

# Decision Notice

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## **Decision 274/2016: Mr Marc Ellison and the Scottish Ministers**

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**Susan O'Brien QC, former chair of the Scottish Child Abuse Inquiry**

Reference No: 201601517

Decision Date: 20 December 2016



Scottish Information  
Commissioner

## Summary

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The Ministers were asked for electronic copies of all documents relating to Susan O'Brien QC, former chair of the Scottish Child Abuse Inquiry, created by the Ministers over a specified period.

The Ministers said that complying with this request would cost in excess of the £600 limit (and so they were not obliged to comply). The requester did not accept that the costs were so high but, if they were, believed more help should have been given from the outset to allow the request to be narrowed. The Commissioner was satisfied that the costs exceeded £600, but found that the Ministers failed to provide reasonable advice on narrowing the request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 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 Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 11 July 2016, Mr Ellison made a request for information to the Ministers. The information requested was:  
  
“... electronic copies of all documents (including but not limited to emails, letters, briefing notes and reports) relating to Susan O'Brien, created/sent/received by Scottish Government officials (including but not limited to special advisors, John Swinney MSP and Angela Constance MSP) between 1 January 2016 and 11 July 2016.  
  
May I remind the Government of its duty to advise and assist under FOISA – as such please do not hesitate to contact me ASAP should you require any clarification or narrowing of scope.”
2. The Ministers wrote to Mr Ellison on 8 August 2016, apologising that they had failed to respond within the statutory timescale and indicating that a response would be issued shortly.
3. On 10 August 2016, Mr Ellison wrote to the Ministers, requiring a review on the grounds that no substantive response had been provided.
4. The Ministers notified Mr Ellison of the outcome of their review on 22 August 2016. They apologised for failing to respond, due to what they described as the “wide search” which was required. The Ministers also informed Mr Ellison that, as they estimated the cost of doing so would exceed £600, they were not obliged to comply with his request. The Ministers suggested narrowing the request to bring the costs down.

5. On 23 August 2016, Mr Ellison wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Ellison stated he was dissatisfied with the outcome of the Ministers' review as he was not convinced that suitable searches had been conducted, nor did he accept that the searches required would be as "wide" as the Ministers suggested. He also complained that he did not believe he had been provided with suitable advice on narrowing the request at an appropriate time.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Ellison made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 25 August 2016, the Ministers were notified in writing that Mr Ellison had made a valid application.
8. On 15 September and 21 October 2016, the Ministers were invited to comment on this application and to answer specific questions. These focussed their reliance on section 12(1) of FOISA. The Ministers responded with submissions, dated 5 October and 1 November 2016 respectively. They also provided further clarifications on 8 November 2016.

## Commissioner's analysis and findings

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

### Section 12(1) – Excessive cost of compliance

10. Under section 12(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the amount prescribed for that purpose in the Fees Regulations. This amount is currently £600 (regulation 5). Consequently, the Commissioner has no power to order a public authority to disclose information should she find that the cost of responding to a request for that information exceeds this sum.
11. 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, the authority reasonably estimates it is likely to incur in:
  - locating
  - retrieving, and
  - providingthe information requested in accordance with Part 1 of FOISA. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
12. The public authority may not charge for the cost of determining:
  - whether it actually holds the information requested, or
  - whether or not it should provide the information.

13. In their response to Mr Ellison's requirement for review, the Ministers gave no detailed breakdown of their calculations used to estimate costs but simply informed Mr Ellison that they considered the £600 threshold to be exceeded.
14. The investigating officer asked the Ministers to provide detailed calculations supporting their estimated costs. The investigating officer asked for the findings from any sampling exercise conducted to test the projected costs.
15. The methodology the Ministers described is in two stages, as follows:

*Stage 1 – locating and retrieving information*

- 21 officials involved at an average of 30 minutes per person = 10.5 hours (although in the submission the Ministers only charged for 10 hours)
- 6 officials (within sponsorship team/SGLD officials) at an average of 2 hours each = 12 hours

Total = £330

As all officials were Graded B2 or above, as the Ministers considered appropriate given the sensitivity of the work, the hourly rate of £15 was used throughout.

