

Decision Notice



Decision 160/2012 Mr N and the Scottish Ministers

Scottish implementation of the LS/CMI risk assessment tool

Reference Nos: 201201196 and 201201373

Decision Date: 4 October 2012

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Summary

Mr N asked the Scottish Ministers (the Ministers) for the information they held on the Scottish implementation of the Level of Service/Case Management Inventory risk assessment tool. The Ministers advised Mr N that the cost of complying with the request would exceed £600 and that they were therefore not obliged to comply.

Following an investigation, the Commissioner accepted that cost of complying with the request would exceed £600. While she found that the Ministers had failed to respond to Mr N's requirement for review in time, she did not require the Ministers to take any action.

Relevant statutory provisions

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); 21(1) (Review by Scottish public authority)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs); 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 9 February 2012, Mr N wrote to the Ministers requesting information which included the following:
“Any information held on the Scottish implementation of the LS/CMI [Level of Service/Case Management Inventory] risk assessment tool.”
2. The Ministers responded on 16 March 2012, informing Mr N that, due to the volume of information held, they were not required to comply with the request as to do so would exceed the cost limit of £600 prescribed for the purposes of section 12(1) of FOISA. The Ministers suggested that Mr N consider reducing the scope of his request in order that the cost be brought within the statutory limit.



3. On 6 April 2012, Mr N wrote to the Ministers requesting a review of their decision. He reduced the scope of his request to “any study commissioned in Scotland on the LS/CMI tool”.
4. The Ministers responded on 1 May 2012 and asked Mr N to confirm whether his letter of 6 April 2012 sought a review or a specific study. If he wished the latter, he was asked to be more specific.
5. On 7 May 2012, Mr N wrote to the Ministers and confirmed that he wished a review of the Ministers’ refusal notice of 16 March 2012. In particular, he considered the Ministers to have failed to provide any details of the cost estimate used by the Ministers in applying section 12(1).
6. Having received no response, on 13 June 2012 Mr N wrote to the Commissioner, stating that he was dissatisfied at this failure and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The Ministers notified Mr N of the outcome of their review on 18 June 2012. They upheld their reliance on section 12(1) of FOISA.
8. On 2 July 2012, Mr N 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.
9. The application was validated by establishing that Mr N 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. The case was then allocated to an investigating officer.

Investigation

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. In particular, the Ministers were asked to justify their reliance on section 12(1) of FOISA.
11. The Ministers responded on 21 August, and on 18 September 2012, with calculations of the costs taken into account for the purposes of section 12(1) of FOISA. The relevant submissions received from both the Ministers and Mr N will be considered fully in the Commissioner’s analysis and findings below.



Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all the submissions made to her by both Mr N and the Ministers and is satisfied that no matter of relevance has been overlooked.

Section 12(1) – Excessive cost of compliance

13. Section 12(1) 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 in terms of regulation 5 of the Fees Regulations. Consequently, the Commissioner has no power to require the release of information should she find that the cost of responding to a request for that information exceeds this sum.
14. 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 or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
15. The Ministers explained that they held information that fell within the terms of the request, namely information held on the Scottish implementation of the LS/CMI risk assessment tool. The Ministers explained that as a large majority of what was done, or had been done historically, with LS/CMI was in connection with its implementation in Scotland, they took the view that the request was wide in scope and should not be considered narrowly.
16. The Ministers considered that there was likely to be information within the scope of the request in a number of locations: the relevant subject folders on their eRDM (electronic Records and Document Management) and Ministerial Correspondence systems, email accounts (both civil servants and contractors) and hard copy paper files. They explained that the implementation of LS/CMI had been in development for some years and that personnel had changed over time, so, without time parameters being identified by the requester, all historical information going back some years would fall within the terms of the request.

Calculation of costs

17. The Ministers submitted that, in order to respond to the request, due to the nature of the work and the staff available to respond, it was likely that it would be undertaken by either a B2 or the senior officer (C2), with the result that the maximum £15 per hour cost would be charged.



