info/uploadedfiles/BriefingSection14VexatiousorRepeatedRequests.pdf>



20. The Ministers further submitted that during the test period, there were more than 300 items where it was not obvious from the title whether they would be relevant to the request. From searches of email inboxes alone, they concluded that the work required would breach the cost limit. They provided supporting calculations: the Commissioner notes that not all of this cost estimate would necessarily be taken into account if she was considering section 12(1) of FOISA.
21. The Ministers further submitted that the work of creating press/media lines was not confined to Communications or media staff. They explained that the type of media line requested was created in discussion with the relevant policy staff, and potentially special advisers in addition, and could appear within a range of forms of emails and submissions. Consequently, the media line could not be identified quickly from a document title. The media line might form only a very short part of a sometimes lengthy e-mail or submission, so it would in some cases take considerable time to retrieve information within the scope of the request from individual documents.
22. The Ministers also explained that the Communications teams did not continue to hold information once a situation or issue was either finished or overtaken. This was particularly true of information with regard to the Constitution Directorate, where lines formulated with advice from policy and special adviser colleagues were deleted by Communications staff to avoid their inadvertent use once that day's topics had been overtaken. Therefore, responding fully to Mr McLaughlin's request would require a Government-wide trawl.
23. The Ministers considered the amount of time and diversion of attention of the required officials to deal with Mr McLaughlin's request would clearly place a significant burden on the Scottish Government. Given the nature of the request, and in particular the absence of any further definition, they did not believe it possible to limit the scope of the searches required.

Manifestly Unreasonable

24. The Ministers considered the request manifestly unreasonable, because of the disproportionate burden which would be imposed by complying with it. They explained that responding to the request would disrupt not only the work of all of their Communications teams, but also a considerable number of core Scottish Government teams who were and had been working on topics which had received media attention of any sort in the time-frame provided. This would impact on their ability to undertake their day-to-day work.
25. They also submitted that there was a variety of publicly available sources of information which Mr McLaughlin could have used to help him create a more focussed request, on a specific issue or a topic of discussion. The cited examples, such as weekly media briefings and news releases. They noted that Mr McLaughlin was a capable journalist who had made a number of information requests, and thus should be capable of formulating a more focussed request for which the information could be identified readily. In the absence of such definition, the characterised the request as a "fishing expedition".



26. The Ministers submitted that they must be in a position where they were not prevented or hampered from carrying out their daily business in dealing with requests for information, where the requester had chosen not to focus a request and particularly where there was considerable information available to the requester to facilitate this.

Comments from Mr McLaughlin

27. Mr McLaughlin was informed that the Ministers considered his request for information to be vexatious in terms of section 14(1), but made no submissions on this point.

Conclusion

28. Having considered the above submissions, the Commissioner accepts that compliance with this request would impose a significant burden on the Ministers. In the circumstances, she accepts that this is more than simply a question of cost.
29. The Commissioner also accepts that Mr McLaughlin's request should be considered to be manifestly unreasonable. This was not a view reached lightly, and in coming to this view the Commissioner has focussed on the request and its wide scope.
30. It is not the purpose of section 14(1) of FOISA to deter reasonable and proportionate requests from any requester, including the media, and generally, the identity or profession of the requester will be of no relevance to a request. There will be many circumstances in which requesters of all backgrounds will require to frame their requests relatively broadly, because they cannot expect to have a complete understanding of the way in which a particular public authority manages its information.
31. On the other hand, the Commissioner accepts as reasonable the points made by the Ministers about the range of available sources the applicant in this case could have used to frame a more focussed request. She acknowledges that it would be reasonable to conclude that Mr McLaughlin would have been aware of these sources. She can also see that these sources could be located easily by any applicant with access to the Minister's web-site.
32. Balanced against any conceivable purpose which might be served by disclosure (on which point she notes that she has no comments from Mr McLaughlin, although he was given the opportunity to comment on the Ministers' application of section 14(1)), the Commissioner accepts that the burden of complying with this request would be disproportionate in the circumstances. Consequently, she agrees with the Ministers submission that the request was manifestly unreasonable.
33. On balance, therefore, and while she has not reached this conclusion lightly, the Commissioner accepts in this case that the Ministers were not obliged to comply with Mr McLaughlin's request, given that the request was vexatious and therefore section 14(1) of FOISA applied.



DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) were not obliged to comply with Mr McLaughlin's request, given that section 14(1) of FOISA applied.

Appeal

Should either Mr McLaughlin or the Scottish Ministers 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.

Rosemary Agnew
Scottish Information Commissioner
26 September 2013



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.

14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

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