*Stage 2 – providing information, including redaction work*

16. The Ministers identified 3,100 documents in searches, providing details of the searches carried out. They submitted that at least 2,500 of these would need to be redacted. The Ministers based this on experience of previous similar cases, and what they considered to be the sensitivities of much of the information here. They anticipated substantial redactions under sections 30, 36 and 38 of FOISA. The Ministers initially estimated half a minute per document for all 3,100 documents, explaining this would include time to sift any duplicate emails. They also stated this was a very conservative estimate. At this point, they estimated the total cost of this stage to be £387.49 (25.8 hours at £15 per hour).
17. During the investigation, the Ministers revised their original estimates, based on a sampling exercise. They acknowledged that the removal of duplicates should not form part of the cost of compliance. The Ministers focussed their costings solely on the 2,500 documents they considered likely to require redaction. In other words, the costings below no longer include the 600 documents the Ministers said did not require redaction.
18. The Ministers estimated it would take three minutes per item to print, redact and then scan the 2,500 documents requiring redaction. Based on the sampling exercise, the Ministers submitted that each item would take, on average, three minutes each. This stage would therefore take 125 hours work at £15 per hour, giving a total cost for step 2 of £1,875.
19. Adding the Ministers' estimated totals for steps 1 and 2 together, the final estimated cost of £2,205 is arrived at.
20. The Commissioner is concerned that there are gaps in the estimates, and what appear to be anomalies. For example, this approach fails to shed light on what proportion of the 2,500 items are likely to be duplicates and in what way, if at all, this would affect the amount of redaction work required. When asked to comment on this during the investigation, the Minister submitted that the issue of duplicate items was not as simple as it might seem. It is common, they noted, for there to be multiple chains containing many of the same emails. However, there are often variations between these chains, as different staff pursue particular issues. This, the Ministers contended, complicated matters.

21. The Ministers submitted that removing duplicates could be just as costly as redacting the same information a number of times. They were also concerned as to the effect doing so could have on changing the story which would be told by releasing the complete email chains. Therefore, in practice, the Ministers submitted they would remove obvious and unnecessary duplicates as part of the process of locating and retrieving the information, or during redaction of exempt information. For these reasons, the Ministers did not specifically include the removal or redaction of duplicates in the revised cost estimate.
22. The Ministers also submitted that as the cost estimate was considerably over the £600 limit, removal or otherwise of duplicates would not make a significant difference to the overall cost, certainly not enough to bring the request under £600.

#### *The Commissioner's conclusions*

23. It is noticeable in the revised costs that the time taken to process a document is now considered to be six times the original estimate, given that one of the actions (removing duplicates) is no longer being timed. However, the points noted above shed some light on why this might be so. The Ministers conclusions do appear to be based on reasonable search parameters and a sampling exercise, and the Commissioner acknowledges that the initial estimate was described as a conservative one.
24. The Commissioner accepts that even if the majority of the 2,500 documents could be processed in just one minute rather than three minutes, the costs for step 2 alone would be £625. With step 1 costing £330, the total, at £955, remains well over the £600 threshold. Moreover, even the original (conservative) estimate of just half a minute would bring the total cost in at £642.50 for the 2,500 documents.
25. Taking all of the circumstances into consideration, the Commissioner is satisfied that the Ministers provided a reasonable estimate of the cost of complying with Mr Ellison's request for information. Given the nature of the work required, the Commissioner accepts that the request could not have been responded to within the £600 limit.

#### **Section 15 – Duty to provide advice and assistance**

26. Section 15(1) of FOISA requires a Scottish public authority, so far as is reasonable to expect it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it. In terms of section 15(2), this duty is taken to be met where, in any given case, the authority conforms with the relevant guidance in the Code of Practice issued under section 60 of FOISA (the Section 60 Code).
27. The Section 60 Code<sup>1</sup> provides (at paragraph 9.3.3 in Part 2, in the version in force at the time the Ministers responded to this request and requirement for review):  
  
*“When refusing a request on cost grounds, it is good practice for the authority's response to provide clear advice on how the applicant could submit a new, narrower request within the cost limit. In giving advice, you may wish to take account of how much the cost limit has been exceeded. Any narrowed request would be a separate new request and should be responded to accordingly.”*
28. The Commissioner considers this important if the public authority is to fulfil its duty to provide advice and assistance under section 15 of FOISA. Frequently, a dialogue between the authority and the applicant will be desirable, if the applicant is to understand fully what can

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<sup>1</sup> <http://www.gov.scot/Resource/0046/00465757.pdf>

be provided within the cost limit. The Ministers were invited to explain how they had discharged this duty in relation to Mr Ellison's request.