18. The Ministers explained that locating the information falling within the scope of the request would involve, firstly, a search of the eRDM system. The Ministers were of the view that, due to the wide nature of the request, a search of the eRDM would have to be done using only the term “LS/CMI”, to identify the documents created with regard to this topic. Such a keyword search would result in a return of many hundreds of items, which would then have to be sifted through manually to locate any information falling within the scope of the request.
19. Once that relevant information was located, the Ministers commented that it would take a considerable period to determine what exemptions applied, while acknowledging that no costs had been factored in for doing this.
20. The Ministers estimated that, due to the historical nature of LS/CMI, locating and retrieving the information from eRDM would take approximately 35 hours at £15 per hour (£525).
21. The second type of search would be of email accounts of all personnel involved in LS/CMI at any point in time. This would include Scottish Government staff and contractors and, in the Ministers’ view, would be fairly complicated, as “some individuals may have left the team and some will have left the organisation altogether.” The Ministers explained that “it is likely that they may have kept information on desks, in notebooks, personal computers, personal email accounts”. The Ministers estimated that locating and retrieving this information would take approximately 25 hours at £15 per hour (£375).
22. The Ministers were asked by the investigating officer to explain in more detail the individual searches and, in particular, how many individuals’ accounts were involved and how many of these individuals were “understood to have left the team/the organisation”. The Ministers were unable to provide a definitive answer to this question, as most of the team were new. There had been many officials who had worked on Good Lives (a sex offender treatment programme) since its inception (and whom the Ministers considered relevant to this request), some of whom were still within the organisation working in other areas and some of whom were not. The Ministers indicated that the number of individuals concerned was “more than ten”.
23. The Ministers were also asked to explain whether, once a member of staff had moved on, it was customary for information to be left in/on desks, on desktops or in personal email accounts.
24. They explained that, when someone was moving on, it was customary for the official to clear their desk before leaving, and some staff might “purge” their email system after saving all necessary information for the official record to the eRDM system. However, others might retain information in their email accounts for a time, due to time constraints regarding the amount of information stored and the time it took to save information into the eRDM system. Some might retain information by agreement to ensure a particular task was concluded. Given these variables, it would be necessary to follow up with the individuals concerned to check that they did not hold anything which might fall within the scope of Mr N’s request.



25. The Ministers also explained, however, that if a person moved on from the Scottish Government completely they would be expected to ensure all relevant information was saved into the eRDM before departure. Their accounts would then be purged and removed from the IT system.
26. The Ministers were also asked about the protocols for saving electronic communications in eRDM system. They referred to internal guidance on saving information to the system, copies of which were provided to the Commissioner. Module 1 explains what the eRDM system is and why the Ministers use it, while Module 2 provides an explanation of the use of the system for records management purposes. The Ministers explained that this guidance formed part of the training package undertaken by all of their employees. Nonetheless, they emphasised that, for reasons similar to those given above, they could not assume that every piece of information held by them was saved in the eRDM system, so to complete the search they would need to consider all possible places where such information could be held.
27. The third type of search would be of the Ministerial Correspondence System. Searching this, they commented, would be easier, as there would be considerably less volume of information. They estimated that the time taken to locate what was relevant would be approximately one hour at £15 per hour (£15).
28. Finally, the Ministers submitted that a “search of paper files etc” would be required, with an estimated cost of £75 (five hours at £15 per hour).
29. The Commissioner asked the Ministers to clarify what the “search of paper files etc” referred to. They explained that, in the course of everyday work, there would always be some paperwork kept in hard copy, to facilitate general work. There might also be paper files stored in some areas, either in duplication of information on eRDM or created prior to the introduction of the electronic system. These were not voluminous, but the Ministers considered that they would need to ensure such information was identified and sifted appropriately.
30. The total estimated cost as submitted by the Ministers was therefore £990. In this estimate, they stated, they had “tried to be conservative ... but given the subject matter and the time over which this policy has been developed there is potential for the exercise to have taken even longer and therefore be more costly”.
31. Mr N’s application to the Commissioner of 2 July 2012 commented that the Ministers’ response to his reduced request of 6 April 2012 (for “any study commissioned in Scotland on the LS/CMI tool) had concluded that no relevant information was held. Mr N commented that this response showed that searches of the information were possible and had been undertaken. While the Commissioner’s present decision can only look at how the Ministers dealt with Mr N’s request of 9 February 2012, the Ministers were invited to comment on this point.



