

# Decision Notice

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## Decision 005/2019: Mr G and the Scottish Ministers

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### First Minister's correspondence about Yammer

Reference No: 201801867

Decision Date: 15 January 2019



Scottish Information  
Commissioner

## Summary

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The Ministers were asked for correspondence sent to and from the First Minister in relation to Yammer.

The Ministers refused to comply with the request on the basis that this would cost more than the £600 limit set out in the Fees Regulations.

During the Commissioner's investigation, the Ministers withdrew their reliance on section 12(1) of FOISA and confirmed that compliance with the request would not breach the £600 cost ceiling.

The Commissioner found that the Ministers had failed to comply with section 15(1) of FOISA by failing to provide reasonable advice and assistance when responding to the request. The Commissioner required the Ministers to carry out a new review of their handling of both parts of the request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1) and (4) (General entitlement); section 15(1) (Duty to provide advice and assistance); section 21(4)(b) (Review by Scottish public authority)

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 29 August 2018, Mr G made a request for information to the Scottish Ministers (the Ministers). The information requested was:
  - (i) All email correspondence to and from First Minister Nicola Sturgeon in relation to Yammer and Glow. Please include all such correspondence that can be released under FOI rules from March to today's date.
2. The Ministers responded on 26 September 2018. They indicated that compliance with the request would exceed £600 and they notified Mr G that they were relying on section 12(1) of FOISA (Excessive cost of compliance). The Ministers submitted that compliance with the request would require them to undertake a government-wide trawl and they advised Mr G to limit his request to one or two particular departments. The Ministers also suggested that narrowing the timeframe covered by the request would not reduce the cost of compliance.
3. On 10 September 2018, Mr G made a new information request to the Ministers:
  - (i) All email correspondence to and from Nicola Sturgeon in relation to Yammer between March and April 2018. Please include all such correspondence including emails and the content of attachments included with these emails.
  - (ii) The number of emails sent to and from the First Minister relating to Yammer between March 2018 and today's date [10 September 2018]. Please provide this for each individual month (so the individual number for March, April and so on).

4. The Ministers responded to this request on 28 September 2018. They argued that compliance with this narrowed request would also exceed £600 and they reiterated their previous view that they would have to undertake a government-wide trawl for relevant information. The Ministers again advised Mr G to limit his request to information held in one or two particular departments.
5. On 28 September 2018, Mr G wrote to the Ministers requesting a review of their decision. He stated that the Scottish Government had previously provided similar information in relation to the Deputy First Minister, presumably by searching his emails, and he considered that the same approach could be used for this request. Mr G also commented that, since his FOI request was sent to the Ministers' central enquiries unit, it should not matter where the correspondence was held.
6. The Ministers notified Mr G of the outcome of their review on 18 October 2018. They upheld their previous reliance on section 12(1) of FOISA and stated that searching the First Minister's email inbox would not retrieve the information he had requested.
7. On 31 October 2018, Mr G applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr G was dissatisfied with the outcome of the Ministers' review because they had failed to provide him with the information he requested. He challenged the view that a search of the First Minister's emails would not provide the information he had requested.

## **Investigation**

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8. The application was accepted as valid. The Commissioner confirmed that Mr G 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.
9. On 29 November 2018, the Ministers were notified in writing that Mr G had made a valid application and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and to answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

## **Commissioner's analysis and findings**

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11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr G and the Ministers. He is satisfied that no matter of relevance has been overlooked.

### **Section 12(1) - Excessive cost of compliance**

12. The Ministers initially relied on section 12(1) of FOISA when refusing to comply with Mr G's request. 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 Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004. This amount is currently set at £600 (regulation 5). Consequently, the Commissioner has no power to require the disclosure of information should he find that the cost of responding to a request for that information would exceed that sum.

13. During the investigation, the Ministers withdrew their reliance on section 12(1) of FOISA. The Ministers conceded that, due to the subject matter, any correspondence which they held would likely be limited to Education Scotland or the Scottish Government Learning Directorate; a government-wide trawl would not be required to identify and retrieve information. The Ministers considered that they were now able to provide a response to Mr G within the upper cost limit of £600, and they indicated that they were willing to provide Mr G with a new review outcome to reflect this change in position.
14. The Ministers explained that they had carried out an extensive search of their corporate records and had identified all of the information falling within the scope of Mr G's request. The Ministers confirmed that, in relation to part (i) of the request, they were satisfied that they did not hold any information and were willing to give Mr G notice of this.
15. The Ministers stated that they had identified information falling within the scope of part (ii) of Mr G's information request and were willing to disclose this to Mr G.
16. As the Ministers have now determined that they can comply with both parts of the request without breaching the £600 upper cost limit, the Commissioner requires the Ministers to carry out a new review of their handling of Mr G's request and (in terms of section 21(4)(b) of FOISA) provide him with a different decision. The Commissioner understands that the Ministers intend to disclose the information covered by part (ii) of Mr G's request.

### **Handling of request**

17. Section 15(1) of FOISA requires a public authority, so far as it is reasonable to do so, to provide advice and assistance to a person who proposes to make, or has made, 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).
18. The Section 60 Code<sup>1</sup> provides (at paragraph 9.4.3 on Part 2):  
*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.*
19. In this case, the Ministers advised Mr G that narrowing the timescale of his request was unlikely to bring the cost of compliance under £600 and they suggested that he restricted his request to the information held by one or more named departments. The Commissioner would note that when someone requests information from a Scottish public authority, they are not required to specify which departments or files or records would be likely to hold the information they have requested.
20. It should have been clear, from the subject matter of the request, that there were many government departments who were unlikely to hold any relevant information, and very few that were likely to hold it. The Ministers acknowledged this in their email to the Commissioner's office on 8 January 2018, when they stated that,

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<sup>1</sup> <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

*“...due to the subject matter, any correspondence would be likely be limited to Education Scotland or the Scottish Government Learning Directorate, so a Scottish Government wide trawl would not be required to identify and retrieve any information held within scope of this request.”*

21. Scottish public authorities are responsible for managing and organising their own information resources and, on receipt of an information request, they should be able to identify where the information is likely to be held and carry out appropriate searches. The Ministers should not have placed this burden on to Mr G by asking him to resubmit his request after restricting it to a couple of named government departments. The Commissioner notes that, in this case, the subject matter of the request was very specific, narrowed to one particular networking tool used in schools, and the correspondence was limited to that received or sent by the First Minister in a relatively short time period. The Ministers should have been able to devise a reasonable, proportionate search likely to retrieve relevant information, without further input from Mr G.
22. Given the above, the Commissioner finds that, by advising Mr G to submit a new request limited to specific Scottish Government departments, the Ministers failed to comply with their duty under section 15(1) of FOISA. As the Ministers have now carried out appropriate searches and identified relevant information falling within the scope of Mr G’s information request, the Commissioner does not require them to take any action in respect of this failing.

## Decision

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The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr G. As the Ministers have acknowledged, they were wrong to refuse to comply with the request on the grounds of excessive cost.

The Commissioner also finds that the Ministers failed to provide reasonable advice and assistance to Mr G, in breach of section 15(1) of FOISA,

The Commissioner requires the Ministers to carry out a new review of their response to Mr G’s request. The Ministers must with a new review outcome (in terms of section 21(4)(b) of FOISA), by 1 March 2019.

## Appeal

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Should either Mr G 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 fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Scottish Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Scottish Ministers as if they had committed a contempt of court.

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

**15 January 2019**

### 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.

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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.

...

#### 21 Review by Scottish public authority

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- (4) The authority may, as respects the request for information to which the requirement relates-

...

- (b) substitute for any such decision a different decision; or

...

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