29. The Ministers submitted that they informed Mr Ellison (in their review outcome) to either specify a particular subject or give "a lesser period of time" to narrow his request.
30. Mr Ellison thought it was not possible to be more specific about the subject of his request as he had already identified a specific topic, "Susan O'Brien". He did not comment in any detail on the possibility of reducing the timeframe, but the Commissioner notes that the Ministers did not state in their correspondence with Mr Ellison by what degree the timeframe would need to be adjusted to ensure costs would fall under £600.
31. During the investigation, the Ministers also explained why, in their view, Mr Ellison's stipulation of the name "Susan O'Brien" had been problematic on this occasion. Without this subject, they submitted it would have been necessary to go through all the documents identified in the searches. They were not convinced that suggesting a specific timeframe or limiting the document type would reduce the volume. They considered the effect of limiting the request to special advisers or specific Ministers, but noted that Ministerial Private Offices do not retain information for more than three months. Any relevant information was likely to have been passed to policy areas, with the result that the same searches would be required as were in fact carried out. They did not believe there was a reasonable way of reducing the scope of the request to the likely satisfaction of Mr Ellison.
32. The Ministers noted that they had received other requests from Mr Ellison referring to Susan O'Brien. They had sought clarification in relation to one of these, in order to determine that Mr Ellison was seeking information on the Scottish Child Abuse Inquiry (which had been chaired by Ms O'Brien). They acknowledged that this would "significantly limit the searches required" and considered "that clarification was equally relevant and should be used to limit potential costs in this case as well". However, the Ministers concluded that limiting the scope to the Scottish Child Abuse Inquiry would not have brought this case within the cost limit: they did not explain why they had reached this conclusion.
33. If the Ministers did not believe the request could be modified to bring it within the cost limit, it is not clear why they told Mr Ellison in their review outcome that he might wish to consider narrowing the scope of his request. If they did not believe this would be effective, the advice was misleading. In any event, the Ministers' submissions on this point appear muddled. It may be the case that simply specifying Ms O'Brien's name would not offer the clarity Mr Ellison believed it would. On the other hand, it is not apparent why (from the submissions offered by the Ministers) narrowing the subject matter of the request should be effective in one case but not in another. Were there truly no reduced parameters within which it might be possible to search at an appropriate cost?
34. The Commissioner also acknowledges Mr Ellison's point that matters were not improved by such advice as was given not being provided until the review outcome. Even at this stage, the Ministers provided no breakdown of their costings, thus providing no assistance to Mr Ellison in understanding the scale of the tasks involved in responding to his request. The suggestion is made that Mr Ellison "may ... wish to consider reducing the scope" of his request, but no guidance is offered on how this might be done effectively, with a view to bringing the cost within the limit. In any event, the suggestion does not really come over as an invitation to engage with the Ministers to this end.
35. In all the circumstances, from the submissions provided by the Ministers, the Commissioner is not satisfied that the Ministers considered fully the options available for narrowing the

scope of Mr Ellison's request, or that they communicated these effectively to Mr Ellison. Consequently, she is not satisfied that the Ministers complied fully with section 15(1) of FOISA in this regard

36. The Commissioner now requires the Ministers to inform Mr Ellison how he might narrow the scope of his request, with a view to bringing the cost of compliance within the £600 limit. With a view to understanding what he is really looking for, it might be helpful if they could open a dialogue with him.

## Decision

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The Commissioner finds that the Scottish Ministers (the Ministers) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Ellison.

The Commissioner is satisfied that the Ministers were not obliged to comply with Mr Ellison's request, given that section 12(1) of FOISA was engaged.

However, the Commissioner not consider that the Ministers complied with their duties under section 15(1) of FOISA, as they failed to provide reasonable advice and assistance to Mr Ellison on narrowing his request to bring the cost of compliance within the cost limit.

The Commissioner therefore requires the Ministers to contact Mr Ellison, with a view to providing the required advice and assistance, by **13 February 2017**.

## Appeal

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Should either Mr Ellison 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.

## Enforcement

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If the Scottish Ministers (the Ministers) fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers has failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**20 December 2016**

### 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.

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#### **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.

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**