32. The Ministers responded that these searches were possible within the cost limit because the scope of the request was vastly reduced and search parameters could be narrowed significantly. They commented that Mr N's statement did not recognise that locating information would be less time consuming (and less expensive) if the authority knew what an applicant was looking for and could tailor that search accordingly.
33. Having taken due account of the submissions made by the Ministers and Mr N, together with the terms of section 12(1) and the Fees Regulations, the Commissioner is satisfied that overall the costs identified in this case represent a reasonable estimate of the cost of complying with Mr N's request for information. There may be cases where, given the nature of the information requested, or the other applicable search parameters, the searches required will be more straightforward, or indeed where less exhaustive searches can be expected to locate the information requested (or at least the great majority of it). In this case, however, considering the broad, unfocused nature of the request, with no obvious parameters beyond the general description of LS/CMI, the Commissioner does not consider that the request could have been responded to within the £600 limit.
34. Consequently, the Commissioner is satisfied that the Ministers were entitled to rely on section 12(1) of FOISA in relation to Mr N's information request, and therefore were under no obligation to comply with the request.

Section 15 - Duty to provide advice and assistance

35. Section 15(1) 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.
36. The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public authorities under FOISA and the EIRs¹ provides (at 1.9):
"Where the cost of responding to a request made under FOISA will exceed the upper cost limit of £600 or the burden of responding a request under the EIRs would be manifestly unreasonable (and so the authority is not obliged to comply), the authority may again consider what information could be provided below the cost limit, and suggest how the applicant may wish to narrow the scope of their request accordingly."
37. In previous decisions, the Commissioner has referred to the duty under section 15 to advise and assist an applicant where the authority believes section 12 of FOISA is applicable. The Ministers were invited to explain how they had discharged this duty in respect of Mr N's request.

¹ <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>



38. The Ministers replied that, in the review letter, they had explained why the decision (that the cost limit applied) was upheld: the fact that the information was contained across different databases and files and that any searching could not be narrowed by specific periods (as none were provided) or documents, due to the wide nature of the request. By implication, the Ministers submitted, this had suggested that the provision of a time frame would have narrowed the request. They acknowledged that perhaps they should have given Mr N more explicit advice, but noted that he was a not infrequent requester and that similar suggestions had been made to him in the past on numerous occasions. Also, the Ministers noted, Mr N had already reduced the scope of his request, which demonstrated that he was aware of the potential for bringing a request within the cost limit by reducing its scope (and indeed had done so).
39. The Commissioner also notes that the Ministers' initial response of 16 March 2012 does draw Mr N's attention to the option of reducing the scope of his request with a view to bringing the cost below the statutory limit, for example by specifying "the subjects, business area or time frame" he was interested in. Similarly, the Commissioner acknowledges that Mr N has made a narrowed request on this topic – and indeed is experienced in making information requests and appears familiar with the requirements of the legislation: she does not believe it unreasonable for an authority to take this latter point into account in considering what it is required to do by way of compliance with section 15.
40. In all the circumstances of this case, therefore, the Commissioner accepts that the responses provided to Mr N in relation to his request included such advice and assistance in as it was reasonable to expect. Consequently, the Commissioner is satisfied that the Ministers complied with their duties under section 15(1) of FOISA.

Failure to comply with timescale in FOISA

41. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, subject to certain exceptions which are not relevant in this case.
42. The Ministers acknowledged that their response was made outwith the relevant statutory timescale and offered an apology for this. Among other factors, they identified a degree of confusion in relation to various requests from Mr N, given their volume. Due to the volume of correspondence, they explained that they had developed a spreadsheet with a view to keeping track of (and keeping on top of) future requests.
43. Since the Ministers did not provide a response to Mr N's requirement for review within 20 working days, the Commissioner finds that they failed to comply with section 21(1) of FOISA. This cannot be excused simply because a particular applicant makes a large number of requests, and in the circumstances the Commissioner acknowledges the introduction of a tracking spreadsheet as a helpful component in the management of such requests.
44. The Commissioner notes that the Ministers provided a response to Mr N on 18 June 2012. Given that the Ministers have responded to Mr N's requirement for review, the Commissioner does not require them to take any further action in respect of their earlier failure to do so.



DECISION

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

The Commissioner finds that the Ministers were entitled to apply section 12(1) of FOISA to information they held and which fell within the scope of Mr N's requests. She is also satisfied that the advice provided to Mr N met the Ministers' duty under section 15 of FOISA.

However, the Commissioner finds that the Ministers failed to comply with Part 1 of FOISA by failing to respond to Mr N's requirement for review within the timescale laid down by section 21(1) of FOISA.

Given that the Ministers have now responded to Mr N's requirement for review, the Commissioner does not require the Ministers to take any action in respect of this failure, in response to Mr N's application.

Appeal

Should either Mr N or the Scottish 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.

Margaret Keyse
Head of Enforcement
4 October 2012

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).

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

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.